IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39941
	)	
vs.	)	
	)	
RICHARD A. LEAVITT,	)	
	)	
Defendant-Appellant.	)	
	)	

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MAY 24 2012
Supreme Court ___ Court of Appeals ___
Entered on ATS by ___

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Defendant-Appellant Richard A. Leavitt ("Leavitt") has filed a Notice of Appeal (R., pp.24-27) challenging "the issuance of the death warrant entered by the Honorable Jon Shindurling, District Judge of the Seventh Judicial District in and for the State of Idaho" (R., p.25). Because this Court is without jurisdiction to hearing Leavitt's appeal, the state is asking that it be dismissed.

Statement Of Facts And Course Of Proceedings

In Leavitt's Statement of the Case, he makes a number of "factual" assertions without citation to the underlying record, many of which are not supported by the record. (Brief, pp.1-3.) While the state recognizes Leavitt's case has a long and protracted history, the vast majority of that history is not before this Court and the record does not indicate any party requested the district court or this Court to take judicial notice of the underlying records or transcripts. Therefore, the state will rely upon the record as it exists before this Court and the published decisions associated with Leavitt's first-degree murder of Danette Elg and imposition of the death penalty for that murder.

In 1984, Danette was "brutally attacked in her bed," suffering "up to fifteen separate slash and stab wounds, some of which proved fatal. Her body had been further brutalized by the slashing removal of her sexual organs." State v. Leavitt (Leavitt I), 116 Idaho 285, 287, 775 P.2d 599 (1989). A jury found Leavitt guilty of first-degree murder. State v. Leavitt (Leavitt III), 141 Idaho 895, 896, 120 P.3d 283 (2005). In 1986, Leavitt filed a petition for post-conviction relief, which was denied by the district court after an

evidentiary hearing. Id. at 897. In a consolidated appeal, this Court affirmed Leavitt's conviction for first-degree murder and the denial of post-conviction relief, but reversed his death sentence because the trial court failed to "detail any adequate consideration of the 'mitigating factors' considered, and whether or not the 'mitigating circumstances' outweigh the gravity of any 'aggravating circumstance' so as to make unjust the imposition of the death penalty." Leavitt I, 116 Idaho at 607. The state's Petition for Certiorari was denied October 16, 1989. Idaho v. Leavitt, 493 U.S. 923 (1989).

Upon remand the district court held another sentencing hearing. State v. Leavitt (Leavitt II), 121 Idaho 4, 4, 822 P.2d 523 (1993). Following the hearing, the court found a single statutory aggravating factor – I.C. § 19-2515(g)(5) – weighed the collective mitigation against the statutory aggravator, and again sentenced Leavitt to death. Id.[1] The Register of Actions indicates the Judgment was filed April 6, 1990. (R., p.1.) On January 23, 1992, this Court affirmed Leavitt's death sentence. Leavitt II, 121 Idaho 4, 822 P.2d 523. Leavitt's Petition for Certiorari was denied on November 9, 1992. Leavitt v. Idaho, 506 U.S. 972 (1992).

Leavitt filed a Petition for Writ of Habeas Corpus in federal district court. Leavitt v. Arave, 646 F.3d 605, 607 (9th Cir. 2011). The district court granted habeas relief based upon an alleged improper jury instruction given at Leavitt's trial, Leavitt v. Arave, 383 F.3d 809, 816-26 (9th Cir. 2004), but denied relief on his remaining habeas claims. Both parties appealed to the Ninth Circuit Court of Appeals, which reversed the district court's decision regarding the jury instruction, but affirmed the dismissal of the remaining claims

[1] Idaho Code § 19-2515(g)(5), which has been recodified to I.C. § 19-2515(9)(e), reads as follows, "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

with the exception of Leavitt's ineffective assistance of counsel claims stemming from his resentencing, which were remanded for the district court to "consider," id. at 826-841. On remand, the district court concluded Leavitt's resentencing attorney was ineffective by "failing to investigate Leavitt's mental health before the second sentencing hearing." Leavitt, 646 F.3d at 608. The court issued a conditional writ stating, 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." (R., p.23.) The state appealed, and on May 17, 2011, the Ninth Circuit reversed. Leavitt, 646 F.3d at 616. Leavitt's Petition for Certiorari was denied May 14, 2012. Leavitt v. Arave, --- U.S. ---, 2012 WL 509134 (2012). The Ninth Circuit's Mandate was issued May 16, 2012. (R., p.17.)

While his federal habeas case was pending, based upon Ring v. Arizona, 536 F.3d 585 (2002), Leavitt filed a successive post-conviction petition contending his death sentence must be vacated because the district court, rather than a jury, found the statutory aggravating factor upon which his death sentence was based. Leavitt III, 141 Idaho at 897. Leavitt also filed a Rule 35 motion based upon Ring. Both the successive petition and Rule 35 motion were rejected by the district court, and Leavitt's appeals were dismissed by this Court pursuant to I.C. § 19-2719. Leavitt III, at 897-98.

Apparently anticipating the issuance of a new death warrant as a result of the Supreme Court's denial of his Petition for Certiorari, on May 15, 2012, Leavitt filed a Notice of Demand for Opportunity to be Heard in his underlying criminal case, conceding no stay of execution was in place and that the previous judgment of death had not been executed, but contending legal reasons exist against the execution of judgment

because his "case has been subject to the Orders of the United States District Court for the District of Idaho, issued pursuant to the federal habeas corpus action" and the warrant should not issue because he had "filed an additional petition for relief in the federal habeas case referenced above." (R., pp.6-7.) On May 17, 2012, at 10:50 a.m., based upon I.C. § 19-2515(5), which was amended in 2012 (Appendix A), and Leavitt's failure to assert a stay of execution was in place or dispute the existence of a death sentence, Judge Shindurling denied Leavitt's motion, explaining, "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.'" (R., p.10) (quoting I.C. § 19-2715(5).) On May 17, 2012, at approximately 11:28 a.m. a new Death Warrant was file stamped, which had been signed by Judge Shindurling, setting Leavitt's execution for June 12, 2012. (R., pp.12-15.)

On May 18, 2012, Leavitt filed a Motion to Reconsider contending his execution is "barred by the permanent injunction of the federal court, which is not 'a temporary postponement of an execution'" and that Judge Shindurling should have proceeded pursuant to I.C. § 19-2715(4). (R., pp.17-18.) Leavitt's conclusion that there is a "permanent injunction of the federal court" is based upon the federal district court's September 28, 2007 Judgment granting Leavitt resentencing habeas relief. (Id.) Judge Shindurling denied Leavitt's motion on May 21, 2012. (R., pp.28-30.)

Leavitt filed his Notice of Appeal on May 21, 2012, contending he is appealing "from the issuance of the death warrant entered by the Honorable Jon Shindurling, District Judge of the Seventh Judicial District in and for the State of Idaho, on May 17, 2012." (R., pp.24-27.)

ISSUES

Leavitt has stated the issues on appeal as follows:

1. Whether the ex parte issuance of a death warrant after a request by Defendant's counsel to be present and to be heard denies Defendant his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. Whether the District Court failed to apply Idaho Code § 19-2715(4) in determining that he only had jurisdiction to sign the death warrant.

3. Whether a Deputy Attorney General who has not appeared in the case has authority to apply for a death warrant before the District Court.

4. Whether the issuance of the death warrant violated Idaho Criminal Rule 38(a) because review of the death sentence is still pending in United States District Court.

5. Whether the District Court erred in failing to make a verbatim transcript of the in-chambers proceedings in regard to the issuance of the death warrant.

(Brief, p.4.)

The state wishes to rephrase the issues on appeal as follows:

Because the Death Warrant from which Leavitt appeals is not an appealable order, is this Court without jurisdiction to hear his appeal?

Alternatively,

Has Leavitt waived the claim that constitutional protections apply when the district court issues a new death warrant because he has failed to provide authority and argument to support his claim?

Alternatively,

Because of the ministerial nature of obtaining a death warrant under I.C. § 19-2715, has Leavitt failed to establish constitutional protections attach when the state applies for a death warrant and, if such rights do attach, whether they were violated when the district court issued the Death Warrant *ex parte*?

