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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

