

1 MAY 29, 2012

2
3 THE COURT: All right. We shall be on the
4 record in Bingham County Case CR-1985-4110, and we are
5 also collaterally tracking CV-08-857, State of Idaho
6 versus Richard A. Leavitt.

7 We have LaMont Anderson present on behalf of
8 the State.

9 Did Scott Andrew join us?

10 MR. ANDREW: Yes, Your Honor, I am here.

11 THE COURT: All right. And Scott Andrew, the
12 prosecuting attorney from Bingham County.

13 We have David Nevin.

14 Mr. Nevin?

15 MR. NEVIN: Yes, I'm here, Your Honor. Thank
16 you.

17 THE COURT: Can you turn that up a little bit?

18 COURT CLERK: It's as high as it will go.

19 THE COURT: All right. Speak up because
20 we're -- the sound has bled out.

21 Do we have Mr. Parnes, Andrew Parnes?

22 MR. PARNES: Yes, Andrew Parnes is here.

23 THE COURT: All right. And Steve Kenyon is
24 here from the Supreme Court to record the matter for
25 the Supreme Court.

1 MR. KENYON: Yes, we are here. Thank you.

2 THE COURT: Anyone else we have on the line?

3 UNIDENTIFIED SPEAKER: Your Honor, Mr. Leavitt
4 is on the line.

5 THE COURT: All right. I had the note for
6 that, and I forgot to stay it. Mr. Leavitt is on the
7 line through Mr. Nevin's office.

8 This conference or this hearing is being
9 conducted by telephone at the request of counsel. I
10 know you're all very busy with matters being filed in
11 the Supreme Court and the District Court and the Ninth
12 Circuit, and so we facilitated this by telephone so
13 that you did not have to put a day into travel. So I
14 would just ask your cooperation during the hearing
15 that you speak up. When you speak, identify yourself
16 for the court reporter and the record at the Supreme
17 Court, and make sure you speak distinctly. We have a
18 couple members of the Press here in the courtroom, so
19 just to let you know that this is being reported by
20 the Press.

21 Now we are here with regard to the defendant's
22 motion to quash the Death Warrant. I have received
23 briefs, two briefs from Mr. Nevin that are copies of
24 the briefs filed in the Supreme Court dealing with the
25 same issues, and I have received Mr. Andrew's brief in

1 opposition to the motion to quash. So keep in mind I
2 have read those briefs thoroughly. I have read all
3 the prior briefs. I have read the Supreme Court
4 briefs. I have tried to keep track of the Ninth
5 Circuit proceedings. I think I'm pretty well versed
6 in the issues.

7 Mr. Nevin, are you speaking?

8 MR. NEVIN: Yes, Your Honor.

9 THE COURT: All right. You may argue.

10 MR. NEVIN: Thank you, Your Honor.

11 THE COURT: Mr. Nevin, hold on just a minute.
12 I am going to try and move the phone so the reporter
13 gets it a little better. And if you will speak up,
14 please.

15 All right.

16 MR. NEVIN: I will try, Your Honor.

17 Should I proceed, Your Honor?

18 THE COURT: Yes, please.

19 MR. NEVIN: Okay. Well, I began with 19-2715.
20 Your Honor, I believe the Court proceeded in issuing
21 the Death Warrant, and I believe that the State has
22 asked you to proceed and has suggested to you that the
23 Death Warrant is justified under 19-2715(3). But we
24 very clearly have a situation where there has been no
25 Death Warrant issued in this case and no outstanding

1 stay of execution in this case since 1992. And there
2 was a Death Warrant in 1992. It was issued. It
3 dissolved of its own operation when the United States
4 Supreme Court denied Mr. Leavitt's petition for a writ
5 of certiorari, and there has not been another warrant
6 applied for or stayed in the interim. So subsection
7 one, which speaks of stays of execution, and then
8 subsection three, which says that if a stay of
9 execution is granted and as a result no execution
10 takes place on the date set by the District Court,
11 when it terminates the State shall apply for a new
12 warrant, that section doesn't apply. That warrant
13 ended years ago, and we are here clearly under
14 subsection four, if at all, which provides that if the
15 execution doesn't occur for any other reason other
16 than because of the issuance of a stay which has
17 expired, then the Court is to proceed in a different
18 way.

19 And Mr. Andrew's brief posits that subsection
20 four could only be applicable to the situation where
21 there is an unexpected weather event, or something
22 happens in the process of conducting the execution
23 which causes it to fail, or something to that effect.
24 And, of course, there is nothing in the legislative
25 history or in the text of the statute which limits it

1 in that way. And we very simply are in a situation
2 where a judgment of death has not been executed for a
3 reason other than the issuance of a stay. And,
4 indeed, that has been the situation for almost
5 20 years since the last stay dissolved in 1992.

