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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** **DISTRICT COURT NO. CV-93-24-BLW** **DECLARATION OF DAVID Z. NEVIN IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD**

1. I am an attorney, duly licensed to practice law in the State of Idaho; I am a member of the bar of this Court, and appear as one of the counsel of record for the

Petitioner-Appellant, Richard A. Leavitt.

2. Counsel believe that the existing record, revealing as it does that Dr. Blake's report established that the two depositions of blood were not mixed, but rather underlay or overlay each other, presented a question which "has some merit," *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012), justifying granting the pending Rule 60(b) motion.

3. Counsels' intention was to fully develop this issue upon being granted leave to pursue Mr. Leavitt's previously defaulted Claim 9, alleging as a ground for habeas relief the ineffective assistance of trial counsel.

4. At today's oral argument, however, the Court observed that counsel had not placed in the record the declaration of an expert witness on the subject whether scientific testing in the mid-1980's could determine whether a sample containing the blood of two persons was mixed or deposited at two separate times, and if so, the amount of time elapsing between the two depositions.

5. Counsel have consulted informally with an expert, Marc Scott Taylor, on this question. Mr. Taylor stated that scientific testing may be able to answer this question, but that a final answer will not be possible until the evidence itself is examined. A true and accurate PDF scan of Mr. Taylor's declaration to this effect is attached to this Declaration, along with his Professional Vita.

6. We respectfully ask that the Court consider Mr. Taylor's declaration in ruling on Mr. Leavitt's appeal, either by correcting, modifying or supplementing the record pursuant to F.R.App.P. 10(e)(2) or (3), or pursuant to the Court's equitable power to supplement the record, or otherwise, in the interests of justice. During argument of the First Amendment case which immediately followed argument of this case, 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.

7. As the Court said in *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003), "[t]here are exceptions to the general rule. We may ... exercise inherent authority to supplement the record in extraordinary cases, *see Dickerson v. Alabama*, 667 F.2d 1364, 1366-68 & n.5 (11th Cir. 1982)." *See also, Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989); *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000), cert. denied, 532 U.S. 943 (2001); *Ross v. Kemp*, 785 F.2d 1467, 1474 n.12 (11th Cir. 1986); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970). *See also* Charles Alan Wright et al., Federal Practice & Procedure § 3956.4, at 349-51 (3d ed. 1999 & Supp. 2003) ("In special circumstances, however, a court of appeals may permit supplementation of the record to add material not presented to the district court."); 20 Moore's Federal Practice § 310.10[5][f], at 310-19 (3d ed. 2000) ("In

extraordinary situations, the circuit court may consider material not presented to the district court when it believes the interests of justice are at stake.").

8. If counsel erred in our belief that the record was sufficient, we respectfully ask that our error in this capital case not be the basis for the Court's failing to permit Mr. Leavitt fully to raise the ineffectiveness of his trial counsel.

This ends my declaration.

DATED this 7th day of June, 2012.

/s/
David Z. Nevin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 7th day of June, 2012, I caused a true and correct copy of the foregoing reply brief to be served on LaMont Anderson, Deputy Attorney General, State of Idaho, by electronic court filing.

/s/
David Z. Nevin