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IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD A. LEAVITT, Petitioner, v. THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT, and the Honorable Jon J. Shindurling, Judge of the District Court, Respondents.	)	S.Ct. No. _____ **VERIFIED PETITION FOR A PEREMPTORY WRIT OF MANDAMUS DIRECTING COURT TO VACATE THE ISSUANCE OF THE DEATH WARRANT AND CONDUCT NEW HEARING**

Richard A. Leavitt, pursuant to IAR 3, 5 and 43, and I.C. § 7-301 *et. seq.*, petitions this Court to issue a peremptory writ of mandamus directing the District Court of the Seventh Judicial District in and for the County of Bingham, the Honorable Jon J. Shindurling presiding, to vacate its Death Warrant entered on May 17, 2012. In support of his request, the Petitioner alleges the following.

1. That Petitioner Richard A. Leavitt is the defendant in *State v. Leavitt*, Bingham County No. CR-1985-4110 and the appellant in *State v. Leavitt*, S.Ct. No. 39941. Further, Petitioner is indigent and is incarcerated on Death Row at the Idaho Maximum Security Institution, and has been continuously incarcerated for some 28 years.

2. That David Nevin and Andrew Parnes are the attorneys for Richard A. Leavitt in the above-mentioned cases.

3. That Respondent Jon J. Shindurling is a judge of the District Court of the Seventh Judicial District.

4. That on May 15, 2012, Petitioner filed a Notice of Demand for Opportunity to be Heard Regarding the Issuance of Death Warrant.

5. That on May 17, 2012, Respondent denied said demand.

6. That on May 17, 2012, upon information and belief, Respondent met with LaMont Anderson, Deputy Attorney General, in an ex parte session, without a representative of the Bingham County Prosecuting Attorney's Office being present, and without a verbatim record of that meeting being made.

5. That on May 17, 2012, in an ex parte, unrecorded in-chambers session, Respondent signed a Death Warrant for Petitioner, setting Petitioner's execution for June 12, 2012.

6. That on May 18, 2012, Petitioner filed a Motion for Reconsideration of its Order Denying Petitioner an Opportunity to be Heard Regarding the Issuance of Death Warrant.

7. That on May 21, 2012, Respondent denied the motion for reconsideration.

8. That on May 21, 2012, Petitioner filed a Notice of Appeal which is currently pending before this Court under Case No. 39941.

9. That on May 23, 2012, Petitioner filed a Motion to Quash Death Warrant.

10. That on May 24, 2012, Respondent set a hearing on Petitioner's Motion to Quash Death Warrant for May 30, 2012, a time after this Court has ordered Petitioner to file "any proceeding that may come before this Court." *See*, Scheduling Order Re Bingham County Case No. CR-1985-4110, issued on May 17, 2012. On May 24, 2012, Petitioner's counsel had indicated by telephone that counsel would be available at any time that day or any day thereafter to appear at a hearing on the Motion to Quash.

11. That on May 25, 2012, Bingham County Prosecuting Attorney J. Scott Andrew filed an opposition to Petitioner's Motion to Quash Death Warrant.

12. That on May 24, 2012, the State filed its Response Brief before this Court in Case. No. 39941.

13. That in the Response Brief, the State claimed this Court had no jurisdiction as there was no right to appeal the issuance of the Death Warrant.

14. That Petitioner claims that this Court does have jurisdiction under the Idaho Appellate Rules to appeal from the issuance of the Death Warrant.

15. That Petitioner files this Extraordinary Writ to protect Petitioner's review of the issuance of the Death Warrant in the event this Court agrees with the State's Response Brief and does not treat the Notice of Appeal as an Extraordinary Writ as the cases relied upon by the State did.

STATEMENT OF CAUSE OF ACTION

This Court may issue a writ of mandamus to an "inferior tribunal . . . to compel the performance of an act which the law especially enjoins as a duty resulting from office . . . or to

compel admission of a party to the use or enjoyment of a right . . . to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal . . . ." I.C. § 7-302.

Here, as explained in detail below, the Respondent Judge has a legal duty to permit Petitioner's counsel an opportunity to be heard regarding the issuance of a death warrant. By refusing to permit counsel to appear at a hearing, Respondent denied Petitioner his rights to due process of law and access to the courts under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Art. I, § 13 of the Idaho Constitution.