ARGUMENT

I.

This Court Is Without Jurisdiction To Hear Leavitt's Appeal Because A Death Warrant Is Not An Appealable Order

A. Introduction

Criminal appeals are governed by I.A.R. 11(c). Because the issuance of a death warrant is not an appealable order, this Court is without subject matter jurisdiction to hear Leavitt's instant appeal.

B. Standard Of Review

"Whether an appeal is taken from an appealable order implicates the subject matter jurisdiction of this Court; thus, it can be raised at any time by the parties or by the Court *sua sponte*. Further it is a question of law that this Court reviews *de novo*. The interpretation of a statute is also a question of law this Court reviews *de novo*." State v. Schultz, 151 Idaho 863, 865, 264 P.3d 970 (2011).

C. Leavitt's Death Warrant Is Not An Appealable Order

Idaho Appellate Rule 11(c) delineates which judgments and orders are appealable in a criminal action, as follows:

> 1. Final judgments of conviction.
>
> 2. An order granting or denying a withheld judgment on a verdict or plea of guilty.
>
> 3. An order granting a motion to dismiss an information or complaint.
>
> 4. Any order or judgment, whenever entered and however denominated, terminating a criminal action, provided that this provision

> shall not authorize a new trial in any case where the constitutional guarantee against double jeopardy would otherwise prevent a second trial.
>
> 5. Any order, however denominated, reducing a charge of criminal conduct over the objection of the prosecutor.
>
> 6. Any judgment imposing sentence after conviction, except a sentence imposing the death penalty, which shall not be appealable until the death warrant is issued as provided by statute.
>
> 7. An order granting a motion to suppress evidence.
>
> 8. An order granting or denying a motion for new trial.
>
> 9. Any order made after judgment affecting the substantial rights of the defendant or the state.
>
> 10. Decisions by the district court on criminal appeals from a magistrate, either dismissing the appeal or affirming, reversing or remanding.

A death warrant is clearly not one of the delineated orders listed in I.A.R. 11(c). Undoubtedly, Leavitt will contend a death warrant is an "order made after judgment affecting the substantial rights of the defendant." I.A.R. 11(c)(9). In State v. Gardner, 234 P.3d 1104 (Utah 2010), the Utah Supreme Court rejected this argument, explaining:

> The issuance of an execution warrant is the ministerial direction that the sentence of death already imposed be implemented; it is neither a judgment of conviction nor an order that affects the rights of the defendant. The sentence itself is the judgment from which an appeal may be taken, and an order to execute the sentence is not itself a sentence.

In State v. Campbell, 770 P.2d 620, 622 (Wash. 1989), the defendant also challenged the issuance of a death warrant, contending it was a "final order made after judgment which affects a substantial right." Recognizing that while a death warrant is a final order entered after judgment, the Washington Supreme Court nevertheless concluded, "it does not affect a substantial right within the meaning of this rule," and dismissed the appeal. Id.

Likewise, I.C. § 19-2715(5) establishes that issuance of a death warrant is "ministerial" only. "No 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." Id. Leavitt's "substantial rights" are not at issue because his conviction and death sentence have been repeatedly challenged. However, the state and federal courts have rejected those challenges and concluded neither the conviction nor death sentence are unconstitutional. Therefore, because the Death Warrant is not an appealable order, Leavitt's appeal must be dismissed for lack of jurisdiction.

II.

Leavitt Has Failed To Establish A Constitutional Violation Associated With The District Court Issuing The New Death Warrant *Ex Parte*

A. Introduction

Leavitt contends that "issuance of the death warrant without providing [him] notice so that his counsel could appear and contest the issuance of the death warrant violated his constitutional rights," and that if his attorneys had been provided the opportunity to be heard they would have raised "all of the specific issues addressed below which would have resulted in the district court's denial of the state's application for a warrant at this time and for the date now set." (Brief, p.5.)

Because Leavitt has provided no authority establishing he is entitled to due process or the right to counsel at the time the Death Warrant was issued, his claim fails. Moreover, because issuance of a death warrant does not implicate Leavitt's rights to due process or counsel, his claim fails. Finally, because the "specific issues" Leavitt raises would not have barred issuance of the Death Warrant, his claim fails.

B. Standard Of Review

The standard of review applicable to constitutional issues such as due process violations is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786 (Ct. App. 2001).

C. Leavitt's Constitutional Claims Have Been Waived

The only authority upon which Leavitt relies for his constitutional challenge is cases that, in general fashion, regurgitate the "heightened scrutiny" afforded capital defendants. (Brief, p.5) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Caldwell v. Mississippi, 472 U.S. 320, 328-30 (1985); Leavitt I, 116 Idaho at 288); he has provided no authority that obtaining a death warrant *ex parte* violates the federal or Idaho constitutions.

Therefore, because Leavitt has failed to support his claims with authority and argument, they are waived. State v. Hairston, 133 Idaho 496, 511, 988 P.2d 1170 (1999) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966 (1996)); State v. Creech, 132 Idaho 1, 19, 966 P.2d 1 (1998). Permitting death-sentenced inmates to merely support claims on appeal with general law regarding "heightened scrutiny" and the steady beat that "death is different" would eliminate the underlying principles associated with basic appellate rules, including the requirement that claims be supported with authority and argument. Leavitt should be required to provide authority that is directly relevant to the issue before this Court.

D. Leavitt Was Not Entitled To Additional Constitutional Protections Associated With Issuance Of The Death Warrant

Presumably Leavitt failed to provide any authority for his constitutional argument because none exists. Similarly, in Marek v. State, 14 So.3d 985, 998 (Fla. 2009), a death-sentenced inmate contended the manner in which the death warrant was issued violated his constitutional rights. After recognizing the defendant had "not provided any authority holding that he must be provided notice before a death warrant is signed or that the Governor many not sign the death warrant of an individual whose death sentence is final and who has had the benefit of a clemency proceedings," the court reviewed Ohio Adult Parole Authority v. Woodland, 523 U.S 272 (1998), and concluded "some minimal procedural due process requirements should apply to clemency proceedings. But none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of warrants for death-sentenced inmates."

The federal district court agreed, concluding, "under Federal law, Florida has not created a protected interest in life or liberty with respect to clemency proceedings; and, assuming such proceedings can be analogized to the *ex parte* contacts and consideration that proceeded the Governor's issuance of the death warrant, Petitioner cannot maintain a due process claim arising from the process of which he complains." Marek v. McNeil, 2009 WL 2488296, *3 (S.D. Fla. 2009) (footnotes omitted). Expressly, addressing the Governor's signing of the death warrant, the court explained:

> In *Woodard*, the Supreme Court recognized that a capital defendant has a "residual life interest" after his sentencing, but that he "cannot use his interest in *not being executed* in accord with his sentence to challenge the clemency determination by requiring [certain] procedural protections...." 523 U.S. 272, 281, 118 S.Ct. 1244, 140 L.Ed.2d 387 (emphasis added). The Supreme Court also recognized in *Woodard* that where a governor is afforded broad discretion by the state, then "*[u]nder any analysis*, the

> governor's executive discretion need not be fettered by the types of procedural protections sought by respondent." *Id.* at 282 (emphasis added).

Id. at *4. After considering these general constitutional principles and the absence of any other authority, the court concluded that the Florida Supreme Court's decision rejecting Marek's claims was not unreasonable. Id.; *see also* Valle v. State, 70 So.3d 530, 552 (Fla. 2011) (rejecting a similar claim asking the court to second-guess the Governor's decision in deciding when to sign a death warrant).

Likewise, Idaho has not created a protected interest in life or liberty with respect to the issuance of a death warrant. Rather, it is a ministerial proceeding where only two requirements must be met – "the fact of an existing death sentence and the absence of a valid stay of execution." I.C. § 19-2715(5). Because Leavitt has failed to establish he was entitled to greater constitutional protections, his claim fails.

