

David Z. Nevin
Nevin, Benjamin, McKay & Bartlett LLP
P.O. Box 2772
Boise, ID 83701
208-343-1000

Andrew Parnes
Law Office of Andrew Parnes
P.O. Box 5988
Ketchum, ID 83340

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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

Petitioner Richard A. Leavitt, through counsel, moves the Court for its Order directing the Blackfoot Police Department to forward to Sorenson Forensics, 2495 South West Temple, Salt Lake City, UT 84115, the following items for forensic testing:

1. shirt - BPD item Z -- lab item # 26
2. sex crime kit - Lab item # 27 - not in evidence
3. tan corduroy shorts - BPD item J-1 -- lab item # 10a - trial exhibit 9
4. pale lavender panties - BPD item j-1 - lab item # 10D
5. locking mechanism - BPD T - lab item 8

1 • EMERGENCY MOTION FOR ORDER TO SUBMIT EVIDENCE FOR TESTING AND FOR ORDER SHORTENING TIME FOR RESPONSE

6. R. Leavitt blood reference - item 17146- E

Good cause exists for this motion in that if counsel are unable to complete testing of the requested items, Mr. Leavitt will be denied due process of law in presenting his claim for commutation of his sentence.

The present motion is made because counsel have diligently sought the assistance of the Bingham County Prosecuting Attorney and the Blackfoot Police Department, which apparently has custody of the items in question, but they have refused to forward the items for testing. It appears that the state, having moved with great dispatch to set Mr. Leavitt's execution at the earliest possible time, is now making every effort to prevent counsel from effectively representing Mr. Leavitt and presenting his commutation petition. Accordingly, Mr. Leavitt respectfully requests that the time for a response to the present motion be shortened so as to permit the Order to issue immediately in the event the Court decides to grant the motion.

The factual basis for this motion is set forth in detail in the attached affidavit of counsel.

DATED this 21st day of May, 2012.

/s/

David Z. Nevin

- 2 • EMERGENCY MOTION FOR ORDER TO SUBMIT EVIDENCE FOR TESTING
AND FOR ORDER SHORTENING TIME FOR RESPONSE

CERTIFICATE OF SERVICE

I hereby certify that on this 21st 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

- 3 • EMERGENCY MOTION FOR ORDER TO SUBMIT EVIDENCE FOR TESTING
AND FOR ORDER SHORTENING TIME FOR RESPONSE

David Z. Nevin
Nevin, Benjamin, McKay & Bartlett LLP
P.O. Box 2772
Boise, ID 83701
208-343-1000

Andrew Parnes
Law Office of Andrew Parnes
P.O. Box 5988
Ketchum, ID 83340

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,)	
	)	CASE NO. CV-93-0024-S-BLW
Petitioner,)	
	)	CAPITAL CASE
vs.)	
	)	AFFIDAVIT OF DAVID Z. NEVIN IN
A.J. ARAVE, Warden of the Idaho State	)	SUPPORT OF EMERGENCY
Maximum Security Prison,	)	MOTION FOR ORDER TO SUBMIT
	)	EVIDENCE FOR TESTING
Respondent.)	
_____)	

David Z. Nevin, being duly sworn, deposes as follows.

1. I am one of the counsel appointed by this Court to represent Richard A. Leavitt, Petitioner in the case pending before this Court in *Leavitt v. Arave*, No CV-93-0024-BLW.

2. On Thursday, May 17, 2012 at 12:06 p.m. the Court entered a budget order under seal in which it approved counsels' request for funding pursuant to *Harbison v. Bell*, 556 U.S. 180, 194 (2009) to conduct testing of certain blood samples from the crime scene. Counsel

thereafter immediately began efforts to reach the Bingham County Prosecutor, Mr. J. Scott Andrew, to request that he forward the evidence to a lab we had contacted in Salt Lake City, UT, and which was willing and able to conduct the testing on an expedited basis.

3. Mr. Parnes called Mr. Andrew twice on the afternoon of May 17, 2012, once at about 1:00 p.m., and again shortly before the close of business. Mr. Andrew did not take or return these calls.

