

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
BINGHAM, IDAHO

2012 MAY 15 AM 8:52

Andrew Parnes, ISB # 4110
P.O. Box 5988
671 N. 1st Avenue
Ketchum, ID 83340
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SARA STACH CLERK

BY _____ DEPUTY

David Nevin, ISB #2280
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IN THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, COUNTY OF BINGHAM

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 v.)
)
 RICHARD A. LEAVITT,)
)
 Defendant-Petitioner.)
 _____)

Case No. CR1985-4110 AND
CV2008-857

**NOTICE OF DEMAND FOR
OPPORTUNITY TO BE HEARD
REGARDING ISSUANCE
OF DEATH WARRANT**

The Defendant/Petitioner Richard A. Leavitt, through counsel, respectfully moves the Court for its Order directing that, prior to the issuance of any death warrant, he be given the opportunity to be heard through counsel on the question whether the warrant should issue.

This motion is made pursuant to I.C. § 19-2715(4) because it appears that no "stay of execution," I.C. § 19-2715(6) is in place, but rather the judgment of death "has not been executed" for reasons "other than those set forth in subsection (1) of this section," I.C. § 19-

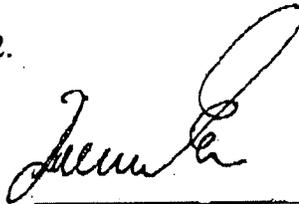
2715(4). Furthermore, "legal reason[s] exist against the execution of judgment," *id*

Mr. Leavitt's case has been subject to the Orders of the United States District Court for the District of Idaho, issued pursuant to his federal habeas corpus action *Leavitt v. Arave*, D.Idaho Case No. CV-93-0024-S-BLW. On May 14, 2012, the United States Supreme Court denied Mr. Leavitt's most recent Petition for Writ of Certiorari. In recent telephone conversations with counsel for the State of Idaho, undersigned counsel has been advised that the state intends promptly to seek a death warrant, with an eye toward scheduling Mr. Leavitt's execution to occur on or about June 12, 2012.

The warrant, however, should not issue at the present time for a variety of reasons including, but not limited to, the fact that Mr. Leavitt has filed an additional petition for relief in the federal habeas case referenced above.

Failure to grant the present motion would result in a death warrant issuing in derogation of Mr. Leavitt's rights to due process of law, the assistance of counsel, a fair trial and sentencing hearing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution.

DATED this 14th day of May, 2012.



David Z. Nevin
Andrew Parnes
Attorney for Defendant-Petitioner

CERTIFICATE OF SERVICE

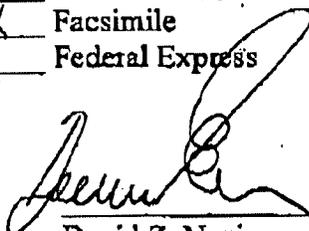
I HEREBY CERTIFY that on the 14th day of May, 2012, I served the foregoing document on all interested parties as follows:

L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit
Statehouse Mail, Room 10
PO Box 83720
Boise ID 83720-0010
Facsimile: 208-854-8074

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J. Scott Andrew
Bingham County Prosecuting Attorney
501 North Maple, #302
Blackfoot, ID 83221-1700
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David Z. Nevin

FILED IN CHAMBERS
AT IDAHO FALLS
BONNEVILLE COUNTY
HONORABLE JON J. SHINDURLING
DATE May 17, 2012
TIME 10:30 AM
DEPUTY CLERK JW201

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

STATE OF IDAHO,)	
)	
Plaintiff/Respondent,	)	Case No. CR-1985-4110
)	
	)	Case No. CV-2008-857
)	
vs.	)	ORDER DENYING DEMAND
	)	FOR OPPORTUNITY TO BE HEARD
	)	REGARDING ISSUANCE OF DEATH
	)	WARRANT
RICHARD A. LEAVITT,)	
)	
Defendant/Petitioner.)	