E. Leavitt's Argument Fails Because His "Specific Issues" Are Without Merit

As explained above, Leavitt's argument is premised upon the "specific issues addressed below," which include four arguments he contends "would have resulted in the district court's denial of the State's application for a warrant," including: (1) the district court erred by not applying I.C. § 19-2715(4); (2) the Idaho Attorney General's Office had no authority to apply for the warrant; (3) I.C.R. 38(a) mandates a stay of the Death Warrant as a review of the death sentence is pending; and (4) failing to provide a verbatim transcript of the issuance of the warrant violates due process. Even if Leavitt had been permitted to present his "specific issues" to the district court prior to issuance of the Death Warrant, because each of these claims fails, Leavitt's argument regarding alleged constitutional violations associated with issuance of the Death Warrant also fails.

1. The Relevant Statute – I.C. § 19-2715

Leavitt takes great pains to parse I.C. § 19-2715. However, because the statute must be read in context and as a whole, it is quoted verbatim as follows:

> (1) Hereafter, no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted during an appeal taken pursuant to section 19-2719, Idaho Code, during the automatic review of judgments imposing the punishment of death provided by section 19-2827, Idaho Code, by order of a federal court or as part of a commutation proceeding pursuant to section 20-240, Idaho Code.
>
> (2) Upon remittitur or mandate after a sentence of death has been affirmed, the state shall apply for a warrant from the district court in which the conviction was had, authorizing execution of the judgment of death. Upon such application, the district court shall set a new execution date not more than thirty (30) days thereafter.
>
> (3) If a stay of execution is granted pursuant to subsection (1) of this section and as a result, no execution takes place on the date set by the district court, upon termination of the stay, the state shall apply for another warrant and upon such application, the district court shall set a new execution date not more than thirty (30) days thereafter.
>
> (4) If for any reason, other than those set forth in subsection (1) of this section, a judgment of death has not been executed, and it remains in force, the state shall apply for another warrant. Upon such application, the district court may inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the warden execute the judgment at a special specified time. The warden must execute the judgment accordingly.
>
> (5) Action of the district court under this section is ministerial only. No 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.
>
> (6) For purposes of this section, the phrase "stay of execution" shall refer to a temporary postponement of an execution as a result of a court order or an order of the governor postponing the execution while a petition for commutation is pending.

2. The "Appropriate" Subsection Of I.C. §19-2715

Leavitt contends the district court erred by not applying I.C. § 19-2715(4) and, because the court allegedly utilized the wrong sub-section, abused its discretion, and he was prejudiced because (1) "the court never made any inquiry into the facts surrounding the status of the case," (2) "made no verbatim record of the matter," and (3) "refused to allow counsel for Mr. Leavitt to appear or raise any objections to the issuance of the warrant." (Brief, pp.6-9.) Leavitt's arguments are simply without merit.

First, Leavitt has failed to establish "the court never made any inquiry into the facts surrounding the status of the case." Second, as explained in I.C. § 19-2715(5), the only inquiry that is mandated is "the fact of an existing death sentence and the absence of a valid stay of execution." In his Notice of Demand for Opportunity to be Heard, filed before issuance of the Death Warrant, Leavitt conceded, "no 'stay of execution,' I.C. § 19-2715(6)[,] is in place" and "the judgment of death 'has not been executed.'" (R., p.6.) While the district court "may inquire into the facts" under I.C. § 19-2715(4), those facts undoubtedly involve the "reason" the "judgment of death [had] not been executed." However, irrespective of the reason, because there was an existing death sentence and the absence of a valid stay of execution, whatever the "reason," not only was no further inquiry mandated, but the court was still required to sign the Death Warrant.

Finally, Leavitt's two remaining arguments are subsumed in his other arguments. As detailed below, a verbatim record was not required and, because Leavitt conceded the only two inquiries required for issuance of a warrant, there was no basis for counsel to appear and raise challenges – even if such a right exists, which the state denies.

3. The Idaho Attorney General's Office

Leavitt contends the Idaho Attorney General's office had no authority to apply for the Death Warrant. (Brief, pp.9-13.) Ignoring the fact that there is nothing in the record supporting Leavitt's claim regarding the Idaho Attorney General's involvement in securing the Death Warrant, his claims still fails.

Leavitt's argument is premised upon statutes that govern the duties of prosecuting attorneys, including I.C. §§ 31-2227 and 31-2604. Based upon those statutes, Leavitt contends, because the Attorney General was not properly appointed, his actions "in seeking the death warrant are void." (Brief, pp.9-12.) Not only has Leavitt failed to provide any authority for the proposition that the actions of the Attorney General are void, but he misinterprets the changes that were made to I.C. § 19-2715.

Prior to I.C § 19-2715 being amended, sub-section (3) read, "If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the **application of the prosecuting attorney**, must order the defendant to be brought before it, or if he is at large a warrant for his apprehension may be issued." (Emphasis added). In amending I.C. § 19-2715, the Legislature no longer required the "application of the prosecuting attorney." Rather, "**the state** shall apply for a warrant from the district court in which the conviction was had." I.C. § 19-2715(2) (emphasis added). Obviously, if application of a death warrant was permitted only by the prosecutor, the Legislature would not have changed the language of the statute to "the state," but simply left the word "prosecutor" resulting in the relevant portion of the statute stating, "the prosecutor shall apply for a warrant." As explained in Woodvine v. Triangle Dairy, Inc., 106 Idaho 716, 721, 682 P.2d 1263 (1984), "When the legislature

changes the language of a statute, it is presumed that they intended to change the application or meaning of that statute."

The obvious reason for this Legislative change is that county prosecutors have no authority to appear on behalf of the State of Idaho in federal habeas cases. Rather, because the defendant in habeas cases is generally the warden where the petitioner is imprisoned, *see* Rule 2(a), Rules Governing Section 2254 Cases, that responsibility lies with the Attorney General. The Legislature recognized the Attorney General's Office handles all of the appellate work in criminal cases, both before this Court and the federal courts, and that it was more efficient to have the Attorney General obtain a death warrant and to answer the two relevant questions under I.C. § 19-2715(5).

Based upon the changes to I.C. § 19-2715, there was no error associated with a deputy attorney general making application for the Death Warrant.

4. Idaho Criminal Rule 38(a)

Idaho Criminal Rule 38(a) states, "A sentence of death shall be stayed pending any appeal or review." Based upon I.C.R. 38(a) and his pending motion in federal court under Fed. R. Civ. P. 60(b), Leavitt contends, "this Court should vacate the death warrant and enter its own stay of execution under Rule 38(a)." (Brief, p.14.) Obviously, if Leavitt desires this Court to issue a stay, he should file an appropriate motion, not make such a request in his opening brief.

Presumably, Leavitt's true motive in making this argument is that if his attorneys would have been provided the opportunity to be heard by the district court prior to issuance of the Death Warrant, they would have contended his Rule 60(b) motion in federal court warranted a stay under I.C.R. 38(a). However, I.C.R. 38(a) has no

application to cases pending in federal court, but is a state rule that permits a stay when a case is being appealed in state court. Moreover, I.C.R. 38(a) is limited by I.C. § 19-2708, which states, "No judge, court or officer, can suspend the execution of a judgment of death, except as provided in sections 19-2715 and 19-2719." Idaho Code § 19-2715(1) states, "Hereafter, no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted during an appeal taken pursuant to section 19-2719, Idaho Code, during the automatic review of judgments imposing the punishment of death provided by section 19-2827, Idaho Code, by order of a federal court or as part of a commutation proceeding pursuant to section 20-240, Idaho Code."