4. Mr. Parnes again called on the morning of Friday, May 18, 2012, and again was not able to reach Mr. Andrew. Mr. Parnes thereafter sent an email to Mr. Andrew at 9:18 a.m. explaining the situation and asking him to return the previous calls. A copy of the email is attached as Exhibit A. Mr. Parnes did not receive a reply to this email. Thereafter, at approximately 2:00 p.m. Mr. Parnes faxed a letter to Mr. Andrew, again asking him to call or respond to the earlier requests. A copy of the letter is attached as Exhibit B.

5. This morning, Monday, May 21, 2012, Mr. Nevin called Deputy Attorney General Lamont Anderson, and asked whether he could assist counsel in reaching Mr. Andrew. Finally, at 12:07 p.m. today, Mr. Andrew faxed a letter to Mr. Parnes and Mr. Nevin which states that the evidence is in the custody of the Blackfoot Police Department, that Mr. Andrew believes he does not have the authority to order them to send it out for testing, but that even if he did, he would not do so. He adds as to the Blackfoot Police Department, that if "they are willing to send the items, that is their prerogative." The letter is attached as Exhibit C.

6. In response to Mr. Andrew's letter, counsel contacted the Blackfoot Police Chief David Moore at approximately 2:45 p.m. Chief Moore advised counsel that his department

would not release the samples without a court order.

7. Accordingly, counsel are required to return to the Court to request another emergency order, on this occasion directing the Blackfoot Police Department to forward the materials referred to in the motion.

8. Immediate forwarding of the blood samples for testing is required in order to fulfill counsels' obligation to represent our client and to present a clemency petition. The execution has now been set for June 12, 2012. The Executive Director of the Idaho Commission of Pardons and Parole has requested that any documentation in support of a Petition for Commutation be filed as soon as possible. Counsel for Mr. Leavitt have informed the Executive Director that we will be filing a formal petition no later than May 25, 2012, and supply supporting documentation prior to that date.

9. Without completing the testing referred to in the present motion, counsel will be unable to prepare the commutation or clemency petition.

10. There is no reason for the State or the Blackfoot Police Department to decline to forward the requested samples. The shipping and testing will be done at no cost to the State. Sorenson Laboratory is a well-established testing firm which will conduct accurate and reliable testing and preserve the samples for future evidentiary use. The only imaginable reason for the State's non-cooperation is the one identified by Mr. Andrew: that the testing could potentially delay the execution, despite the fact that it may be exculpatory. Mr. Andrew apparently believes that it will not be. Exhibit C at p. 2. But it is improper for the prosecutor and the local authorities to drag their feet in a passive-aggressive effort to thwart a legitimate effort to

get at the truth.

11. It is worth noting in this regard that Mr. Andrew's letter also mentions that the State apparently submitted blood samples for testing to the state police forensic lab "at about the time of Judge Winmill's decision that vacated Mr. Leavitt's conviction." This could conceivably refer either to this Court's decisions on December 14, 2000 (Docket No. 141), or on September 28, 2007 (Docket No. 297). In either event, the fact or results of this testing have never been provided to counsel, such as in a supplemental discovery response.

12. Mr. Parnes viewed the evidence in possession of the Blackfoot Police Department on or about April 16, 2012. During this viewing, Mr. Parnes spoke with Mr. Andrew, and with Lt. Paul Newbold, who advised Mr. Parnes that it was believed that certain evidence had been sent out "around 2001 or so" to determine whether "fingerprints had been found in the blood." Mr. Parnes was further advised that no such fingerprints had been located. The lab which Mr. Andrew and Lt. Newbold referred to was a lab *other than* the state police forensic lab. Mr. Parnes orally requested any and all reports on the evidence and Mr. Andrew advised him that the reports would be provided. They have never been provided.

