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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT, Petitioner, vs. A.J. ARAVE, Warden of the Idaho State Maximum Security Prison, Respondent.	)	CASE NO. CV-93-0024-S-BLW **CAPITAL CASE** **MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER EMERGENCY MOTION FOR ORDER TO SUBMIT EVIDENCE FOR TESTING AND FOR ORDER SHORTENING TIME FOR RESPONSE**

Petitioner Richard A. Leavitt previously filed his Emergency Motion for Order to Submit Evidence for Testing and for Order Shortening Time for Response on May 21, 2012 (Dkt. 330) (the Motion). This Court held a hearing on the Motion on Tuesday, May 22, 2012, and denied it the next day by its Order filed May 23, 2012 (Dkt. 335) (the Order). The Court should reconsider its denial of the Motion for the following reasons.

1. The Court concluded first that it was not bound to grant the Motion even though it had previously ordered Respondent to allow Mr. Leavitt access to Charles R. Honts, Ph. D., in its Order of May 21, 2012 (Dkt. 329). The Court reasoned that the meeting with Dr. Honts had been agreed to previously by the Warden, the death warrant had been arbitrarily issued the day before the visit, there was a "relatively lengthy time between the visit and the execution date," and in any event, there was no prejudice to the State. Order at p. 2. Of course, the same is true of the motion to submit evidence for testing. The Bingham County Prosecuting Attorney Mr. Andrew had expressed no objection to the testing when he met with Mr. Parnes on April 27, 2012; the arbitrary nature of the timing of the issuance of the death warrant is not changed by the nature of the present motion; sufficient time prior to the execution date existed within which to complete the testing (and indeed still exists); and the State has made no showing that it would be prejudiced by simply causing the requested samples to be tested by a reputable lab.

The Court also notes, however, that in the former motion the Warden was a party to the habeas action, while the Blackfoot Police Department is not. But the Court either has jurisdiction or not – non-parties to litigation are frequently subject to Court orders. The State's argument was that according to the *Baze* gloss on *Harbison*, the Court does not have jurisdiction to enter an Order directing anyone to do anything in support of Mr. Leavitt's clemency petition, and the Court seemed to accept that argument, Order at p. 3 (agreeing with *Baze* that if the State interferes with preparation of the clemency petition a solution is to be found in state court, not in 18 U.S.C. § 3599). Thus if *Baze* is correctly decided, the order granting access to Dr. Honts was necessarily improper – after all, Philip Parker, the defendant

in *Baze*, was also the Warden of the institution where Baze's attorneys sought access to conduct interviews.[1] Rather we respectfully suggest that this is a distinction without a difference, and that the Court's power to issue an Order of the type sought here has already been decided in Petitioner's favor when it issued Docket No. 329.

We again respectfully direct the Court's attention to Judge Cole's concurrence in *Baze*, which focused on the proposition that at least part of the relief Baze requested ("the cooperation of [] state prison officials ..."), was beyond the reach of § 3599. *Baze*, 632 F.2d at 346. Although the opinion does not reveal exactly what this "cooperation" was to consist of, it would probably be considered unworkable for any court to order prison guards, for example, to "cooperate" with defense counsel, at least in the sense of holding conversations with them. That is, after all, why depositions exist. Judge Cole spoke of the example of a state taking a purely mechanical frustrating action, such as not allowing a defendant to meet with his counsel. *Id.* Again, purely mechanical actions, the packaging and forwarding of evidence to a reputable lab, are at issue in the present case, and counsel respectfully suggest that Judge Cole would, and the Court should, find that ordering such relief is required by §3599.

2. The Court also faults Petitioner for not seeking blood testing under the stringent conditions established by Idaho post-conviction procedure statutes, Order at pp. 3-4. This case's unique posture over the past twenty years provides an answer to the Court's concerns. First, in its 1996 ruling the Court dismissed all claims relating to ineffective assistance of trial counsel. Petitioner could not seek funding or release of evidence related to claims no longer

[1] *See* http://corrections.ky.gov/depts/AI/KSP/Pages/WardenPhilipParker.aspx.

before this Court. In 1996, there was also no state mechanism to obtain DNA testing in the post-conviction setting.

Second, when I.C. § 19-4902 was amended in 2001 to permit DNA testing, Petitioner's conviction had been set aside by this Court. The State renewed the prosecution in state district court, appointed local counsel (who filed a Request for Discovery), and set a trial date. The State then sent certain items of evidence to its lab, apparently to test for the presence of semen. The results of this analysis, which apparently did not include DNA testing, were not provided to trial counsel, despite the pending discovery request.[2] Thus, because of the posture of the case during the relevant time period when a post-conviction petition could have been filed, the matter was in pre-trial discovery mode in Bingham County.

Third, the Idaho post-conviction statutes contain provisions which limit the state court's authority to release the evidence for testing. First, the petitioner must show by prima facie evidence that identity was an issue at trial and that "[t]he evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect." I.C. § 19-4902(c). Additionally, a petitioner must demonstrate that "(1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is *innocent*...." I.C. § 19-4902(e)(1) (emphasis added).

None of these rules relate to potential use of DNA evidence in commutation

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[2]The lab notes were provided to current counsel yesterday morning, and counsel are currently attempting to have an expert review these notes. The notes are attached as Exhibit A to the Affidavit of counsel, contemporaneously filed.

proceedings. The rules of evidence do not apply in commutation proceedings so that issues of chain of custody would not exclude the evidence, and a person seeking clemency need not prove innocence. Furthermore, Petitioner acted rapidly after obtaining approval for the funding, asking that very day for release of the evidence. Petitioner's lab was ready for expedited handling of the evidence and the testing would have been completed by June 1 at the latest had the State not objected to the release of the evidence.

Since the State has conceded that Petitioner has no remedy in any state court to obtain the evidence at this time, this Court remains the final means of getting the State to perform a task as simple as forwarding certain items to a lab in Salt Lake City and allowing Petitioner to pursue fully and fairly his commutation request. The State in its pleadings and at oral argument provided not a single reason against the testing of the evidence, other than procedural hurdles. In the face of an impending execution, one would think that the State, including the pardon commission and the Governor would want the facts to come to light. But the State continues to seek to thwart and delay the process, having objected to access by an expert as well as the testing of the evidence.

3. Finally, the Court expresses doubt that the "proposed testing would bring favorable results." Order at p. 4. But the State's lab report apparently shows that the evidence has not yet been tested for DNA, and it is not possible to know what, if anything, the testing will reveal until it is completed. If the DNA showed that the blood of a third person were present at the crime scene, this would be directly exculpatory. Had the State followed through on its earlier agreement to allow testing of the evidence, the parties would have had the results in hand next

week, long before June 12. If the Court grants this motion to reconsider on May 25, 2012, the results could be back as early as June 4, 2012.

We also respectfully ask the Court to consider the results of the polygraph testing which was accomplished as a result of the Court's previous Order, discussed in section 1 of this Memorandum, above. Dr. Honts's report, attached as an exhibit to the Affidavit of counsel, demonstrates that Mr. Leavitt *passed* the polygraph exam, and was found to be truthful when he stated that he did not stab or mutilate the victim, and that he was not present when these acts occurred. The State is rushing headlong into *executing an innocent man*. Surely it is not too much to ask that important evidence in the case be tested at no expense and no risk to the State.

DATED this 24th day of May, 2012.

/s/
David Z. Nevin

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/
David Z. Nevin