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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT, Petitioner-Appellant, vs. A.J. ARAVE, Respondent-Appellee.	No. 12-35450 RESPONSE TO PETITIONER-APPELLANT'S MOTION TO SUPPLEMENT THE RECORD

COMES NOW, Respondent, A. J. Arave, Warden ("state"), by and through his attorney, L. LaMont Anderson, Deputy Attorney General and

Chief, Capital Litigation Unit, and does hereby respond to Petitioner's ("Leavitt") Motion to Supplement the Record, by objecting to the same.

On June 7, 2012, at 7:49 PDT, approximately eight hours after conclusion of oral argument, Leavitt filed the instant motion seeking to augment the record with the declaration of Marc Scott Taylor (Dkt. 18-1), in which Taylor contends he has been "apprised of the issues associated with the evidence bloodstains on an item of evidence described as denim shorts" (Dkt. 18-3, p.3). Taylor further explains, "The issue is whether the blood stain that was previously tested from the shorts is a mixture of blood that was deposited in one event, or an overlay of blood from one source on top of blood from another source." (Dkt. 18-3, p.3.) Based upon his experience, Taylor opines, "it is possible to determine if the blood was deposited separately or contemporaneously as a mixture, depending on the nature of the stains and the manner in which the stain or stains was deposited." (Id.) However, despite the fact that Taylor does not opine DNA testing was available in 1984 at the time of Danette Elg's murder, he proposes the use of unspecified DNA testing "because of the greater specificity afforded by this current technology." (Id.) Taylor does not contend he can make any kind of determination regarding the blood based upon technology available in 1984, but presumably contends, based upon the unspecified DNA testing he wants

to perform, he "may be able to determine if the bloodstain is the result of contemporaneous deposit of a mixed sample, or separate deposits of blood from different sources." (Id., p.4.)

Leavitt's attempt to supplement the record with Taylor's affidavit in the context of his Rule 60(b) Motion transforms the claim regarding the serology evidence into a successive claim in violation of the successive petition prohibition of 28 U.S.C. § 2244(b).[1] When a Rule 60(b) motion seeks to "add a new ground for relief" or "attacks the federal court's previous resolution of a claim *on the merits*," it constitutes an application for habeas relief and is governed by § 2244(b). Gonzalez v. Crosby, 545 U.S. 524, 532 (2005) (emphasis in original). Under § 2244(b), "any claim that has already been adjudicated in a previous petition must be dismissed." Id. at 529-30. "Newly discovered evidence" and "a subsequent change in substantive law" constitute successive petitions even if labeled as a Rule 60(b) motion. Id. at 531. "That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Id. at 532.

[1] Of course, this assumes Leavitt's claim has not already been converted in violation of 28 U.S.C. § 2244(b).

Even if Taylor's affidavit did not transform the claim, Leavitt's instant motion should be denied because he has not demonstrated extraordinary circumstances. As recognized in Lowry v. Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003), "Save in unusual circumstances, we consider only the district court record on appeal." The state certainly recognizes "[t]here are exceptions to the general rule" and this Court can exercise its inherent authority to supplement the record, but only in "extraordinary cases." Id. For example, consideration of new facts may be mandatory "when developments render a controversy moot and thus divest us of jurisdiction." Id. In counsel's supporting affidavit he notes that at the end of the "First Amendment case," which followed the two habeas arguments, the Court "invited the parties to provide supplemental information during the lunch hour or later in the afternoon, presumably in view of the seriousness of the issues presented and Mr. Leavitt's pending execution." (Dkt. 18-2, p.3.) The "seriousness of the issues presented" and Leavitt's "pending execution" were not the reasons the Court permitted the parties to provide supplemental information. Rather, the information that was to be provided was whether the Warden, considering the tenor of the oral argument and Arizona's recent capitulation concerning the same issue, would reconsider his position and

permit media to view the "entirety of the execution." Obviously, had the Warden reconsidered, it would have mooted the appeal.

