David Z. Nevin
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
Boise, ID 83701
208-343-1000
dnevin@nbmlaw.com

Andrew Parnes
Law Office of Andrew Parnes
671 N. 1st Avenue
Ketchum, ID 83340
208-726-1010
aparnes@mindspring.com

Attorneys for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT, Petitioner-Appellant, vs. A.J. ARAVE, Respondent-Appellee.	**NO. 12-35450** **DISTRICT COURT NO. CV-93-24-BLW** **REPLY IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD**

The State complains that Mr. Taylor plans to use DNA technology – which it correctly observes was not available in 1984 – to complete his analysis of the evidence. Mr. Taylor's

declaration makes clear, however, that "the examination techniques utilized to collect the samples for testing to determine how the deposition took place were available in 1984. DNA testing should be utilized with these samples because of the greater specificity afforded by this current technology." Taylor Declaration, ¶16. Mr. Taylor's references to DNA technology was plainly offered to establish his ongoing expertise as a serologist (which now of course focuses heavily on DNA), and not to suggest that he intended to consider testing the evidence using DNA.

More importantly, the declaration now makes explicit, what we believed was obvious before, that a serology expert needs to examine the evidence in question to make a determination if the items can reveal the answer to the question posed.

As the State concedes, this Court can expand the record in extraordinary circumstances. Such circumstances exist in this case. In district court, the State opposed the re-consideration of the claim on the serology primarily on procedural grounds — that this Court had decided the issue on the merits in *Leavitt v. Arave,* 383 F.3d 809, 884 n. 4 (9th Cir. 2004). Dkt 337. The district court accepted that argument and held that this claim did not fall within the dictates of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). E.R. 28. In the alternative, the district court examined the merits of the claim without holding an evidentiary hearing involving the testing results.

The report of Dr. Blake was before the district court concerning the question of the technique for determining the timing of the placement of the blood. Since Dr. Blake's report referred to "overlay or underlay," that report is consistent with the ability of serologists in 1984 and 1985 to determine the sequence of blood being deposited at two different times. The State has never contested the conclusions of that report or sought to introduce any evidence that his

conclusions were erroneous.

At oral argument, this Court raised the issue that there was no affidavit in evidence that such testing was available and could answer the question of the timing of the placement of the blood on the shorts. Leavitt's counsel acting in good faith then sought an affidavit from an expert in serology to assist the court in determining an issue which we believed was already covered by Dr. Blake's report. This was not an attempt to hold back information previously obtained but to address one specific question from the court.[1]

Despite trying to cast blame on others, the State has fought the release of the evidence to answer a critical issue in this capital case. Had the State conceded to release the evidence as the Blackfoot Police Department had been willing to do upon a simple court order three weeks ago, that testing would have been completed now. *See*, Dkt. 330-1. Instead, the State continues to deny Leavitt's attempt merely to obtain the results of the testing, which may in the end even support the State's theory, simply so the State can go forward with an execution thus preventing the federal courts from considering the issues in a deliberate manner.

DATED this 8th day of June, 2012.

/s/
David Z. Nevin
Andrew Parnes

[1]In reference to the Associated Press oral argument, counsel believe that this Court also asked for possible affidavits from the medical personnel regarding their concerns about their anonymity, not just whether the State was willing to accept the Arizona Department of Corrections procedures.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 8th day of June, 2012, I caused a true and correct copy of the foregoing to be served on LaMont Anderson, Deputy Attorney General, State of Idaho, by electronic court filing.

/s/
David Z. Nevin