The Defendant/Petitioner Richard A. Leavitt filed a Notice of Demand for Opportunity to be Heard Regarding Issuance of Death Warrant on May 15, 2012. The motion asserts the judgment of death has not been executed for reasons other than those set forth in Idaho Code § 19-2715(1) and that legal reasons exist against the execution of judgment. The motion indicates that it appears no stay of execution is in place. Leavitt argues that failure to grant his motion would result in a death warrant issuing in derogation of his "rights to due process of law, the assistance of counsel, a fair trial and sentencing hearing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution."

A stay of execution was granted pursuant to Idaho Code § 19-2715(1) but that stay has been lifted. Pursuant to Idaho Code § 19-2715(3), after the state applies for another warrant, this

ORDER DENYING DEMAND FOR OPPORTUNITY TO BE HEARD REGARDING ISSUANCE OF DEATH
WARRANT
CR-1985-4110

Court "shall set a new execution date not more than thirty (30) days thereafter." Further, action by this Court is ministerial only and "[n]o hearing shall be required for setting a new execution date and the court shall inquire only into the fact of an existing death sentence and the absence of a valid stay of execution." Idaho Code § 19-2715(5). Leavitt does not assert that a stay of execution is in place and does not dispute the fact of an existing death sentence.

Leavitt's arguments regarding the death warrant being issued in derogation of his various legal rights must be addressed to a court with proper jurisdiction to hear them. There is no right to be heard given to defendants pursuant to Idaho Code § 19-2715.

Therefore, Defendant/Petitioner Leavitt's Notice of Demand for Opportunity to be Heard Regarding Issuance of Death Warrant is DENIED.

IT IS SO ORDERED.

Dated this 17 day of May, 2012.



J. Chindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of May, 2012, I served a true and correct copy of the foregoing **ORDER DENYING DEMAND FOR OPPORTUNITY TO BE HEARD REGARDING ISSUANCE OF DEATH WARRANT** upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Defendant/Petitioner

Richard A. Leavitt #23081
IDOC
1299 N. Orchard, Suite 110
Boise, Idaho 83720

Attorneys for Defendant/Petitioner

Andrew Parnes
P.O. Box 5988
671 N. 1st Avenue
Ketchum, Idaho 83340

David Nevin
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303 West Bannock
P.O. Box 2772
Boise, Idaho 83701
Boise, Idaho 83720-0010

Attorneys for Plaintiff/Respondent

J. Scott Andrew
Bingham County Prosecuting Attorney
501 N. Maple, #302
Blackfoot, ID 83221-1700

L. Lamont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit
Statehouse Mail, Room 10
P.O. Box 83720
Boise, Idaho 83720

Sara J. Staub
Clerk of the District Court
Bingham County, Idaho

by 
Deputy Clerk

ORDER DENYING DEMAND FOR OPPORTUNITY TO BE HEARD REGARDING ISSUANCE OF DEATH WARRANT
CR-1985-4110

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
BINGHAM COUNTY, IDAHO

2012 MAY 18 AM 7:57

CLERK
SARA STAUB CLERK

BY _____ DEPUTY

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IN THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, COUNTY OF BINGHAM

STATE OF IDAHO,)	Case No. CR1985-4110 AND
	)	CV2008-857
Plaintiff-Respondent,)	
)	
v.	)	MOTION TO RECONSIDER
	)	ORDER DENYING DEMAND FOR
RICHARD A. LEAVITT,	)	OPPORTUNITY TO BE HEARD
	)	REGARDING ISSUANCE OF
Defendant-Petitioner.	)	DEATH WARRANT
_____)	

The Defendant Richard A. Leavitt, through counsel, respectfully moves the Court for its Order reconsidering its Order Denying Demand for Opportunity to be Heard, dated May 17, 2012.

This motion is made because the Order incorrectly concludes that a previous death warrant was not executed because of the pendency of a stay of execution, and the case is therefore governed by I.C. § 19-2715(3). Prior to the issuance of the Ninth Circuit's mandate on May 16, however, execution of Mr. Leavitt was barred by the permanent injunction of the federal

court, which is not “a temporary postponement of an execution,” I.C. § 19-2515(6).