6 So when the Court -- and I know that the Court
7 at one time issued an order indicating that it felt
8 that it had no jurisdiction to issue orders other than
9 the Death Warrant and that its activities were
10 ministerial only. And subsection four makes it clear
11 that that's just not the case. And so the basis for
12 the notice -- or, sorry, the motion to be -- or the
13 notice of a demand to be heard and of the motion to
14 quash was simply because it seemed apparent from the
15 rulings of the Court that the Court had understood its
16 discretion in a way that was not accurate, that was
17 not reflected. It didn't actually reflect the
18 discretion that the Court had under 19-2715. And
19 that, of course, is the primary element of a
20 determination as to whether or not the Court has
21 abused its discretion; that is to say, that it
22 understands correctly that it is acting in a manner in
23 which it has discretion and it understands correctly
24 the extent of its discretion.

25 So the reading -- and I would just say,

1 Your Honor, this view -- I submit to the Court that
2 where we are at this point is that the State is coming
3 to the Court -- the plaintiff in this case, the State
4 of Idaho, is coming to the Court and it is asking you
5 to issue an order directing that the warden of the
6 Idaho State Correctional -- or the Department of
7 Correction execute Mr. Leavitt, kill him by injecting
8 him according to the requirements of the statute. And
9 it is anathema to the idea of due process that in a
10 situation like this Mr. Leavitt would not be given an
11 opportunity to be heard. And I say that simply as a
12 matter of due process in a matter of the utmost
13 seriousness which this situation presents. It's
14 simply not appropriate in this kind of a situation
15 where there have been many proceedings in Federal
16 Court; there are still proceedings pending in Federal
17 Court. It's not appropriate for this to be done on a
18 ex parte basis without providing an opportunity for
19 counsel for Mr. Leavitt to be heard. So the -- it's
20 for this reason I submit to the Court that subsection
21 four provides that the Court may inquire into the
22 facts and, if no legal reason exists against the
23 execution of the judgment, must make an order that the
24 warden execute the judgment at a special specified
25 time.

1 And that inquiry -- excuse me, Your Honor. And
2 I must say, I don't know if the Court can hear that
3 noise in the background. That's an announcement at
4 the penitentiary where Mr. Leavitt is, and he is on
5 the line, and I think he is unable to mute his phone,
6 so that noise may come through from time-to-time.

7 THE COURT: All right. If you hear it, just
8 pause and let it pass because the reporter -- it makes
9 it difficult for the reporter.

10 MR. NEVIN: I'll do that, Your Honor.

11 THE COURT: All right.

12 MR. NEVIN: So it hardly can be the case that
13 the Court is empowered to inquire whether a legal
14 reason exists against the execution of the judgment on
15 the one hand, but on the other hand not permit the
16 person who is to be executed in the matter to be heard
17 on that question. And there is nothing to suggest in
18 the text or in the subtext of subsection four that the
19 State would be expected to speak to the question of
20 whether or not there's a legal reason which exists
21 against execution of the judgment. Nor is there any
22 reason to suppose that that situation would be that it
23 would make more sense for that situation to apply if
24 there has been a power failure or something to that
25 effect that has caused the execution not to occur, as

1 opposed to the pendency of proceedings in Federal
2 Court, for example, over many years where there has
3 not been an active Death Warrant and -- nor as a
4 result of a stay in place.

5 So I simply suggest to you, Your Honor, that
6 the Court, in a matter of this seriousness, should
7 have responded to our demand for an opportunity to be
8 heard and should have given us an opportunity to be
9 heard, rather than doing -- rather than issuing the
10 Death Warrant out of chambers.

11 I will say that there are, you know -- and I
12 think, Your Honor, I -- my point would be that if the
13 Court had afforded us a hearing of this type, we would
14 have advanced several arguments to you about this
15 matter.

16 And my request, if the Court quashes the -- or
17 grants our motion to quash the warrant, my request
18 would be that you would set that hearing and give us
19 an opportunity to be heard.

20 So our motion recites several other matters
21 that I think are important, as well, and I just will
22 say that we refer to Rule 38(a). And I understand
23 counsel to be saying that Rule 38(a) means something
24 other than what it says, and I guess -- I mean, I
25 think that's what I would argue, too, if I were in

1 their position, but it is a rule, of course. It is
2 clear on its face what it means, what it says.

3 It says, a sentence of death shall be stayed
4 pending any appeal or review. And it doesn't say
5 shall be stayed pending any appeal or review in the
6 courts of this state or any appeal or review that
7 is -- that -- including only a first federal habeas
8 corpus matter, but no other matter once that case is
9 fully completed, or some kind of language like that.
10 It just doesn't say that. It says simply on its face
11 what it says. A sentence of death shall be stayed
12 pending any appeal or review.