13. Counsel in the last few minutes have received a subsequent letter from Mr. Andrew, attached as Exhibit D. In this letter, Mr. Andrew confirms that indeed testing was performed on a variety of items in 2001. Again, counsel have never been provided until this moment with confirmation of the fact of this or the other testing, and have still not received reports or results of it. Remarkably, Mr. Andrew chastises counsel because the present situation "sets up a scenario of scrambling in the final weeks before the execution" Yet it is Mr. Andrew's

office which has failed until the present moment to advise counsel of the existence of testing by the state police forensic lab, results of which have apparently been in the possession of the state of Idaho for some eleven years. Nor has Mr. Andrew provided the results of the separate testing.

14. By establishing a short time period before the execution and then denying Mr. Leavitt access to persons who may assist in obtaining a commutation of that execution, the State of Idaho is denying Mr. Leavitt his rights to due process and equal protection of the laws, and imposing cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

This ends my affidavit.

DATED this 21st day of May, 2012.

/s/
David Z. Nevin

SUBSCRIBED AND SWORN to before me this 21st day of May, 2012.

/s/

Notary Public for Idaho.
My commission expires: 11-8-13

CERTIFICATE OF SERVICE

I hereby certify that on this 21ST 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

David Nevin

From: Andrew Parnes [aparnes@mindspring.com]
Sent: Friday, May 18, 2012 9:19 AM
To: Scott Andrew
Cc: David Nevin
Subject: Leavitt Evidence

Scott-

I have been trying reach you by phone regarding some of the evidence in the Leavitt case. We have arranged to have it tested at Sorenson Forensics and obviously need to have it sent there ASAP. I need to discuss this with you so that the evidence can be in SLC no later than this coming Monday. Please give me a call at your earliest convenience today.

Thanks for your assistance in this request.

Andy

Andrew Parnes
P.O. Box 5988
Ketchum, ID 83340
208-726-1010

Law Office of Andrew Parnes

Andrew Parnes, Member of Idaho and California Bar
Lori Nakaoka, Member of Idaho Bar

BY TELEFAX

May 18, 2012

J. Scott Andrew
Bingham County Prosecutor
501 N. Maple, #302
Blackfoot, ID 83221

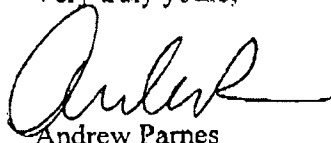
Re: State v. Richard A. Leavitt, No. 1985-4110

Dear Scott:

I have left several telephone messages for you as well as an email this morning. It is urgent that we arrange to have some of the evidence forwarded to Sorenson Forensics in Salt Lake City no later than Monday May 21, 2012.

Please call me to discuss the arrangement as soon as possible.

Very truly yours,



Andrew Parnes

cc: David Nevin

J. Scott Andrew
Prosecuting Attorney

Mark V. Cornelison
Civil Deputy

501 North Maple, #302
Blackfoot, Idaho 83221-1700



OFFICE OF THE PROSECUTING ATTORNEY
BINGHAM COUNTY
STATE OF IDAHO

Randy W. Smith
Chief Criminal Deputy

Tyler J. Salvesen
Jared H. Ricks
Criminal Deputies

TEL: (208) 782-3101
FAX: (208) 785-5199

May 21, 2012

Andrew H. Parnes, Esq.
P.O. Box 5988
Ketchum, ID 83340

RE: State of Idaho v. Richard Albert Leavitt, Case No. CR-1985-4110

Mr. Parnes:

I have received your message that you desire to have items of evidence in the Danette Elg murder case sent immediately to Sorensen Forensics in Salt Lake City. The evidence is in the custody of the Blackfoot Police Department at this time. I do not believe I have the authority to order them to send it anywhere and, even assuming I did, am not willing to issue such a directive.

In 2001, the Idaho Legislature amended Idaho Code §19-4902 to allow a convicted person to file a petition before the trial court for the purpose of having DNA testing performed on evidence that was "secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial." Any such petition in Mr. Leavitt's case was required to be filed by July 1, 2002. No petition under I.C. §19-4902 was filed by July 1, 2002, or thereafter.