Leavitt apparently contends there is a conflict between I.C.R. 38(a) and I.C. § 19-2708, and that I.C.R. 38(a) controls because "the rules of the courts of Idaho control over the statutes enacted by the Legislature when those rules concern procedural matters." (Brief, p.14.) However, as explained above there is no conflict between I.C.R 38(a) and I.C. § 19-2708. Moreover, even if such a conflict exists, "[b]ecause of the unique nature of the death penalty, as provided in chapter 27, title 19, Idaho Code, as well as the stringent constitutional protections afforded to a person sentenced to death," I.C. § 19-2708, which limits suspension of the execution of a judgment of death except as provided in I.C. §§ 19-2715 and 19-2719, "is a substantive rule." State v. Beam, 121 Idaho 862, 864, 828 P.2d 891 (1992). Otherwise, there would never be an execution in Idaho because death-sentenced inmates would repeatedly file new cases for "review" and "appeal," which, under I.C.R. 38(a), would result in an automatic stay and thwart the very purpose for passage of I.C. § 19-2719. In State v. Beam, 115 Idaho 208, 213, 766 P.2d

678 (1988), the Idaho Supreme Court discussed the purpose and policy behind the passage of I.C. § 19-2719:

> The underlying legislative purpose behind the statute stated the need to expeditiously conclude criminal proceedings and recognized the use of dilatory tactics by those sentenced to death to "thwart their sentences." The statute's purpose is to "avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . ." We hold that the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences.

Because I.C. § 19-2708 expressly references I.C. § 19-2719, there is simply no basis for concluding I.C. § 19-2708 is not a substantive rule that governs when a death sentence may be stayed.

5. Verbatim Transcript

Based upon due process and I.C. § 1-1103, Leavitt contends, "A verbatim transcript is required by this court to exercise its constitutional duty to review cases on appeal." (Brief, p.16.) Apart from the fact that this Court is without jurisdiction to hear Leavitt's appeal, because application of a death warrant is a ministerial task, a verbatim transcript was neither mandated nor warranted.

Idaho Code § 1-1103 states the reporter "shall correctly report all oral proceedings had in said court and the testimony taken in all cases tried before said court." In State v. Lovelace, 140 Idaho 53, 65, 90 P.3d 278 (2003), the defendant contended the court reporter's failure to record telephone conferences and pre-trial conferences between counsel and the court violated the statute. Rejecting the defendant's argument, this Court explained, "It is basic to appellate practice that error will not be presumed, but must be

affirmatively shown by an appellant. Furthermore, error in the abstract does not necessarily rise to the level of constitutional dimension unless and until a defendant properly presents a specific prejudice from such error." Id. (citations omitted).

Likewise, even if the chamber conference to obtain the Death Warrant should have been recorded, an allegation the state vehemently denies, Leavitt has failed to establish any prejudice, particularly in light of the fact that he conceded the only two questions that are relevant to obtaining a death warrant – "the fact of an existing death sentence and the absence of a valid stay of execution." I.C. § 19-2715(5).

6. Leavitt Has Failed To Establish Prejudice

Idaho Criminal Rule 52 reads, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The four "specific issues" raised by Leavitt fall within Rule 52 since, irrespective of whether (1) the district court erred by allegedly not applying the correct sub-section, (2) a deputy attorney general should not have applied for the Death Warrant, and (3) a "verbatim transcript" should have been made, Leavitt's execution will still take place on June 12, 2012, because the district court will simply apply the correct sub-section, the Bingham County Prosecutor will apply for the Death Warrant, and a verbatim transcript will be made establishing what Leavitt has already conceded - there is "an existing death sentence and the absence of a valid stay of execution." I.C. § 19-2715(5). Therefore, the district court will be mandated to issue the same Death Warrant because there simply is "no legal reason" for the district court to deny an application for issuance of the warrant, unless this Court concludes that I.C.R. 38(a) requires the issuance of a stay every time some kind of new "review" is launched by an Idaho death-sentenced murderer.

CONCLUSION

The state respectfully requests Leavitt's appeal be dismissed or, alternatively, that issuance of the Death Warrant be affirmed.

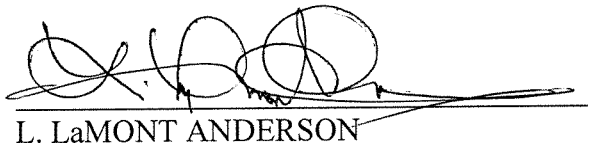
DATED this 24th day of May, 2012.

L. LaMONT ANDERSON
Deputy Attorney General and
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 24th day of May, 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	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail _____ Facsimile X Electronic Mail
Andrew Parnes Law Office of Andrew Parnes P.O. Box 5988 Ketchum, ID 83340	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail _____ Facsimile X Electronic Mail



L. LaMONT ANDERSON

APPENDIX A

LEGISLATURE OF THE STATE OF IDAHO

Sixty-first Legislature Second Regular Session - 2012

IN THE SENATE

SENATE BILL NO. 1266

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO EXECUTION; AMENDING SECTION 19-2715, IDAHO CODE, TO ESTABLISH ADDITIONAL PROVISIONS RELATING TO A STAY OF EXECUTION, TO REVISE PROVISIONS AND TO ESTABLISH ADDITIONAL PROVISIONS RELATING TO CERTAIN WARRANTS, TO ESTABLISH ADDITIONAL PROVISIONS RELATING TO RESETTING EXECUTION DATES AND TO DEFINE A PHRASE; DECLARING AN EMERGENCY AND PROVIDING RETROACTIVE APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 19-2715, Idaho Code, be, and the same is hereby amended to read as follows:

19-2715. MINISTERIAL ACTIONS RELATING TO STAYS OF EXECUTION, RESETTING EXECUTION DATES, AND ORDER FOR EXECUTION OF JUDGMENT OF DEATH. (1) Hereafter, no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted during an appeal taken pursuant to section 19-2719, Idaho Code, ~~and~~ during the automatic review of judgments imposing the punishment of death provided by section 19-2827, Idaho Code, by order of a federal court or as part of a commutation proceeding pursuant to section 20-240, Idaho Code.

(2) Upon remittitur or mandate after a sentence of death has been affirmed, the state shall apply for a warrant from the district court in which the conviction was had, authorizing execution of the judgment of death. Upon such application, the district court shall set a new execution date not more than thirty (30) days thereafter.

(3) If a stay of execution is granted pursuant to subsection (1) of this section and as a result, no execution takes place on the date set by the district court, upon termination of the stay, the state shall apply for another warrant and upon such application, the district court shall set a new execution date not more than thirty (30) days thereafter.

(4) If for any reason, other than those set forth in subsection (1) of this section, a judgment of death has not been executed, and it remains in force, the state shall apply for another warrant. Upon such application, the district court ~~in which the conviction was had, on the application of the prosecuting attorney, must order the defendant to be brought before it, or if he is at large a warrant for his apprehension may be issued. Upon the defendant being brought before the court, the court must~~ may inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the warden execute the judgment at a special specified time. The warden must execute the judgment accordingly.

(~~4~~5) Action of the district court under this section is ministerial only. No 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.

(6) For purposes of this section, the phrase "stay of execution" shall refer to a temporary postponement of an execution as a result of a court order or an order of the governor postponing the execution while a petition for commutation is pending.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 2012.

STATEMENT OF PURPOSE

RS21016

This amendment seeks to clarify the process of obtaining a death warrant, including specifying a time during which the warrant must be obtained, sets forth a process for obtaining successive warrants if necessary, and clarifies responsibilities if an execution does not proceed. Some language was changed to reflect federal practices.

FISCAL NOTE

There is no fiscal impact.

Contact:
Name: Brent Reinke, Director
Office: Department of Correction
Phone: (208) 658-2139

MINUTES

SENATE JUDICIARY & RULES COMMITTEE

DATE:	Wednesday, January 25, 2012
TIME:	1:30 P.M.
PLACE:	Room WW54
MEMBERS PRESENT:	Chairman Darrington, Vice Chairman Vick, Senators Davis, Lodge, Malloy (McKague), Mortimer, Nuxoll, Bock, and LeFavour
ABSENT/ EXCUSED:	
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

Chairman Darrington called the meeting to order at 1:32 and asked the Secretary to call the roll.