13 This case is still under review, and it's
14 under review on a Rule 60(b) motion in front of
15 Judge Winmill, which is pending for hearing. And I
16 assume that the Court is aware of this based on what
17 the Court just said about having read these materials,
18 but -- so I will say this quickly. *Martinez v. Ryan*
19 was a United States Supreme Court opinion that was
20 decided in March of this year. In other words, a
21 couple of months ago, maybe about two-and-a-half
22 months ago. I believe it was March the 12th.

23 When the United States Supreme Court decided
24 *Martinez v. Ryan*, they changed an important aspect of
25 the federal habeas corpus law. And in particular,

1 they made Judge Winmill's earlier decision that
2 Mr. Leavitt's ineffective assistance of counsel
3 argument on the part of referring to the trial
4 counsel, that that argument had been defaulted.

5 Martinez v. Ryan changed the law on that, and
6 it made it clear that Judge Winmill could not have
7 rejected Mr. Leavitt on that claim. Now I say should
8 not have because the law at the time was Judge Winmill
9 ruled correctly based on the law at the time. But the
10 law has now changed, and there is an important
11 substantive matter that is left pending now in front
12 of Judge Winmill. This is the motion now to go
13 forward with a serious and substantial claim that was
14 defaulted early on in this case and never pursued as a
15 result of it having been defaulted and excluded. And
16 the case has come back so that -- I recognize that the
17 State recites to you that the writ of certiorari was
18 denied and that the Ninth Circuit mandate has been
19 returned to the Federal District Court here. But that
20 was done without contemplation of an important part of
21 Mr. Leavitt's petition for a writ of habeas corpus,
22 and that important matter is pending in front of the
23 District Court. It's not our fault it hasn't been
24 raised before. It certainly is not Mr. Leavitt's
25 fault that it has not been raised before. It was

1 litigated. It was placed in the petition that we
2 filed in 1993, some 18, 19 years ago. It was placed
3 in the petition, but we never got a chance to
4 litigate it because it was defaulted and it was --
5 Judge Winmill ruled that it was defaulted. We never
6 had a chance to do that again until March of this
7 year. And as I said before, two-and-a-half months
8 ago promptly filed a 60(b) motion, a motion for the
9 Court to reconsider and to allow us to go forward on
10 that claim. And that is pending in front of
11 Judge Winmill.

12 THE COURT: Well, doesn't the Federal Court
13 have the power to stay?

14 MR. NEVIN: It does.

15 THE COURT: And it has not done so?

16 MR. NEVIN: Well, we haven't -- that is
17 correct. We have not asked it to at this point.

18 THE COURT: All right.

19 MR. NEVIN: And I imagine that we will,
20 Your Honor, ask the Federal Court to do that. But I
21 just recite this at this point to say that this case
22 is still pending review in the language of Rule 38,
23 and this Court should also stay the execution because
24 of that.

25 And more to the point, in terms of our pending

1 motion, is that the Court should quash the warrant
2 that it already issued. And I don't know -- I know
3 that -- well, I say upon information and belief, I
4 believe in the motion, that I believe the Court issued
5 the Death Warrant out of chambers without holding a
6 hearing and without reporting the proceeding. And,
7 quite literally, I don't know what representations
8 were made to the Court, but if I had been or if
9 Mr. Parnes had been permitted to be heard on behalf of
10 Mr. Leavitt, we certainly would have said to the
11 Court, don't issue this warrant now because this case
12 is still pending review and there is a -- they've
13 refrained from obtaining a warrant for many years in
14 the absence of stay, and there is no reason to rush to
15 this conclusion now.

16 There is reference in the moving papers, if I
17 am not mistaken, for the idea that the State is
18 obligated to move to obtain a Death Warrant
19 immediately upon a remittitur coming from the Federal
20 Court. The old version of 19-2715 had that language
21 in it. The current version does not. The current
22 version simply says that upon the expiration of a
23 stay, or in our case if an execution -- if a judgment
24 of death has not been executed, then it remains in
25 force, 19-2715(4). In either event, it just simply

1 says that the State shall apply for another warrant.
2 It doesn't say when. And the State could easily
3 readily, without losing anything, could have allowed
4 the proceedings to run to their logical conclusion in
5 front of Judge Winmill on the 60(b) motion. But,
6 instead, they chose to go immediately. And I mean
7 this literally within 24 hours of the mandate being
8 issued counsel is in chambers obtaining this warrant.
9 And there was absolutely no reason to issue that
10 warrant at that time. Issuance of it violates
11 Rule 38, and there is no -- there is no pressing
12 reason to hold an execution on June the 12th. This
13 could have been done -- this could readily have been
14 done at another time. So I -- we come to the issue,
15 Your Honor, of the -- of Mr. Anderson applying for the
16 warrant.