I believe that the timing of the current request makes it clear that it is merely a tactic to delay Mr. Leavitt's execution. Mr. Leavitt has had more than a decade to make such a request, but has not done so. Instead the request comes as a new death warrant has been issued and with approximately one month until his scheduled execution date. I am not willing to participate in yet another heart-breaking and frustrating delay for the victim's family. This is especially so where the basis for the delay will not, in my opinion, ultimately provide Mr. Leavitt with the relief he seeks.

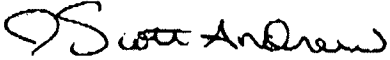
I have been in touch this morning with the Idaho State Police forensic lab in Meridian about DNA testing. I was informed that their records show that they received several

EXHIBIT C

items for testing some years ago. I was not given a time frame for when that occurred or the specifics of the testing. I have reason to believe that the items were sent to the state lab around the time of Judge Winmill's decision that vacated Mr. Leavitt's conviction. At that time, we were looking at having DNA testing done. I was informed that the file on the testing would be pulled and I would get a call back this afternoon about what was done by the lab in regard to the evidence.

If you will send me a list of items you want sent to Sorensen Forensics, I will forward that to the Blackfoot Police Department. If they are willing to send the items, that is their prerogative. Otherwise, at this time, I am only prepared to intervene to have the evidence sent to Sorensen Forensic in compliance with a court order.

Sincerely,



J. Scott Andrew
Bingham County Prosecuting Attorney

cc: LaMont Anderson
David Nevin

J. Scott Andrew
Prosecuting Attorney



Randy W. Smith
Chief Criminal Deputy

Mark V. Cornelison
Civil Deputy

Tyler J. Salvesen
Jared H. Ricks
Criminal Deputies

501 North Maple, #302
Blackfoot, Idaho 83221-1700

OFFICE OF THE PROSECUTING ATTORNEY
BINGHAM COUNTY
STATE OF IDAHO

Tel.: (208) 782-3101
Fax: (208) 785-5199

May 21, 2012

Andrew H. Parnes, Esq.
P.O. Box 5988
Ketchum, ID 83340

RE: State of Idaho v. Richard Albert Leavitt, Case No. CR-1985-4110

Mr. Parnes:

I received a call from Rylene Nowlin at the Idaho State forensic lab in Meridian this afternoon. She informed me that there were a number of items from the Leavitt case that were received and analyzed by Ann Bradley in 2001. These items, as I recall them being listed, included the comforter, a pillow case, a shirt, a pair of panties and some brown shorts.

Ms. Nowlin told me that the notes in the file indicate that in 2001 Ms. Bradley analyzed the items for the presence of semen. None was detected. She also states that she did not see anything in the file regarding any DNA testing being done on the items.

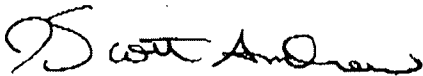
Ms. Nowlin did confirm what I had been told some time ago, which is that bacteria from fecal matter can degrade the DNA, which can complicate or eliminate the ability to obtain testable DNA. I do not know that degradation of the DNA was the reason why the items were not tested for DNA at the time. But, I do remember being informed about the degradation issue back when items were being sent out for testing following Judge Windmill's order vacating the conviction.

Lastly, I was informed that it normally takes approximately two weeks to conduct DNA testing on items. This does not include any time to analyze the evidence to determine where samples should be taken from or the time it takes to extract samples for testing. This type of a delay in having a result sets up a scenario of scrambling in the final weeks before the execution that is certain to be the basis for Mr. Leavitt requesting a last-minute delay in the execution. As I indicated in my previous letter, the DNA testing is something that could have been addressed anytime in the last decade. I am not prepared to frustrate

EXHIBIT D

and anger Ms. Elg's family by being a participant in any procedure that would simply delay the execution based on evidence I do not believe will ultimately provide Mr. Leavitt a basis for relief from his conviction.

Sincerely,



J. Scott Andrew
Bingham County Prosecuting Attorney

cc: LaMont Anderson
David Nevin