NO. 12-35427

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT, Petitioner-Appellant, vs. A.J. ARAVE, Respondent-Appellee.	)	DISTRICT COURT NO. CV-93-24-BLW DISTRICT OF IDAHO BOISE

OPENING BRIEF OF THE APPELLANT

On appeal from the United States District Court for the District of Idaho the Honorable B. Lynn Winmill, United States District Judge, presiding.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioner-Appellant Richard A. Leavitt requests oral argument. This appeal involves substantial issues regarding the scope of *Harbison v. Bell*, __ U.S. __, 129 S.Ct. 1481 (2009) and a federal district court's jurisdiction over habeas cases after the mandate has issued from this Court. Oral argument would substantially aid the Court in resolving the issues presented.

JURISDICTIONAL STATEMENT

Petitioner-Appellant Richard A. Leavitt is an indigent death row prisoner in the custody of the Idaho Department of Correction. On May 23, 2012, the United States District Court for the District of Idaho entered a final order denying Mr. Leavitt's Emergency Motion for Order to Submit Evidence for Testing (Motion for Testing), which sought the submission for forensic testing of evidence in the possession of the police department in Blackfoot, Idaho. (ER 249.) On May 25, 2012, the district court denied Mr. Leavitt's motion to reconsider. The district court had jurisdiction over the request pursuant to 18 U.S.C. § 3599 and pursuant to 28 U.S.C. § 2254 and the Rules Governing Section 2254 Cases in the United States District Courts. This Court has jurisdiction over this appeal pursuant to 28 U.S..C. §§ 1291 and 1651.

STANDARD OF REVIEW

The district court ruled that it lacked subject matter jurisdiction and this Court reviews that decision *de novo*. *Olson Farms v. Barbosam*, 134 F.3d 933, 936 (9th Cir. 1998); *Skagit County Pub. Hosp. Dist. No.2 v. Shalala*, 80 F.3d 379, 385 (9th Cir. 1996).

In addition, the district court ruled that if it had jurisdiction in regard to the pending F.R.Civ.P. Rule 60(b) motion, there was an insufficient showing to require the submission and testing. This Court reviews the denial of a discovery request under an abuse of discretion standard. *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court have jurisdiction to grant Mr. Leavitt's request that the state be ordered to submit certain physical evidence to a certified independent lab for testing?

II. Did the district court err in alternatively ruling that Mr. Leavitt had not made a sufficient showing to permit discovery?

STATEMENT OF THE CASE

On May 11, 2012, Mr. Leavitt filed a motion for relief from judgment pursuant to F.R.Civ.P. 60(b), arguing that the district court's 1996 ruling

procedurally defaulting his ineffective assistance of counsel claims should be reconsidered in light of *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309 (2012). At the time Mr. Leavitt filed that motion, his Petition for Writ of Certiorari was pending in the Supreme Court. On May 14, 2012, the Supreme Court denied his certiorari petition. On May 16, 2012 at 4:09 p.m. (MDT), this Court issued its mandate. On May 17, 2012, the State in an ex parte hearing obtained the issuance of a death warrant setting Mr. Leavitt's execution for June12, 2012.

Counsel for Mr. Leavitt had been provided funding on May 9, 2012 for testing of certain items of evidence held by the Blackfoot Police Department. Counsel for Mr. Leavitt were preparing a state commutation petition in addition to seeking relief from judgment while the certiorari petition was pending in the Supreme Court. Once that petition was denied, Mr. Leavitt filed his commutation petition on May 25, 2012. That commutation petition is currently pending before the Idaho Commission on Pardons and Parole.

On May 21, 2012, after the Blackfoot Police Department refused to release the items for testing without a court order and the Bingham County Prosecutor refused to release the evidence as well, Mr. Leavitt filed the Motion for Testing. The requested evidence consisted of several items of clothing and a blood sample. The purpose of the testing was to conduct DNA testing for use in the upcoming

commutation proceedings and for possible use in the 60(b) motion pending before the district court. (ER 249.)

The State filed an objection alleging the district court had no jurisdiction to enter the requested order. (ER 234.) The State conceded that Mr. Leavitt had no remedy available in the state courts to obtain the evidence for testing.

The district court expedited briefing and conducted an oral argument on May 22, 2012. Mr. Leavitt had no opportunity to file a reply brief before the hearing. The district court entered its order denying the motion on May 23, 2012. Mr. Leavitt filed a Motion to Reconsider on May 24, 2012, and the district court denied the motion to reconsider on May 25, 2012.

A Notice of Appeal was timely filed on May 29, 2012.