17 And Mr. Andrew points to the language in
18 19-2715 and says that it's been changed from the
19 prosecuting attorney to the State. And again,
20 Your Honor, the State of Idaho is asking you to find
21 language -- to read meaning into language that is
22 simply not there. The State of Idaho is the plaintiff
23 in every criminal case. That's a matter of
24 constitutional dimension. Furthermore, the
25 prosecuting attorney represents the State in every

1 criminal case. When this statute says that the State
2 of Idaho shall apply for the warrant, it says nothing
3 more than that the plaintiff in a criminal case shall
4 apply for a warrant. It doesn't really change the
5 meaning of 19-2715 at all, because the prosecuting
6 attorney is the person who represents the State of
7 Idaho by statute.

8 Now there are some exceptions to that, but they
9 involve appointment or usurpation if particular
10 showings are made. I'm thinking of Newman v. Lance
11 now. And so, of course, as we all know, there is a
12 process that can be followed for someone in
13 Mr. Anderson's position to become counsel of record in
14 a case like this. But to my knowledge, at least to
15 the extent that notice has been given to me, that has
16 not been done. And so I know that Mr. Anderson is on
17 our call today, and I don't know that that -- I take
18 it that his presence on the call doesn't imply that an
19 appearance has been entered even at this point.

20 Although, obviously, there may have been --

21 Mr. Anderson may have made the application, and the
22 Court may have ruled without my knowledge of it, and
23 so I don't want to speak out of school. But at least
24 I will say that to my knowledge Mr. Anderson, even as
25 we sit here today, has still not entered an

1 appearance.

2 And, Your Honor, obviously Mr. Anderson is no
3 more empowered to come to the Court and ask it to take
4 action, have a mind to do so on an ex party basis.
5 He's no more in a position to do that than any other
6 person would be in in any other lawsuit who had not
7 entered an appearance on behalf of one of the parties.
8 And so, I mean, I simply -- I take Mr. Andrew to be
9 saying that this whole problem is cured by the
10 amendment to 19-2715, but it would have been very
11 easy -- I don't doubt for a second that Mr. Anderson,
12 himself, may have been the drafter or may have played
13 some role in the drafting of 19-2715. And it would
14 have been very easy for him to have said, the State
15 acting through the prosecuting attorney, or through
16 the Attorney General, or his designated -- his or her
17 designated delegatee. I'm just, you know, making this
18 language up. My point is, it would have been easy for
19 the Legislature to have said, someone from the
20 Attorney General's Office. We will hereby
21 short-circuit the procedures that exist under the
22 statutes for the appointment of the Attorney General.
23 All of that will go out the window in the case of a
24 Death Warrant, and we direct that the AG can also
25 apply for a Death Warrant. It would have been easy to

1 have said that. It could have been done in a few
2 words, but the Legislature did not choose to do that.
3 And now it seems to me the State is asking you to do
4 the thing that we always hear that the Court shouldn't
5 do, which is read into language -- read into statutory
6 language material that is not there. And so I do very
7 much ask the Court to not take that action.

8 So, Your Honor, if the Court would give me just
9 a second.

10 I believe I have touched on each of the
11 arguments that I wanted to make, and I appreciate the
12 Court hearing my argument.

13 THE COURT: All right. Mr. Andrew or
14 Mr. Anderson.

15 MR. ANDREW: Your Honor, this is Mr. Andrew. I
16 guess I will take these up probably in the reverse
17 order that Mr. Nevin did. And obviously I have
18 briefed it, so I don't want to belabor the point.

19 With regard to whether or not the prosecuting
20 attorney of the county of conviction is required to
21 get or apply for the Death Warrant, the statute now
22 says the State. And it used to say the prosecuting
23 attorney. So there's got to be an explanation to
24 that. I think the explanation is that the Attorney
25 General's Office is the one who ends up handling

1 federal habeas corpus proceedings, which is usually
2 what causes and has traditionally caused the delay in
3 carrying out an execution.

4 I'm familiar with the case that Mr. Nevin talks
5 about involving Gara Newman, who was the prosecuting
6 attorney in Rupert, in Minidoka County. And
7 Attorney General Lance decided he was going to go take
8 over a murder case in that county and basically
9 decided he was going to appoint his office and take
10 over the case, and that ended up in a lawsuit in front
11 of the Idaho Supreme Court, in which the Idaho Supreme
12 Court said the prosecutory authority lies in the
13 county prosecutor, not the Attorney General's Office,
14 unless the Attorney General's Office is requested to
15 participate.