As a result, the Court should have analyzed the State’s request for a death warrant under I.C. § 19-2715(4), under which the Court “may inquire into the facts” Accordingly, the Court misunderstood the correct basis for the exercise of its discretion, and as a result the present motion should be granted.

This motion is based on the record herein and on the Affidavit of David Z. Nevin, contemporaneously filed.

DATED this 17th day of May, 2012.



David Z. Nevin
Andrew Parnes
Attorney for Defendant-Petitioner

CERTIFICATE OF SERVICE

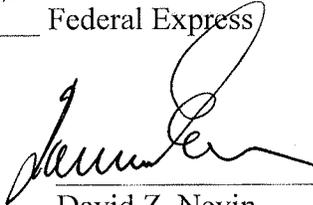
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DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
BINGHAM COUNTY, IDAHO
2012 MAY 18 AM 7:57
SARA STAUB CLERK
BY _____ DEPUTY

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IN THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, COUNTY OF BINGHAM

STATE OF IDAHO,)	Case No. CR1985-4110 AND
	)	CV2008-857
Plaintiff-Respondent,)	
	)	AFFIDAVIT IN SUPPORT OF
v.	)	MOTION TO RECONSIDER
	)	ORDER DENYING DEMAND FOR
RICHARD A. LEAVITT,	)	OPPORTUNITY TO BE HEARD
	)	REGARDING ISSUANCE OF
Defendant-Petitioner.	)	DEATH WARRANT
_____)	

David Z. Nevin, being first duly sworn, deposes and says that:

1. I am an attorney, duly licensed to practice law in the State of Idaho. I am one of the attorneys of record for the Defendant Richard A. Leavitt. I make the statements contained in this affidavit based on my own personal observations.

2. My co-counsel Andrew Parnes and I have reviewed the record of this case in Idaho state and federal courts and find that, through and including the time when this Court issued the death warrant today, May 17, 2012, that there was no "stay of execution," as that phrase is used

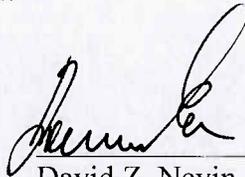
in I.C. § 19-2715(6), in place in this case. Instead, it is my understanding that Mr. Leavitt “has not been executed,” *id.*, I.C. § 19-2715(4) because of the Judgment of the United States District Court for the District of Idaho, dated September 28, 2007. A true and accurate copy of this Judgment is attached as Exhibit A to this Affidavit.

3. This Judgment is not a “stay of execution” because it is not “a temporary postponement of an execution,” but rather by its terms a permanent injunction against carrying out a death sentence against Mr. Leavitt unless a new sentencing proceeding is instituted.

4. As a result, when the state applied for a new death warrant today, the Court should have proceeded under I.C. § 19-2715(4), under which it “may inquire into the facts.” Accordingly, the Court misunderstood the basis for the exercise of its discretion, and as a result the present motion to reconsider should be granted.

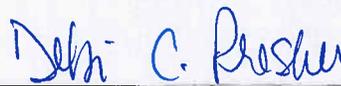
This ends my Affidavit.

DATED this 17th day of May, 2012.



David Z. Nevin

SUBSCRIBED AND SWORN TO before me this 17th day of May, 2012.



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



CERTIFICATE OF SERVICE

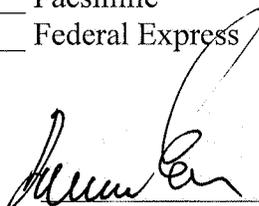
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David Z. Nevin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT)

Petitioner,)

v.)

A.J. ARAVE,)

Respondent.)

Case No. CV-93-24-S-BLW

CAPITAL CASE

JUDGMENT

Based upon the Court's Findings of Fact and Conclusions of Law filed herewith, IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus shall be conditionally GRANTED in part. The Writ shall issue and the State of Idaho shall be enjoined from carrying out a death sentence against Petitioner unless it initiates a new sentencing proceeding within 120 days of the date of this Judgment.



DATED: September 28, 2007

B. Lynn Winmill
Honorable B. Lynn Winmill
Chief U. S. District Judge

JUDGMENT - 1

EXHIBIT A