STATEMENT OF FACTS

Petitioner-Appellant Richard A. Leavitt is a state prisoner under a sentence of death following a conviction of first degree murder in 1985. Mr. Leavitt's sentence was reversed by the Idaho Supreme Court in 1989. Following his resentencing in 1990, his sentence was affirmed by the Idaho Supreme Court.

He timely filed a petition for writ of habeas corpus in 1993. After grants of relief by the federal district judge both as to conviction and sentence, this Court reversed twice. This Court issued its mandate on May 16, 2012, after Mr. Leavitt

had filed his 60(b) motion.

Mr. Leavitt's counsel obtained funding from the district court for the preparation and representation of Mr. Leavitt before the Idaho Commission of Pardons and Parole in seeking commutation of his sentence. See, *Harbison v. Bell*. As part of that representation, counsel were budgeted funds for further forensic testing of the evidence currently in the possession of the Blackfoot Police Department.

On or about April 16, 2012, counsel for Mr. Leavitt reviewed the evidence at the Blackfoot Police Department in the presence of law enforcement and the Bingham County Prosecuting Attorney. Following that meeting, counsel understood that the prosecuting attorney would permit release of the evidence if requested. Immediately upon the mandate issuing on May 16, 2012, counsel attempted to renew his contact with the prosecuting attorney, but did not receive any response until May 21, 2012, when the prosecutor changed course, and now refused to release the evidence.

Mr. Leavitt then filed the Motion for Testing. The motion sought only the transfer of the evidence to a certified laboratory in Salt Lake City approximately three hours drive from Blackfoot or through Federal Express. In Idaho, evidence is routinely sent to independent labs for testing in this way. Mr. Leavitt had

arranged for expedited processing of the evidence at the lab, because of the rapidly set date of execution. The district court had provided *Harbison* funding for the expedited testing and transport, so that all of this would occur without expense to Respondent. The requested act would not interfere with the chain of custody of the evidence nor require any threat to the security of any institution of the State. No contact with Mr. Leavitt was required for completion of the testing.

SUMMARY OF ARGUMENT

The federal court has jurisdiction to grant the relief requested and the district court erred in holding to the contrary. First, the mandate had issued before the district court ruled on the motion. Second, jurisdiction is conferred by 18 U.S.C. § 3599 and *Harbison*. Third, the habeas petition was pending before the district court at the time of the motion. And fourth, the federal courts have jurisdiction to assure that minimal due process standards are applied in state commutation proceedings under *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

The requested relief placed little or no burden on the State and its agents and is critical to the proper representation of Mr. Leavitt in his commutation petition as guaranteed by § 3599, *Harbison*, and the Fourteenth Amendment. The fact that there is no avenue for obtaining this relief in the state courts requires that

the federal courts provide a vehicle for Mr. Leavitt to resolve this central issue. Particularly inasmuch as Mr. Leavitt recently passed a rigorous polygraph on the question whether he murdered the decedent, there is good reason to believe that the testing of the blood evidence will provide additional support for his claims of innocence at the commutation hearing. The State could identify no harm to it from the release of the evidence to a certified laboratory.

Also, pending before the district court was a properly filed Rule 60(b) motion seeking consideration of claims of ineffective assistance of trial counsel. The testing was also relevant to the merits of that motion which in part was based on challenges to the forensic serology evidence, which has been repeatedly cited by state and federal courts as providing strong evidence of Mr. Leavitt's guilt. The district court erred in denying the motion on this alternative ground as the request for testing was narrowly drawn, identifying specific items of evidence and limited in its scope. The failure to grant the request was thus an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO GRANT THE MOTION TO HAVE THE STATE SUBMIT THE EVIDENCE TO A CERTIFIED INDEPENDENT LAB FOR TESTING

The district court erred in relying on *Baze v. Parker*, 632 F.3d 338 (6th Cir.

2011), which held that a federal court had no jurisdiction to order a state prison to make its prison guards available for interviews during the petitioner's commutation proceedings. The majority in *Baze* held that a federal court would never have jurisdiction under §3599 or the All Writs Act to order the state to require the witnesses to meet with the defendant's investigators. *Baze* and the district court relied in part on an unpublished decision of this Court, *Beaty v. Ryan,* 413 Fed. Appx. 964 (2011).[1]

However, both of these case are distinguishable from Mr. Leavitt's case. In both, the federal habeas litigation was final, with nothing pending in the federal court at the time the motion was made. In each case, the sole issue pending in the federal court was the complaint seeking an order from the federal court. Thus, there was no other jurisdiction for the court in these cases. In *Beaty*, this Court stated that while he filed the motion under the habeas case number, "the motion is not in any way connected to his habeas case." *Beaty*, 413 Fed. Appx. at 965.