16 I have always taken that, Your Honor, in
17 conjunction with the other duties the Attorney
18 General's Office has, that the responsibility of the
19 county prosecuting attorney is with regard to
20 prosecuting the case, trying it, going through
21 sentencing. It has everything but the judgment of
22 conviction. Once the judgment of conviction is
23 entered, all those acts beyond that have been the
24 traditional function of the Attorney General's Office;
25 an appeal, those sorts of things. We do deal with the

1 postconviction matter, but this warrant has to do with
2 carrying out the sentence of death, and it's a
3 ministerial act. It doesn't require any discretionary
4 matter on behalf of a prosecuting attorney about
5 whether it gets issued or not. It's required to be
6 issued. The State, in that sense, in carrying it out,
7 in carrying out a death sentence, includes a lot of
8 different players, and we all have roles to take and
9 to fill, starting with the prosecutor. It can be the
10 Attorney General's Office. It's the judge, and it's
11 the Department of Correction. I think the statute
12 says the State. And there is no reason why a
13 representative of the State, whether it's from the
14 Attorney General's Office or someone from the
15 Department of Correction, can't come over and request
16 the warrant. The Department of Correction has some
17 concerns because they are the ones that are
18 responsible for scheduling; you know, having a date,
19 making people available. And the Attorney General's
20 Office has somebody assigned to the Department of
21 Correction. So it makes sense to have the Attorney
22 General's Office handling the warrant, doing those --
23 taking those sorts of measures. And they also have
24 the ability to take it right back to the Department of
25 Correction to the director after it's been issued, as

1 opposed to me, who would have to make some other
2 provision to transport it over there. So the way it
3 was handled by Mr. Anderson makes perfect sense to me
4 both practically speaking and statute speaking.

5 With respect to Rule 38, Your Honor, that rule
6 does not provide for the granting of a motion to quash
7 a warrant. It addresses a stay of execution, and I
8 don't think the Court, the Supreme Court, intended
9 that to be read outside of what the Legislature
10 provided in Title 19. There are very specific
11 procedures in Idaho governing death sentences; how
12 they're appealed, their postconviction rights, and
13 the stays. And all of those are found in the same
14 chapter.

15 This particular code or this particular rule,
16 Rule 38(a), references an appeal and a review, which
17 is exactly what the statute on postconviction remedies
18 for death penalties talks about. It makes a reference
19 to the automatic review that's supposed to be done by
20 the Supreme Court regardless of whether an appeal
21 takes place or not. There is no reason to believe
22 that the Idaho Supreme Court wanted to go beyond what
23 the Legislature set out. There's two postconviction
24 remedies. Have an appeal. You can have a
25 postconviction in that statute and you can appeal from

1 that, and there is an automatic review. There is no
2 reason to believe it went beyond that.

3 There are obviously practical problems with
4 what is suggested in reading any review. Because if
5 it's a federal -- if it's a federal case, the Court
6 has the District Court. The State District Court
7 would have to be advised of that. And it's
8 impractical to think the Court is going to be aware of
9 everything that gets filed.

10 I know, because I was present, that Paul
11 Rhoades' execution was delayed because someone decided
12 to file a motion that morning. And it was someone who
13 was disinterested in the proceeding, and it delayed
14 it. I don't think that's what the Supreme Court
15 intended. I think the Court, that Court has an
16 ability when it reviews that application to issue an
17 injunction, the same way the Federal Court has the
18 ability to issue an injunction. I don't think the
19 Idaho Supreme Court went beyond what's in Title 19.
20 I think it's, I'm sure, aware of the Federal Court's
21 authority to issue an injunction. If the Federal
22 Court believes there is merit that needs to be
23 explored in whatever is filed, then an injunction is
24 appropriate. I think the relief that Mr. Leavitt is
25 ultimately seeking in terms of not having a Death

1 Warrant issued, that relief needs to come from the
2 Federal Court, not by creating a procedure to quash a
3 ministerial act of the District -- the State District
4 Court.

5 With respect to the statute 19-2715,
6 Your Honor, the last subsection of that, it has to be
7 read in conjunction with all the other sections. In
8 this case, there has been a Death Warrant issued. It
9 was not carried out because of proceedings that were
10 taking place in State Court. No warrant was requested
11 subsequently because of issues or orders entered by
12 Judge Winmill. So that is why it has not taken place.

13 Those are the things that are contemplated in
14 subsections two and three. There is no other part of
15 the statute that would address the unexpected
16 circumstance, something that happens. The most
17 obvious things are something that happens during the
18 period of execution that caused the execution not to
19 occur, whether it's a problem with the machinery that
20 is used, whatever it is, a medical emergency,
21 whatever. There is no provision. If it's not the
22 last subsection of that statute, then one doesn't
23 exist to address it. And that makes sense, the
24 language that's in there, that the Court should be
25 exploring what exactly happened. Why didn't this get

1 carried out? So that it can make an appropriate
2 corrective measure, or those can be taken, and the
3 Court can reschedule it at a time that is appropriate
4 to address whatever occurred that stopped the
5 execution from occurring.