RS 20972

Relating to the State Victim Notification Fund. Mike Kane, representing the Idaho Sheriff's Association, said they were proposing a way of obtaining sustainable funding for the victim and witness notification system, known as VINE. The concept is to add a $10 one-time fee at time of conviction for a misdemeanor or felony. It is projected that this will raise enough money to maintain the program. Any excess fees generated will be turned over to the Victim Restitution Fund. **Chairman Darrington** stated that several years ago a constitutional amendment was passed providing for victim notification. **Mr. Kane** said that was correct and this assists the state and the local entities in fulfilling the constitutional function of keeping victims notified of the status of the offenders. **Chairman Darrington** remarked that Mr. Kane seemed to be pleased with the vendor and satisfied with the operation of the program throughout the state and the fear was that it would be interrupted with the absence of funding which would make us out of compliance. **Mr. Kane** said that was correct. **Vice Chairman Vick** asked if they had approached JFAC for funding as an alternative. **Mr. Kane** said they had sent an email to JFAC and given the financial crisis at the time, they thought this was the best avenue.

MOTION

Senator Bock moved, seconded by **Senator Nuxoll** to print **RS 20972**. The motion was carried by **voice vote**.

RS 20973

Relating to the Control of Veneral Diseases. Mike Kane explained the purpose of this bill is to modernize the law regarding STD testing in correctional facilities by adding appropriate STDs and eliminating another, and by reducing the need to test for STDs in certain cases. Right now everyone in the state that is incarcerated must be tested for venereal diseases. You will note that we have eliminated testing for those with drug related charges in Section (4). That would mean that every juvenile arrested with a small bag of marijuana or drug paraphernalia must be tested for VD at a significant expense on the state and local correctional entities. There are lots of other ways to test for venereal diseases including those who might share bodily fluids. The second part is adding the most prevalent venereal disease in the state which is chlamydia and also hepatitis C and eliminating chancroid, which is a tropical disease.

Senator Malloy asked why "drug related" charges would be stricken from the language since the sharing of needles is a very common way for the exchange of bodily fluids, possibly causing STDs. **Mr. Kane** said that was right, however, if a young person gets arrested for having marijuana or drug paraphernalia that would have nothing to do with the exchange of bodily fluids. It's a significant burden on the state and for that reason it should be eliminated from this section.

MOTION **Senator Nuxoll** moved, seconded by **Senator LeFavour** to print **RS 20973**. The motion carried by **voice vote**.

RS 21014 **Relating to Execution. Brent Reinke**, Director of Idaho Department of Correction (IDOC), explained that Idaho recently carried out its first execution in 17 years. During preparations to carry out this order, a few issues were discovered in Idaho's death penalty statutes that needed to be addressed. As a result, the Department and the Attorney General's office present a package of three statute changes. Director Reinke gave an overview of the key procedural issues. Deputy Attorney General Lamont Anderson will address two of these proposed amendments. **Director Reinke** requested that Mark Kubinski, the lead Deputy Attorney General for the Department of Correction, be allowed to speak to RS 21014.

Mark Kubinski explained that in 2009, there was an amendment to the Idaho Code to remove the firing squad as an alternative means of execution. In addition, language relating to an exemption from the practice of medicine and pharmacy was also removed. As a result of the execution last November and that experience, the Department is seeking to amend 19-2716 to reinsert those provisions and to provide a statutory immunity for the individuals participating in executions. Subsection (2) clarifies that carrying out an execution is not the practice of medicine and that the director and those acting under his authority are exempt from any legal departments governing the practice of medicine. Subsection (3) allows for any entity authorized to possess controlled substances may distribute to the director and also provides those entities with immunity from liability as a result of the condemned person's death. Subsection (4) authorizes the director of the department to contain, possess, and store controlled substances for purposes of carrying out an execution and exempts the director from any legal requirements governing pharmacy and controlled substances. He stated that also any individuals participating in the execution are immune from civil or criminal liability as a result of the death and would prevent a wrongful death action being brought against them. Lastly, the proposed amendment contains an emergency clause.

Senator Davis asked if the language that was inserted was the same language as before or something different. **Mr. Kubinski** said it was not identical, but it was substantially similar with respect to the practice of medicine and pharmacy. The immunity for providing chemicals to the department was not in the previous version of the statute. **Senator Davis** suggested that Subsection (2) was pretty broad about who could administer the drugs to the inmate. **Mr. Kubinski** said that was not the intent of the statute and the corresponding administrative rules and the department's standard operating procedure was more detailed in how the execution was carried out. **Senator Davis** said he recognized that it said all persons authorized by the director to participate in the execution, but he thought there should be language that tied it to some administrative process for the director in qualifying those persons to participate in the execution. **Mr. Kubinski** replied that the language in Subsection (2) was in previous law prior to 2009.

Senator Mortimer said he had some of those same concerns that Senator Davis pointed out and thought it needed further clarification. **Senator Bock** asked to bring back the Director for a question. He asked if there were limitations elsewhere in statute as to who you might appoint to participate in the process. **Director Reinke** replied there were not. He said although this is broad, it is outlined in the standard of operating procedure and is extremely detailed. **Senator Bock** commented that there was no other authority in any other statute or rule that specifically limits who can be appointed. Since statute takes precedence over any rules or procedures, you might have more authority than you want. **Director Reinke** stated that there was much scrutiny over each step and every word by many attorneys during this past execution. **Senator LeFavour** said she hated to think of someone being required to take another's life. She said that in worst case scenarios and for

future directors, perhaps a tightening of the verbiage would be helpful. **Director Reinke** stated that participation was unquestionably voluntary. There was no one that served or worked in the facility or on any facet of that execution that did not voluntarily attend. He further stated that if the language needed to be tightened, it would be done.

MOTION **Senator Bock** moved, seconded by **Senator LeFavour**, to have **RS 21014** returned to the sponsor. The motion carried by **voice vote**.

RS 21011 **Relating to Execution. Lamont Anderson**, Assistant Attorney General, explained this amendment is to clarify that upon execution, the death warrant is to be returned to the district court, making this procedure consistent with Idaho Code 19-2715.

MOTION **Senator Davis** moved, seconded by **Vice Chairman Vick**, to print **RS 21011**. The motion carried by **voice vote**.

RS 21016 **Relating to Execution. Lamont Anderson** explained this amendment seeks to clarify the process of obtaining a death warrant, including specifying a time during which the warrant must be obtained, sets forth a process for obtaining successive warrants if necessary, and clarifies responsibilities if an execution does not proceed. Some language was changed to reflect federal practices. **Senator Davis** asked about the "communication proceeding" pursuant to section 20-240, Idaho Code. **Mr. Anderson** said that was a typo and should have read "commutation proceeding."

MOTION **Senator Mortimer** moved, seconded by **Senator Lodge**, to print **RS 21016** with correction of the word, commutation. The motion carried by **voice vote**.

Rules Review of Idaho State Police (Pending Rules) with **Vice Chairman Vick**, presiding.

DOCKET NO. 11-1101-1101 **Rules of the Idaho Peace Officer Standards & Training Council. William L. Flink**, POST Division Administrator, explained the rule defines the terms "direction" and "supervision" as it relates to reserve officers. Under "direction," it allows an employing agency to utilize a Level II reserve officer to work under the immediate presence and direction of a full-time peace officer of the same agency. The second definition, "supervision," allows a Level I reserve officer to work by himself, but there must be a full-time peace officer of the agency working at the same time. Section 071 establishes that the Basic Misdemeanor Probation Academy may operate as a closed campus if POST has dorm space available and clarifies that a student must attend all basic academy classes to successfully complete the course. Mr. Flink said Sections 095 and 174 establishes criteria for obtaining credit toward higher certifications for officers who formerly served as military law enforcement officers. The requirement that communication specialists meet the minimum employment standards for age and traffic record is removed as well as references to the Advanced Dispatch Academy which is no longer offered. The rule removes confusing language in reference to canine team training and certification requirements. The list of explosive substances used for detection canine team certification is updated.

Senator Malloy asked with the difference of supervision for Level I and Level II officers, would they not be acting independent of one another. **Mr. Flink** said they were acting as a team, and since they only had 25 hours of training, POST Council believed they needed supervision.

Vice Chairman Vick told Mr. Flink that he had a letter from **Oliver Chase** that raised a question that this rule classifies all military law enforcement experience as the same and was not fair.