In contrast, Mr. Leavitt's first and only federal habeas petition was before

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[1]In *Beaty*, the defendant sought to order the prison to provide "a confidential contact visit" between Beaty and a neuro-psychologist. The court had no case or controversy then pending before it other than the motion at issue. The situation is starkly different here. Moreover, this Court without jurisdictional challenge from the state permitted non-confidential access between Mr. Leavitt and an expert two days before denying this motion.

the district court at the time he filed his motion. In addition, while the motion addresses primarily concerns with clemency proceedings, the request also relates to the Rule 60(b) motion pending before the district court. Therefore, the district court had jurisdiction to grant the requested relief.

Moreover, the concurring opinion in *Baze* noted that the majority decision was broader than necessary and set forth the possibility that in an appropriate situation the federal court would have jurisdiction to order some forms of relief. Here, Mr. Leavitt is merely seeking access to a few items of physical evidence, not attempting to force guards to talk with investigators or to force a confidential visit with Mr. Leavitt within the prison setting.

Because the district court retained jurisdiction it could assure that the clemency proceedings then maintained at least minimal due process standards, such as providing access to testing of the physical evidence not otherwise obtainable through the state courts.[2] See, *Ohio v. Woodard,* 532 U.S. at 288-89 (O'Connor, J., concurring) and *Baze,* 632 F.3d at 346 (Cole, J., concurring).

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[2]Respondent claimed that Mr. Leavitt and his counsel's last opportunity to obtain the evidence was in 2002 when the statute of limitations under the state DNA post-conviction act expired. But at that time, Mr. Leavitt had been granted a new trial and the State had begun new proceedings to re-try Mr. Leavitt, so his rights under that statute were inapplicable. Furthermore, that statute requires a higher standard to obtain the evidence that either the commutation standards or discovery in federal habeas cases.

II. The District Court Erred in Denying Discovery Related to the Rule 60(b) Motion

The district court alternatively denied the motion because the request was "tardy and speculative in light of the evidentiary record before the court." (ER 5.)

But all claims of ineffective assistance of trial counsel were denied on the basis of procedural default in1996, with the result that Mr. Leavitt could never develop the factual record before the district court. The default was based on the controlling case law then in effect barring consideration of state post-conviction counsel's acts and omissions as cause to excuse the failure to raise issues. Mr. Leavitt's Rule 60(b) motion has still not yet been decided. It was filed in light of the changed circumstances created by the Supreme Court's decision in *Martinez* decided on March 20, 2012, less than two months before Mr. Leavitt filed his 60(b) motion in this case. Thus, the motion for release of the evidence is not "tardy" in relation to the Rule 60(b) motion, and its "grand reservoir of equitable power, [which] affords courts the discretion and power to vacate judgments whenever such action is appropriate to accomplish justice." *Phelps v. Almedai*, 569 F.3d 1120, 1135 (9th Cir. 2009).

Nor is the request speculative. It goes directly to a claim raised in the Rule 60(b) motion in that it seeks to controvert the serology evidence presented in the

state courts. At trial, the prosecution relied on one particular piece of evidence to attempt to disprove Mr. Leavitt's testimony that his blood was deposited at the scene of the crime prior to the time of the decedent's killing. By claiming that his blood was "mixed" with the victim's blood, the prosecution sought to prove that Mr. Leavitt was necessarily present when she was killed and thus was responsible for the murder. On appeal, the Idaho Supreme Court stressed the damning nature of that particular testimony: "The victim's blood was type A, and tests of the blood samples from the crime scene reveal that type O blood *had been deposited contemporaneously* with that of the victim's type A blood. . . . No explanation could be offered as to how his blood *became mixed* with of the victim." *State v. Leavitt*, 116 Idaho 285, 287-88, 775 P.2d 599, 602 (1989) (emphasis added). This Court also made specific reference to and relied on the mixing of Mr. Leavitt's blood with that of the victim in reversing Chief Judge Winmill's conditional granting of the writ of habeas corpus. *Leavitt v. Arave*, 383 F.3d 809, 815 (9th Cir. 2004).

Yet one of the claims defaulted by the district court, on which Mr. Leavitt was never able to develop the record in federal court because of the procedural default, goes *directly* to the testing requested by the Motion for Testing. The

request is neither a "fishing" expedition nor speculative and is relevant to the merits of the 60(b) motion pending in the habeas case. Therefore, the district court abused its discretion in denying the request for release of the evidence.

DATED this 31st day of May, 2012.

David Z. Nevin
Andrew Parnes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 31st day of May, 2012, I caused a true and correct copy of the foregoing opening brief to be emailed to LaMont Anderson, Deputy Attorney General, State of Idaho, lamont.anderson@ag.idaho.gov.

David Z. Nevin