Respondent erred in permitting the Idaho Attorney General to apply for the warrant, in failing to apply the proper section of I.C. § 19-2715, in failing to determine under I.C.R. 38(a) whether further review was pending, and in failing to make a contemporaneous verbatim transcript of the session.

Alternatively, this Court should direct the Respondent Judge to hold a hearing on the Motion to Reconsider. It is long-established that a writ of mandamus is properly issued to compel a court to act where it has jurisdiction. *Hays v. Stewart*, 7 Idaho 193, 195, 61 P. 591, 592 (1900) (writ issued to compel judge to hold trial on pending criminal charge); *Hill v. Morgan, Judge*, 9 Idaho 718, 726, 76 P. 323, 326 (1904) (writ issued to compel court to consider case after it erroneously determined it had no jurisdiction); *see also, Connolly v. Woods*, 13 Idaho 591, 92 P. 573 (1907); *St. Michael's Monastery v. Steele*, 39 Idaho 609, 167 P. 349 (1917); *Law v. Rasmussen*, 104 Idaho 455, 457, 660 P.2d 67, 69 (1983) (writ issued compelling district court to credit defendant's presentence confinement against his five year prison sentence).

Respondent has caused irreparable harm to Petitioner because he is facing an execution date of June 12, 2012, which was issued in a manner inconsistent with the constitutions of the

United States and the State of Idaho, as well as the laws of the State of Idaho. Unless this Court issues an order directing Respondent to conduct a hearing which assures Petitioner his full rights under the law and the federal and state constitutions, Petitioner will be executed on June 12, 2012, without a full and fair hearing regarding the issuance of the death warrant.

The State has argued that Petitioner has no right to appeal the issuance of a death warrant and if the state is correct, Petitioner will have no adequate and speedy remedy to challenge respondent's illegal actions in issuing the death warrant.

Petitioner incorporates by reference here, as if fully set forth, arguments and statements of fact contained in his briefing before this Court in Case No. 39941.

PRAYER FOR RELIEF

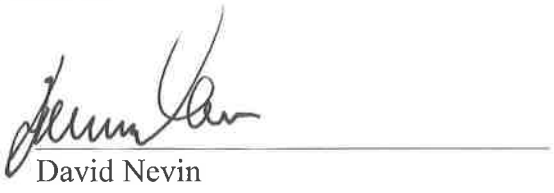
Wherefore, the Petitioner asks this Court to grant the foregoing relief:

A. That this Court vacate the death warrant issued on May 17, 2012 and order the Respondent to conduct a hearing with counsel for Petitioner present to consider the issuance of a new Death Warrant which comports with the laws of the State of Idaho and the federal and state constitutions;

B. That this Court file this original Writ without requiring the payment of filing fees as Petitioner is indigent; and

C. Such other relief as the Court deems just and equitable.

Respectfully submitted this 29th day of May, 2012.



David Nevin

VERIFICATION OF CONTENTS

David Nevin being first duly sworn upon oath hereby deposes and says:

1. That I am the attorney for the Petitioner.

2. That I have personal knowledge of the events alleged above.

3. That I have reviewed the contents of the above Petition for Peremptory Writ of Mandamus and state that they are true to the best of my knowledge.

David Nevin

SUBSCRIBED AND SWORN BEFORE ME
this 29th day of May, 2012.

Debi C. Presher

Notary Public for the State of Idaho
Residing at: Caldwell, Id
My commission expires: 11-8-

DEBI C. PRESHER
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th 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	____ U.S. Mail ____ Hand Delivery _X_ Facsimile ____ Federal Express
J. Scott Andrew Bingham County Prosecuting Attorney 501 North Maple, #302 Blackfoot, ID 83221-1700 Facsimile: 208-785-5199	____ U.S. Mail ____ Hand delivery _X_ Facsimile ____ Federal Express
Hon. Jon J. Shindurling Bonneville County District Judge 605 N. Capital Avenue Idaho Falls, ID 83402 Facsimile: 208-529-1300	____ U.S. Mail ____ Hand delivery _X_ Facsimile ____ Federal Express

David Z. Nevin