6 So, Your Honor, I think it was properly applied
7 for under the appropriate subsection of 2715. It
8 doesn't matter whether it's subsection two or
9 subsection three. And even if it was under subsection
10 four, the only thing that the Court should be looking
11 at is whether there is any legal justification for
12 stopping it or whether it's supposed to be issued and
13 it was. The appeal is final in State Court. He has
14 no more state remedies.

15 In the federal proceeding, there was a mandate
16 issued, and so for purposes of this Court the
17 proceeding is done. And so those are the only two
18 things the Court can inquire into. If there is a
19 motion filed, the remedy for stopping the execution
20 has to come from the Federal Court.

21 So I will leave it at that, Your Honor. Thank
22 you.

23 THE COURT: All right. Thank you.

24 Mr. Nevin?

25 MR. NEVIN: Your Honor, did you just call on

1 me?

2 THE COURT: Yes.

3 MR. NEVIN: Okay. I'm sorry. I didn't hear
4 the Court clearly.

5 Well, Your Honor, I think at least we
6 understand where we disagree. Mr. Andrew, I'm not
7 surprised to hear he's familiar with Newman v. Lance.
8 And there are a number of other decisions that talk
9 about the seriousness of the limitation of the right
10 to appear on behalf of the State being to the county
11 prosecuting attorney unless specific statutory hoops
12 are jumped through. And very clearly they haven't
13 been in this case. I think it's very simple. And I
14 understand the argument that we changed it from
15 prosecuting attorney to the State, but the State is
16 who represented the plaintiff in this criminal case
17 anyway.

18 Now you can look in the -- you can look for
19 something in the legislative history to say that it
20 was the intention of the Legislature to allow the
21 State to do this. You can say that it makes sense.
22 Although I suspect if we ask Mr. Anderson -- and
23 counsel makes this point about the practical matter of
24 getting the warrant out to the -- getting the warrant
25 out to the prison. And after all, Mr. Anderson is

1 here in Boise and so is the prison, and it just sort
2 of all follows. But I bet if we asked Mr. Anderson,
3 he will say he drove over to Idaho Falls and to
4 Blackfoot and got the warrant from the Court, and then
5 turned around and drove a conformed copy of it back
6 and delivered it to the prison. In other words, my
7 guess is he drove about the same number of miles that
8 Mr. Andrew would have had to have driven only just in
9 the opposite direction. There is really no practical
10 reason that Mr. Andrew couldn't have done this, none
11 at all.

12 And what we have here is the State asking you
13 to redraft this statute for them. And I say that
14 literally. The State is asking you to redraft the
15 statute. And I just -- you know, I'll have to admit.
16 I have asked courts to redraft statutes for me plenty
17 of times in the past, and the courts always say the
18 same thing. That's not why I'm here, Mr. Nevin. I
19 deal with the statute the way it's written. And, you
20 know, I've sort of grudgingly come to accept that over
21 the years that that's the way it is. But now the
22 State is asking you to do the same thing, and I hope
23 the Court will decline to do it, just as is the normal
24 limitation on the Court's power to rewrite actions or
25 statutes that the Legislature has passed.

1 And the same is true with respect to Rule
2 38(a), Your Honor. I know what the code sections say,
3 but Rule 38 doesn't -- does not reference those. It
4 doesn't say, appeal a review as provided for by Idaho
5 Code Section such and such and so and so. And that
6 doesn't even require -- the rule doesn't even require
7 an act of the Legislature. That's just simply a
8 matter of the Supreme Court committee changing the
9 language. That rule also means what it says, and it
10 governs to the extent of a conflict with the statute
11 in procedural matters.

12 Now I don't know if the State is going to tell
13 you that it thinks that these are substantive as
14 opposed to procedure matters, but my guess is they
15 won't make that argument to you. This rule means what
16 it says, and it governs this situation, pure and
17 simple. And I think Mr. Andrew puts the best face on
18 it, and I respect him obviously for doing that, but
19 it's really nothing more than that. It doesn't change
20 the substance of it.

21 Finally with respect to 2715, again, I have
22 listened for the argument. The statute simply says
23 that -- you know, we do not have a situation where a
24 stay was entered by a Federal Court. So lets just
25 read 19-2715(1): Hereafter, no further stays of

1 execution shall be granted to persons sentenced to
2 death except as follows -- except, excuse me, that a
3 stay of execution shall be granted during an appeal
4 taken pursuant 2719. That's over. During the
5 automatic review of judgments imposing the punishment
6 of death provided by 2827. That's complete. Or by
7 order of a Federal Court or as part of a commutation
8 proceeding. And no Federal Court has issued a stay.
9 The Commission of Pardons and Parole has not issued a
10 stay. Nothing under subsection one was in place on
11 May the 17th, when Mr. Anderson came to the Court and
12 asked for a Death Warrant. None of those things were
13 present. And I don't hear anybody saying that they
14 were; but, nonetheless, they're saying, look at
15 subsection two or subsection three.