While this Court has not adopted a set test for utilization of its inherent authority, the Eleventh Circuit noted three factors that can be considered: (1) acceptance of the material "would establish beyond any doubt the proper resolution of the pending issue"; (2) remanding to the district court would have been contrary to both the interests of justice and efficient use of judicial resources; and (3) the unique powers of federal courts in the context of federal habeas. Ross v. Kemp, 785 F.2d 1467, 1475 (11th Cir. 1986). Leavitt cannot even meet the first factor because there is nothing in Taylor's declaration establishing anything that is truly relevant to Leavitt's case. Rather, Taylor wants to utilize testing that was apparently not available in 1984 to aid this Court in determining whether the district court abused its discretion by denying Leavitt's Rule 60(b) motion concerning a claim of alleged ineffective assistance of trial counsel stemming from his 1985 trial, and alleged ineffective assistance of post-conviction counsel in 1986. However, because ineffective assistance of counsel claims must be based upon the technology available at the time of the alleged ineffectiveness, *see* Strickland v. Washington, 466 U.S. 668, 689 (1984), the unspecified DNA testing being sought by Leavitt and Taylor are

irrelevant to his claim and certainly does not "establish beyond any doubt the proper resolution of the pending issue." Ross, 785 F.2d at 1475.

Moreover, permitting Leavitt to augment the record at this juncture is not an efficient use of judicial resources. Both this Court and the district court reviewed the record provided by Leavitt in support of his Rule 60(b) Motion and Motion to Submit. It was only after Leavitt tested the waters at oral argument that his attorneys concluded additional evidence should be submitted to this Court that has never been presented to the district court. As explained in Oregon Natural Resources Counsel, Inc., v. Grossarth, 979 F.2d 1377, 1379 (9th Cir. 1992), the presentation of new evidence which has not been presented to the district court "[i]s difficult for an appellate court to evaluate in the first instance." Additionally, Idaho's federal judges are simply overwhelmed with a burgeoning caseload and should not be required to waste their valuable time and resources on decisions that are not premised on all the evidence a litigant has to offer on a particular issue or claim.

Nor has Leavitt established excusable neglect. *See* Ross, 785 F.2d at 1476-77 (remanding for a determination of excusable neglect because "the apparent negligence on the part of Ross' attorneys may have been due to their reliance on misrepresentations by the state official who had legal custody of the records"). Rather, counsel concedes that any error by not

previously submitting any evidence establishing the difference between "mixed" and "overlaid" blood was based upon their mistaken "belief that the record was sufficient." (Dkt. 18-2, p.4.) It is simply extraordinary that in 1996, Leavitt would raise a claim contending his trial attorneys were ineffective by allegedly failing "to counter the forensic serology evidence introduced by the state" (E.R., Vol.2, p.23, ¶70), without attempting to establish prejudice with supporting evidence from an expert establishing the alleged difference between mixed and overlaid blood. It is even more incredible that Leavitt filed his Rule 60(b) motion on May 11, 2012 (S.E.R., pp.21-34), found Sorenson Forensics to complete "forensic testing," and filed his Motion to Submit on May 21, 2012 (E.R., Vol.3, pp.249-51), but was unable to find an expert to submit a supporting declaration until after he tested the waters during oral argument.

The district court, this Court, and the state have been forced to address Leavitt's motions in an exceptionally short time period. While Leavitt has attempted to portray the state as the "bad guy," it is Leavitt who has failed to timely litigate the matter of his trial attorneys' effectiveness, both in state court and before the district court. He should not be rewarded for finding an expert at the eleventh-and-one-half hour based upon his attorneys' tactical decision "that the record was sufficient," and then finding out at oral

argument that their tactical decision may have been erroneous. Leavitt's conviction has been pending since 1985, and his latest death sentence since 1991, when it was affirmed by the Idaho Supreme Court. Even his federal habeas case has been pending since 1993. There simply is no excuse for the tardiness of Taylor's affidavit, and it completely fails to establish a reasonable probability of a different outcome as required under Strickland, but is nothing more than another attempt to delay Leavitt's execution after 28 years of litigation.

The state respectfully requests that Leavitt's Motion to Supplement the Record be denied.

Dated this 8th day of June, 2012.

/s/
L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 8th day of June, 2012, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

David Nevin Nevin, Benjamin, McKay & Bartlett P.O. Box 2772 Boise, ID 83701	____ ____ ____ ____ X	U.S. Mail Hand Delivery Overnight Mail Facsimile Electronic Court Filing
Andrew Parnes Law Office of Andrew Parnes P.O. Box 5988 Ketchum, ID 83340	____ ____ ____ ____ X	U.S. Mail Hand Delivery Overnight Mail Facsimile Electronic Court Filing

/s/
L. L.LaMont Anderson