Mr. Flink said it was a long standing process in POST history and the POST Council felt this was proper in evaluating training. The training may have been as a security guard and not in line with performing law enforcement functions. **Vice Chairman Vick** asked if the practice had always been to give three months of law enforcement experience credit for each year of military service. **Mr. Flink** said that was the practice, but it was not in rule.

Senator Davis suggested that POST may be undervaluing the service and experience of the military. He wondered what standards could be adopted that would take advantage of the disparity of applicants. It appears to be a problem. **Mr. Flink** said that was what Council wrestled with and they were looking for consistency.

Oliver Chase came to the podium, representing himself, and reiterated the concerns that were identified in his letter. He said his concern is the discrimination against veterans. **Senator Davis** asked how would he write the rule. **Mr. Chase** said he would evaluate everyone based on their experience. **Senator Davis** asked if he was troubled by the disparity in the classification and what they were doing in reviewing or setting a standard for military police service. **Mr. Chase** said that was right. **Senator Mortimer** asked if it was true that some other officer coming in for POST certification with previous experience is being reviewed on a personal basis and qualifications before he is given a certification. **Mr. Flink** said that was correct. **Senator Mortimer** said then that is not the case with our military personnel. **Mr. Flink** said that was correct.

MOTION **Senator Mortimer** moved, seconded by **Senator Malloy**, to adopt **Docket No. 11-1101-1101** with the exception of Subsection 095, 02 and 174, 02.

DISCUSSION **Senator Lodge** asked Chairman Darrington what the procedure was if those two sections were excluded. **Chairman Darrington** said it would be necessary for the Committee to draft a resolution formally rejecting that section of the rule and that resolution would have to pass this Committee and the floor of the Senate, the House Committee and the floor of the House.

SUBSTITUTE MOTION **Senator LeFavour** made a substitute motion, seconded by **Senator Lodge**, to adopt **Docket No. 11-1101-1101** with the exception of Subsection 095, 02, c and 174, 02, c. The motion failed.

MOTION **Chairman Darrington** moved, seconded by **Senator Davis** to adopt **Docket No. 11-1101-1101**.

SUBSTITUTE MOTION **Senator Mortimer** made a substitute motion, seconded by **Senator Malloy** to adopt **Docket No. 11-1101-1101** with the exception of Subsections 095, 02, c. and d. and 174, 02, c. and d. **Senator Bock** requested a roll call vote. The motion carried 5 to 4 with Vice Chairman Vick, Senators Malloy, Mortimer, Nuxoll, and LeFavour voting aye, and Chairman Darrington, Senators Davis, Lodge and Bock voting nay.

DOCKET NO. 11-1101-1102 **Rules of the Idaho Peace Officer Standards & Training Council. William L. Flink** explained that there were some technical errors in Sections 91 and 92 and POST Council would like to rewrite after subsequent review and return it at a future meeting.

ADJOURNMENT There being no further business, **Chairman Darrington** adjourned the meeting at 2:50 p.m.

Senator Darrington
Chairman

Leigh Hinds
Secretary

MINUTES

SENATE JUDICIARY & RULES COMMITTEE

DATE:	Monday, February 06, 2012
TIME:	1:30 P.M.
PLACE:	Room WW54
MEMBERS PRESENT:	Chairman Darrington, Vice Chairman Vick, Senators Davis, Lodge, Malloy(McKague), Mortimer, Nuxoll, Bock, and LeFavour
ABSENT/ EXCUSED:	
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

Chairman Darrington called the meeting to order at 1:33 p.m. and asked the secretary to call the roll.

RS 21014C1

Relating to Execution. Brent Reinke, Director of Idaho Department of Correction (IDOC), introduced Mark Kubinski, Lead Deputy Attorney General of the Idaho Department of Correction. Mark Kubinski explained that this RS was reformatted from the previous RS due to the concerns of the committee members. It is basically the same as RS 21014, but clarifies some of the confusion and by making the language more direct. It proposes to create a new section, 19-2716A and to leave 19-2716 in tact. Subsection (1) clarifies that carrying out an execution is not the practice of medicine and the director and individuals acting under his authority are exempt from any legal requirements regarding the practice of medicine. Subsection (2) of the statute allows for any entity that is authorized to possess controlled substances to be able to distribute those to the director and department for purposes of carrying out an execution. Subsection (3) authorizes the director to obtain, possess and store controlled substances for purposes of carrying out an execution. This section also clarifies that employees participating in an execution are entitled to immunity from liability or wrongful death. Lastly, he said there was an emergency provision attached to this section.

Senator Davis asked why the emergency provision was retroactive to January 1, 2012. **Mr. Kubinski** said it was probably unnecessary, but was a holdover from the previous RS.

MOTION

Senator Mortimer moved, seconded by **Senator Nuxoll** to print **RS 21014C1**. The motion carried by **voice vote**.

S 1265

Relating to Execution. Brent Reinke introduced Lamont Anderson, Deputy Attorney General of the Criminal Law Division, to present the bill. **Mr. Anderson** explained the purpose of the proposed legislation was to clarify that upon execution, the death warrant is to be returned to the district court, making this part of the procedure consistent with Idaho Code § 19-2715.

Leo Morales, Public Education and Communications Coordinator for the American Civil Liberties Union of Idaho, stated that they were in support of both S1265 and S1266 legislation.

MOTION

Senator Nuxoll moved, seconded by **Senator Malloy**, to send **S 1265** to the Floor with a **do pass** recommendation. The motion carried by **voice vote**.

S 1266 **Relating to Execution. Mr. Anderson** explained this legislation clarifies the process of obtaining a death warrant, including specifying a time during which the warrant must be obtained, and sets forth a process for obtaining successive warrants if necessary. It also clarifies responsibilities if an execution does not proceed.

MOTION **Senator Davis** moved, seconded by **Senator Lodge**, to send **S 1266** to the Floor with a **do pass** recommendation. The motion carried by **voice vote**, with **Senator Bock** and **Senator LeFavour** voting no.

S 1215 **Relating to Escape or Rescue of Prisoners. Brent Reinke** introduced **Tim Higgins**, Deputy Warden, who has a background of investigation and a great knowledge of contraband and the challenges it causes IDOC behind the fence. **Mr. Higgins** explained this legislation seeks to make it harder for inmates to continue their criminal behavior while incarcerated. Cell phones are becoming the most sought after contraband inside the prisons today. Prisoners smuggle cell phones to participate in drug trafficking, targeting hits on civilians in Idaho communities. He gave an example of a recently confiscated cell phone from a gang member inside one of their facilities; it was used 33,000 times in a period of six months which included 11,000 telephone calls, 22,000 text message all of which bypassed the security system as he continued to conduct gang business while incarcerated. The proposed bill makes it a felony to possess, introduce cell phones, or any other telecommunication into their prison system. Lastly, he stated that the proposed Section 18-2510, Idaho Code, would enhance safety and security in correctional facilities statewide.

Senator Davis noted that the effective date of the bill appeared to be July 1st instead of at the signature of the Governor and he wondered if that was correct. With the problem as significant as it was, **Senator Davis** thought they would rather have it effective sooner than later. **Director Reinke** said they were not thinking of having an emergency clause in the legislation, but perhaps they should pursue that. **Senator Davis** asked if the Director would find it valuable to be effective with the Governor's signature. **Director Reinke** replied that he would.

Senator Vick asked how long ago was tobacco banned. **Mr. Higgins** replied it was about ten years. **Senator Vick** said that he had information from someone that having tobacco as contraband was a positive thing compared to marijuana or some other illegal drug. **Mr. Higgins** said more tobacco was smuggled in than marijuana. One advantage they saw was that cigarette smoke would mask the smell of marijuana, but now if they smell cigarette smoke they know it is inappropriate and can target that very quickly. He said they were trying to stop the major flow of tobacco products from coming in. He stated that it would be a felony for the person introducing the contraband or for the one in possession.

MOTION **Senator Davis** moved, seconded by **Senator Lodge**, to send **S 1215** to the **14th Order for Amendment** to add the emergency clause. The motion carried by **voice vote**.