16 Subsection three says, if a stay of execution
17 is granted pursuant to subsection one of this section
18 and therefore no execution has taken place, do the
19 following. Well, that didn't happen. I don't know
20 what -- I don't know what else I should say about it.
21 We're under subsection four where, for a reason other
22 than those set forth in subsection one, a judgment of
23 death has not been executed. In that situation, the
24 Court is empowered to call for a -- and I -- honestly,
25 within one sentence, I think there is contradiction

1 because it says, the District Court may inquire into
2 the facts. And then it says, and if no legal reason
3 exists against the execution of the judgment must make
4 an order.

5 Well, how would the Court determine whether or
6 not there was a legal reason against execution of the
7 judgment if it didn't inquire? And, you know, if you
8 read the State's -- if you take the State's reading of
9 this, they could have come to you -- not that they
10 would have done this, but they could have come to you
11 and asked for a warrant to execute Richard B. Leavitt,
12 instead of Richard A. Leavitt. And they could have
13 said, on May the 17th, we would like to execute him
14 on May the 18th. And according to their reading,
15 there wouldn't be anything that anybody could do about
16 it, including Richard B. Leavitt, even though it was a
17 mistake. There would be no way for the Court to hear
18 anything in this regard, nothing. It's because all
19 the Court is going to do is sign the warrant, period.
20 Well, that's not right. That's not the law. That's
21 not what subsection four says, and that really --
22 again, that cannot be right. And that's why we filed
23 our motion to quash.

24 And, yes, Rule 38 is not -- doesn't refer to a
25 motion to quash, but it does say when a warrant should

1 or should not issue. And under Rule 38, this one
2 shouldn't have. And the remedy for avoiding the
3 operation of the warrant that shouldn't have issued is
4 to quash it. That's our motion, and that's what we
5 ask the Court to do.

6 THE COURT: All right. Thank you.

7 Well, I would note for the record that the
8 arguments that are made here today are the same ones
9 that have been raised previously in the court with
10 regard to the defendant's motion to be heard with
11 regard to the Death Warrant and the motion to
12 reconsider that, both of which are on appeal to the
13 Supreme Court.

14 When Mr. Nevin sent his briefs to me yesterday,
15 he acknowledged that these issues that are presented
16 today are identical to the issues that are already
17 pending before the Idaho Supreme Court in that appeal;
18 and, hence, he tendered the briefs from the Appellate
19 Court, rather than present new briefs. And that's
20 fine. And I think we all recognize what the point of
21 argument is here.

22 I think the key to understanding this issue is
23 the language in Idaho Code Section 19-2715 and how
24 that is to be applied. As I understand that statute,
25 once a mandate, which we have here, is submitted, then

1 I have certain duties.

2 Now just for background, we acknowledge that
3 Judge Winmill, in the Federal Case -- I had that
4 before me a minute ago. It's Federal Case No.
5 CV-93-24-S-BLW, in the District Court for the
6 District of Idaho. In an order dated September 28,
7 2007, Judge Winmill enjoined the execution. That
8 matter was appealed to the Ninth Circuit. The
9 Ninth Circuit, in its opinion, reversed Judge Winmill.
10 So at that point, implicitly, the injunction was
11 dissolved. The matter was then appealed to the
12 United States Supreme Court prior to its mandate back
13 to the District Court from the Ninth Circuit. And
14 from my view at that point there is an implicit stay
15 in place pursuant to the federal appeal.

16 That came back on the 15th of -- or at least on
17 the 15th of May, if I recall my dates correctly, the
18 Supreme Court denied cert. It came back to the -- it
19 would be the 14th; was it not? The 14th it was denied
20 cert. It came back to the Ninth Circuit, who issued
21 its mandate on the 16th. This Court signed the
22 warrant on the 17th.

23 Now 2715 specifically -- I think it has to be
24 read in light of that last paragraph, subsection five,
25 which says, an action of the District Court under this

1 section is ministerial only. The entire section is
2 ministerial only. And no hearing shall be required
3 for setting a new execution date, and the Court shall
4 inquire only into the fact of an existing death
5 sentence and the absence of a valid stay of execution.

6 My view of the term stay of execution in that
7 paragraph, or in that subsection and then in the
8 entire section, is that it has to be read broadly to
9 include any manner of interfering with the execution
10 of the warrant, including the federal injunction. And
11 it limits my inquiry.

12 Now in subsection four, I am also allowed to
13 inquire. But if I read that within the parameter of
14 five, I still don't hold a hearing. I just make
15 whatever necessary inquiry I need to make.