APPOINTMENT **Gubernatorial Appointment. Sara B. Thomas** of Meridian, Idaho was appointed to the State Appellate Public Defender (SAPD) to serve a term commencing January 12, 2012 and expiring August 1, 2014. Ms. Thomas has been working for the State Appellate Public Defender since 1999. In 2002, she became Chief of the Appellate Unit where she was second in command. She participated in various committees including the Idaho Supreme Court's Appellate Rules Committee and the Criminal Rules Committee. She also participated in the Idaho Criminal Justice Commission's Sex Offender Registration Subcommittee. She stated that the way she sees the position is to represent people in their appeals to the Idaho Supreme Court and considers the position to, literally, be one of law enforcement. Ms. Thomas said the Constitution has procedural statutes that protects people's rights.

Senator Darrington asked Ms. Thomas if she saw her role as getting a person off or protecting their rights. **Ms. Thomas** said the role of SAPD was protecting someone's rights. She added that the job of SAPD was to make sure that the Court or prosecutor did their job properly. **Chairman Darrington** said at the time SAPD was created it was to help the counties financially and also to give uniform defense counsel throughout the state on appeals. **Ms. Thomas** stated that those goals had been met. After a few questions from the committee to Ms. Thomas, **Chairman Darrington** said the committee would act on the confirmation at the top of the order on Wednesday's meeting.

PRESENTATION **Idaho Criminal Justice Commission Overview and Update. Brent Reinke**, Director of Idaho Department of Correction, explained that the Commission was established in 2005 with 25 members and three major branches of government, county, city and citizen representatives. They meet ten times a year and it truly is an opportunity to break the process down from an educational standpoint and they have had great success in developing relationships with all three branches of government and with citizen representatives as well. He stated that there were several subcommittees within the Commission and their focus this year has been: the (1) Research Alliance chaired by Gary Raney, (2) Children of Incarcerated Parents, sponsored by the Department of Health & Welfare, Ross Edmunds, from the Division of Behavioral Health, (3) Public Defense, headed by Dan Chadwick, (4) Misdemeanor Probation Project, chaired by Gary Hahn, (5) Gang Strategies headed by Jim Tibbs, (6) Sex Offender Management Board, chaired by Shane Evans, and the Grant Review Council which is an entirely new function of the Commission. Slide presentation is attached.

Chief Jim Tibbs, said they would continue to look at the Gang Enforcement Act, which was created last session, to make sure that it provides the necessary safety and that it was constitutional. He felt it would be a tool box for communities to use, not just enforcement.

MINUTES MOTION **Senator Bock** moved, seconded by **Senator Davis**, to approve the minutes of **January 30, 2012** as written. The motion carried by **voice vote**.

ADJOURNMENT There being no further business, **Chairman Darrington** adjourned the meeting at 2:33 p.m.

Senator Darrington
Chairman

Leigh Hinds
Secretary

MINUTES

HOUSE JUDICIARY, RULES, & ADMINISTRATION COMMITTEE

DATE: Wednesday, February 15, 2012

TIME: 1:30 P.M.

PLACE: Room EW42

MEMBERS: Chairman Wills, Vice Chairman Luker, Representative(s) Smith(24), Nielsen, Shirley, Hart, Bolz, Ellsworth, Bateman, McMillan, Perry, Sims, Burgoyne, Jaquet, Killen

ABSENT/ EXCUSED: Rep. Ellsworth

GUESTS: Randy Colson, Idaho Towing and Recovery Professionals; Woody Richards, Attorney/Lobbyist; Lamont Anderson, Attorney General's Office; Lt. Col. Ralph Powell & Sharon Lamm, POST, Idaho State Police (ISP)

Chairman Wills called the meeting to order at 1:33 p.m.

MOTION: **Rep. Bolz** made a motion to approve the minutes from the February 7, 2012 meeting. **Motion was carried by voice vote.**

Chairman Wills recognized **Drew Nelson**, House Page, for her service during the first half of this session.

H 531: **Dawn Peck**, Manager of the Bureau of Criminal Investigation, ISP, presented **H 531**. She said that after further review by the agency, the language in the bill contained errors and fell short of the statutory goal and ISP would like to pull the bill and introduce a replacement RS.

UNANIMOUS CONSENT REQUEST: **Rep. Killen** requested unanimous consent to pull **H 531**. There being no objection, consent was granted.

RS 21304: **Dawn Peck**, ISP, presented **RS 21304.** She explained that **RS 21304** will replace **H 531** because the language in **H 531** was confusing and inadequate to accomplish the ISP's goal for the bill. The only change is to § 49-202 (2)(q), to the word "transfer," clarifying that this is a one time fee for vehicle title transfer that will be used to support the Idaho Public Safety and Security Information System (more commonly known as "ILETS"). This proposed legislation proposes to establish a fee on the issuance or transfer of each vehicle title which will provide a stable funding source to support and maintain ILETS. ILETS primary mission is to provide a dedicated, secure, reliable, high-speed communications system that enables the public safety and criminal justice communities to fulfill their missions of protecting and serving Idaho citizens. The ILETS Board has recognized that the current funding structure is inadequate to sustain daily operations and infrastructure need and monies earned from this fee would go into an ILETS dedicated fund to be used for ILETS maintenance and usage costs.

In response to committee questions, **Ms. Peck** stated that total annual funds earned from this fee collection would be about $4 million. Yearly cost to keep the system running is about $2.7 million/year. She clarified that there would be an excess, but the Board is trying to build the fund to be able to pay for a replacement part if/when it is needed and to make sure that they do not have to ask for increased funding for ILETS in the near future for this purpose. Committee members requested a list of all the fees involved with this.

Ms. Peck stated that a fee is assessed when any title transfer is made, even if the vehicle was a gift. Also, on page 6, line 41, "all access fees collected under the provision of this chapter," she said that these fees are outlined in IDAPA 480. The access and system usage fees were raised in 2007 to an amount counties felt they could absorb. The Board feels this is not enough to maintain the system, and currently ISP is covering 48% of the costs, where they should be covering 25%.

Amy Smith, a Vehicle Services Manager for the Idaho Dept. of Transportation (IDT), explained the breakdown of the title fee. The committee expressed concern about the fees listed on the first two pages of the RS and questioned where the fees, other than to ILETS, were going to be distributed. **Ms. Peck** stated that the Idaho Code section that has been changed is the IDT title section, it is not for the ILETS system.

Rep. Sims invoked **Rule 38** stating a possible conflict of interest as she is an automobile dealer, but will be voting on **RS 21304**.

MOTION: **Rep. Smith** made a motion to introduce **RS 21304**.

Ms. Peck stated that she will advise the Department of Transportation (DOT) Advisory Board about the substance of the bill. In regards to the "other vehicles" listed on page 2, **Ms. Smith** said that this could be a boat or trailer, technically not a motorized vehicle. In regards to the language she stated that this is just left over language, as all these "other" vehicles would be included here, so the "other" is likely unnecessary.

VOTE ON THE MOTION: **Motion was carried by voice vote.**

H 403: **Lt. Col. Ralph Powell**, ISP, presented **H 403**. He explained the purpose of this bill is to create a requirement for tow truck drivers who contract with the ISP to have criminal background checks through both the FBI and Idaho criminal databases. There is a public expectation that the tow truck driver has gone through some kind of background check, and ISP would like to send a tow truck driver that does not have a criminal record that includes any of the disqualifying crimes. The intent is to make this process safer for those who are having their cars towed, under the direction of the ISP.

In response to committee questions, **Lt. Col. Powell** stated that ISP is interested in crimes committed against persons and serious property crimes when examining someone's background. For example: battery, burglary, rape, etc. He explained ISP is adding the federal review to the state check that is already being used. He emphasized that it is a more comprehensive check because it is nationwide, not just for the state of Idaho. In regards to the doubling of the fees to tow truck drivers, he said the addition is the cost of using the FBI fingerprint-based check.

Lt. Col. Powell explained the payment for the background check would not apply to every employee of the tow-truck company, but would apply only to the owner and all drivers that will be responding to the scene. Lt. Col. Powell deferred to **Dawn Peck**, ISP, for a question about the fee increase, which was authorized to $25.00 for the fingerprint based check (increased from $10.00). She stated that the fingerprint based check is important because it is a positive identification. Total fees would be about $41 for each responding tow-truck driver.

In regards to the ability of the state to use the substance of the FBI background checks, **Lt. Col. Powell** said that the authority to conduct a state background check is governed by FBI rules and there must be a statute that authorizes ISP's use of the FBI database. He deferred to **Ms. Peck**, and she said Title 67, Chapter 30 governs authority to do state background checks.

Randy Colson, President of the Idaho Towing Recovery Professionals, stated his concern is with the timing of the fees required. He said he would like the fee application to happen at the time of hire. He also said there is no standard of measure to apply this to and there needs to be a requirement in writing. He emphasized that they are seeking a measured guideline so that tow truck companies are able to comply.

In response to committee questions, **Mr. Colson** stated that the AAA background checks do not have access to the FBI database. He said that he would be satisfied with at least one check through the FBI based system, though it is not possible to transfer federal information, and AAA can verify that the check was completed. In regards to the City of Boise evaluation, the check is annual, meaning that any crimes for the next 12-month period would be undiscovered. He emphasized that he, as a business owner, is paying attention to the quality of his employees.

When asked if the City of Boise would be willing to accept the background check from ISP and not require an additional check, **Lt. Col. Powell** said the ISP check is completed once at the time of hire, however, Boise City requires annual checks and he does not know what they might be willing to accept in the future. In regards to timing of the background check, there isn't a particular time in mind and this bill stems from a particular incident in Oregon, where a tow truck driver used by the ISP that had various convictions in Oregon, which were not detected in the Idaho database search.

In regards to committee concerns over whether this is an ongoing problem, **Lt. Col. Powell** stated the national background check provides a comprehensive criminal check and ISP has no current intention of changing the policy to include itemized specifics as far as "disqualifing crimes" go. Also, the ISP procedure on tow truck operators does not spell out the specific qualifications and ISP conducts a case-by-case analysis when they conduct a background check. The committee expressed a concern that there are no qualifications codified somewhere. Lt. Col. Powell stated that if the applicant is denied approval, they have the opportunity to meet with ISP to redress their concerns. He added that tow-truck drivers do not have to be on the rotation list used by ISP.

When questioned, **Mr. Colson** stated that he was not involved in drafting this bill. In regards to suggested changes to the bill, he would like the background check to be conducted at the time of application to the ISP tow truck pool, and he would like to see clarification on timing and definitions of disqualifying crimes.

MOTION: **Rep. Killen** made a motion to send **H 403** to the floor with a **DO PASS** recommendation. **In favor** of the motion, **Rep. Luker** made a request to add various standards to this, but overall he supports the bill due to public safety concerns. **Rep. Perry** stated **in opposition** to the motion, she is likely not to support the bill because of the fear that certain drivers will be excluded, the high cost, lack of standards, and lack of strict time frames for check requirements.

SUBSTITUTE MOTION: **Rep. Bateman** made a substitute motion to hold **H 403** in committee. In support of the motion he stated that Idaho is a small state and these fees and other issues are of great concern to Idaho's citizens.

AMENDED SUBSTITUTE MOTION: **Rep. Hart** made an amended substitute motion to hold **H 403** in committee for a time certain, no longer than one week, for parties to get together and come up with better language.

ROLL CALL VOTE ON THE AMENDED SUBSTITUTE MOTION:

Chairman Wills requested a roll call vote on the amended substitute motion to hold **H 403** in committee for a time certain. **Motion passed by a vote of 8 AYE, 6 NAY and 1 absent/excused. Voting in favor** of the motion: **Vice Chairman Luker, Reps. Smith(24), Nielsen, Shirley, Hart, Bolz, McMillan, and Perry. Voting in opposition** to the motion: **Chairman Wills, Reps. Bateman, Sims(Ingram), Burgoyne, Jaquet, and Killen. Rep. Ellsworth** was **absent/excused.**

H 403 will come before the committee on Thursday, February 23, 2012.

H 532:

Sharon Lamm, POST/ISP, presented **H 532**. She stated this will amend Idaho Code to allow POST counsel to collect and spend fees earned from POST dormitory usage. The fees are structured to recoup costs associated with use of training equipment from non-law enforcement institutions. POST academy rooms are available to non-POST entities. POST charges $10.00/night/room which benefits POST and saves lodging costs for those who are using the room.

Ms. Lamm next provided responses to committee concerns from the RS hearing. She said that in regards to concern about exemptions from the bed tax, all charges for room occupancy that are exempt from sales tax, are exempt from the room tax. Over 99% of POST customers receive the tax exemption and the remaining customers are from out-of-state. In 2011, POST collected $32,000 in dormitory fees. She emphasized that law enforcement agencies throughout the state benefit from the use of the facility for the training they are required to complete in order to retain their certifications. In FY2011 POST collected $80,000 from POST-associated users and without this charge in place, POST would have to bill these agencies about $20,000 annually for their usage.

MOTION:

Rep. Shirley made a motion to send **H 532** to the floor with a **DO PASS** recommendation.

In regards to an audit on the taxes being taken out, **Ms. Lamm** stated POST has been audited in the past. The committee was concerned that a law enforcement agency has been doing something they are not yet authorized to do, she said that this is one of the areas that needed to be addressed.

VOTE ON THE MOTION:

Motion was carried by voice vote. Rep. Shirley will sponsor the bill on the floor.

S 1265:

Brent Reinke, Director of the Idaho Dept. of Corrections (IDC), presented **S 1265**. He handed out copies of IDC's standard operating procedures. He explained the lessons learned from the November 18, 2011 execution which was the first in many years. **S 1265** addresses pre- and post- execution procedure. The purpose of the bill is to clarify that after the execution the death warrant is to return to the district court, which is consistent with the statute.

MOTION:

Rep. Nielsen made a motion to send **S 1265** to the floor with a **DO PASS** recommendation. **Motion was carried by voice vote. Rep. Nielsen** will sponsor the bill on the floor.

S 1266: **Lamont Anderson**, Attorney General and Chief of the Capital Litigation Unit, presented **S 1266**. He said this bill addresses "how" and "when" a warrant of execution is obtained. It clarifies that the state of Idaho, the Idaho Supreme Court, and Federal Courts can impose a stay of execution. Section 2 addresses procedure for obtaining the death warrant, which occurs after unitary review by the Idaho Supreme Court. Remittitur is executed by the Idaho Supreme Court, but the word "prosecutor" has been changed to the "state." He explained that after a death warrant is obtained, death sentence inmates are reviewed by federal courts. If a stay is obtained, then a mandate is issued by the 9th Circuit Court of Appeals. After this, it is possible to get a second death warrant. There also may be a situation where the Dept. of Corrections has not been able to complete an execution by the time allotted by the court. In this case, the bill allows the department to obtain another warrant from the district judge with an explanation of why the execution has not been completed. This prevents a death sentence inmate from skirting the death sentence because of a timing issue.

In response to committee questions, **Mr. Anderson** said § 4, line 35, changed from "must" to "may" because the death sentenced inmate is not actually brought into court. In the case that the district court wants to inquire why that warrant was not carried out, this change removes the requirement that the inmate has to be present during this inquiry. In regards to whether a judge would want to make an inquiry, he clarified that the judge must make an inquiry and stated it would be hard to imagine a situation where the district judge would not want to sign an additional death warrant. In regards to the timing of the issuance of the death warrant, he said constitutional speedy trial requirements would govern this. Regarding line 37, the "special specified time," Mr. Anderson stated that this is prior language from the statute and means the warden shall execute the death warrant as specified by the district judge.

MOTION: **Rep. Perry** made a motion to send **S 1266** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote. Rep. Nielsen** will sponsor the bill on the floor.

ADJOURN: There being no further business to come before the committee, the meeting was adjourned at 3:23 p.m.

Representative Wills
Chair

Stephanie Nemore
Secretary