16 Now Mr. Nevin says that violates due process.
17 But in my view, due process has been had in this case,
18 and this is the point at which the ministerial act of
19 the execution of the warrant or the signing of the
20 warrant takes place, which does not involve a due
21 process threshold and does not require any chance to
22 be heard in regard thereto.

23 Now go back to subsection two. It says, upon
24 remittitur or mandate, after a sentence of death has
25 been affirmed, the State shall apply for a warrant.

1 Now in this case, the sentence of death was
2 affirmed sometime ago, but these intermittent
3 ancillary appeals were had, and we are at the point
4 where there is no further recourse except for the one
5 that Mr. Nevin says he is taking in the Federal Court
6 on the 60(b) motion.

7 In my view, if the Federal Court feels that
8 that's a substantive point that needs to be addressed,
9 the Federal Court can grant either an injunction or a
10 stay, and we will take time to have that heard, but I
11 don't think that I have authority to do that.

12 As to the application of the Rule 38 of the
13 Idaho Criminal Rules, I have difficulty reading that
14 in light of the statutes as meaning anything but the
15 direct appeal or review that is provided for in Idaho
16 Code Section 19-2827. If there were an automatic stay
17 under Criminal Rule 38(a) as to any consideration in
18 any court in the land, why would it be necessary for
19 the Federal Court to issue a stay or injunction at
20 all? It would simply be stayed. But that's not the
21 case. That's not how it works.

22 In addition to that, 38(a) only applies to an
23 appeal or review of the death sentence. That has been
24 taken care of years ago, and these other issues are
25 collateral issues of habeas corpus or other matters

1 that the courts have been addressing for the last
2 20 years.

3 So I simply don't -- I cannot read Rule 38(a)
4 as to apply beyond the provisions in the statute. And
5 as we now have Idaho Code Section 19-2715, it
6 explicitly acknowledges the Idaho appeals and then
7 the federal processes that can take place, and
8 acknowledges the right of the Federal Court to issue
9 its stay.

10 Now as to the transcript of the signing of the
11 warrant, as I said, the statute does not require me to
12 convene a hearing. It merely requires the
13 presentation of the warrant, determination by the
14 Court on its own of whether or not there is a valid
15 death sentence and whether or not there is any valid
16 stay. I did that. I was following the case
17 carefully. I am familiar with the case. I have dealt
18 with the postconviction issues, and I feel like I had
19 a good view of what was going on. There was no
20 discussion other than some chitchat with Mr. Anderson,
21 and I signed the warrant. There was no hearing.
22 There was nothing to record.

23 As to the authority of Mr. Anderson to appear,
24 in Idaho there is an automatic review, as we have
25 referenced in Idaho Code Section 19-2719. At that

1 point, the Attorney General gets engaged in the case
2 and follows it through that process and through the
3 postconviction -- or the federal habeas process. And
4 it was for that reason, and that reason alone, that I
5 can conceive that the Legislature chose to change the
6 language in the statute to provide that the State, or
7 any legal officer of the State, in my inference, could
8 ask for the Death Warrant, as opposed to restricting
9 that to the prosecuting attorney in the county in
10 which the conviction was had.

11 In every death case that I have observed over
12 the last 20 years, that's the process that has
13 occurred, that the Attorney General has a unit that
14 gets involved and it becomes a specialist, just as
15 there are groups like Mr. Nevin, who become involved
16 and are specialists. And we very much appreciate that
17 level of expertise, and it makes sense that that's
18 what the Legislature intended when they changed the
19 statute. So I see no difficulty in that regard
20 whatsoever. The Supreme Court can review that, and I
21 assume that they will.

22 So based upon those considerations, the Court
23 will find that there is no basis for me to quash the
24 warrant here. I believe it was legally entered and
25 that there is no reason why it should be interfered

1 with at least by this Court. I have no jurisdiction
2 to do anything else, as I have indicated. If there is
3 to be any collateral review, it must be either done in
4 the State Court in Boise, I would assume, a state
5 habeas proceeding, or in the Federal Court in a habeas
6 proceeding, or something ancillary to that. I don't
7 have jurisdiction once the case goes -- once the Death
8 Warrant -- or, excuse me, once the judgment of
9 conviction is entered, other than to deal with the
10 postconviction, which we have dealt with. And that's
11 done. And to issue the warrant.

12 So the motion to quash will be denied. I will
13 enter an order to that effect with this hearing, and
14 the record of this hearing will stand as my findings
15 in that regard.

16 Anything else at this time, gentlemen?

17 MR. ANDREW: This is Mr. Andrew. No,
18 Your Honor.

19 THE COURT: Mr. Nevin?

20 MR. NEVIN: No, Your Honor. David Nevin, on
21 behalf of Mr. Leavitt.

22 THE COURT: All right. Thank you. We shall be
23 adjourned.

24
25 (Proceedings Concluded)