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IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE VERIFIED COMPLAINT AND ALTERNATE WRIT AND REQUEST FOR STAY OF EXECUTION	SUPREME COURT NO. 40021-2012
RICHARD H. LEAVITT, Petitioner, vs. **OLIVIA CRAVEN, ET AL.,** Respondents.	**RESPONDENTS' RESPONSE TO PETITIONER'S VERIFIED COMPLAINT FOR WRIT OF MANDAMUS AND ALTERNATE WRIT FOR STAY OF EXECUTION**

COMES NOW the Respondents[1], Olivia Craven, Janie Dressen, Norman Langarek II, Mike H. Matthews and Gary Scheihing (hereinafter collectively "Respondents"), by and through

[1] Petitioner erroneously names Mark Funaiole and Bill Young as Respondents. These individuals are no longer on the Idaho Commission of Pardons and Parole and did not participate in the Commission's consideration of Petitioner's commutation petition.

their counsel, and hereby file Respondents' Response to Petitioner's Verified Complaint for Writ of Mandamus and Alternate Writ and Request for Stay of Execution ("Verified Complaint").

INTRODUCTION

On May 17, 2012, the State obtained a death warrant for the execution of Leavitt. Verified Complaint, Ex. A. Leavitt filed a petition for commutation on May 25, 2012 with the Commission. *Id.* at Ex. B. On June 5, 2012, in executive session, the Idaho Commission of Pardons and Parole (hereinafter "Commission") conducted deliberations and made a determination to recommend to the Governor denial of Leavitt's commutation petition. On June 6, 2012, Leavitt's counsel was notified by e-mail of the Commission's recommendation to the Governor. Thereafter Leavitt filed his Verified Complaint alleging he has been denied due process.

ARGUMENT

A. GENERAL STANDARDS OF LAW REGARDING A WRIT OF MANDAMUS

"Idaho Code § 7-302 authorizes courts to issue writs of mandate against those that have a duty resulting from an office, trust, or station. A party seeking a writ of mandate must establish 'a clear legal right to the relief sought.'" *Total Success Investments, LLC v. Ada County Highway Dist.* 148 Idaho 688, 691, 227 P.3d 942 (2010) (quoting *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704 (1997)). "'A writ of mandamus will lie if the officer against whom the writ is brought has a **clear legal duty to perform** and if the desired act sought to be compelled is ministerial or executive in nature, and does not require the exercise of discretion.'" *Almgren v. Idaho Dept. of Lands*, 136 Idaho 180, 183, 30 P.3d 958 (2001) (emphasis added) (quoting *Cowles Pub. Co. v. Magistrate Court*, 118 Idaho 753, 760 P.2d 640 (1990)).

"Additionally, the writ will not issue where the petitioner has a 'plain, speedy and adequate remedy in the ordinary course of law.'" *Id.* (quoting I.C. § 7-303).

B. LEAVITT HAS FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS FOR ISSUANCE OF AN EXTRAORDINARY WRIT

Idaho Appellate Rule 5(b) governs the content of a special writ, and states in relevant part, "Special writs shall issue only upon petitions verified by the party beneficially interested therein and upon briefs in support thereof filed with the Clerk of the Supreme Court...." While Leavitt's Petition is verified by his attorney, David Nevin, it has not been verified by Leavitt. Rule 5(b) expressly requires that the Petition be verified "by the party beneficially interested therein." Because Nevin is not the "party beneficially interested therein," Leavitt has failed to comply with the dictates of I.A.R. 5(b) requiring that this Court deny any requested relief.

C. LEAVITT FAILS TO SATISFY THE REQUIREMENT FOR A WRIT OF MANDAMUS

Even if this Court concludes Leavitt has complied with the relevant procedural rules, Leavitt's request for relief should still be denied because the Commission acted within its discretion and Leavitt has an adequate remedy at law.

It is well settled that "'[a] writ of mandamus will lie if the officer against whom the writ is brought has a **clear legal duty to perform** and if the desired act sought to be compelled is ministerial or executive in nature, and does not require the exercise of discretion.'" *Almgren v. Idaho Dept. of Lands*, 136 Idaho 180, 183, 30 P.3d 958 (2001) (emphasis added) (quoting *Cowles Pub. Co. v. Magistrate Court*, 118 Idaho 753, 760 P.2d 640 (1990)). As clearly established throughout this response, and as acknowledged by Leavitt, the decision to grant a commutation hearing is a matter of discretion with the Parole Commission. "The commission has the ability to be selective about which applications it hears and, indeed, may summarily

refuse to hear applications that, in its discretion, are determined to be unworthy of review." Idaho Att'y Gen. Opinion, 94-3. Therefore, as a matter of law, Leavitt seeks a remedy that is unavailable.

Likewise, a writ will not issue where there is a "plain, speedy, and adequate" remedy at law. Idaho Code § 7-303; *Almgren v. Idaho Dept. of Lands*, 136 Idaho 180, 183, 30 P.3d 958 (2001). In this case Leavitt repeatedly attacks the Commission's failure to provide him with a hearing on his commutation petition in compliance with Idaho's Open Meeting Law. *See Brief in Support of Petition for Writ of Mandamus,* pp. 4-5 (citing Idaho Code §§ 67-2341, 67-2342, 67-2345). Pursuant to Idaho Code § 67-2347(6), "[a]ny person affected by a violation of the provisions of this act may commence a civil action in the magistrate division of the district court of the county in which the public agency ordinarily meets, for the purpose of requiring compliance with provisions of this act." Thus, it is clear that Leavitt has a remedy at law to challenge the Commission's alleged failure to comply with an open hearing. Because Leavitt has an adequate remedy at law, his request for a writ of mandamus fails as a matter of law and should be denied by the Court.

D. THIS COURT SHOULD DENY LEAVITT'S REQUEST FOR THE EXTRAORDINARY REMEDY OF A WRIT GIVEN HIS FAILURE TO SEEK COMMUTATION BEFORE THE ELEVENTH HOUR

A court will "'refuse to interfere where there has been gross laches in commencing the proper action, or long acquiescence in the assertion of adverse rights.'" *Abrams v. Porter*, 128 Idaho 869, 873, 920 P.2d 386, 390 (1996) (emphasis added), quoting *Johnson v. Strong Arm Reservoir Irrigation Dist.*, 82 Idaho 478, 487, 356 P.2d 67, 72 (1960). This equitable principle has been recognized in cases involving last minute requests designed to delay an execution. For example, in *Gomez v. U.S. Dist. Court for Northern Dist. Of California*, 503 U.S. 653 (1992), the

United States Supreme Court rejected a last minute request to stay an execution in conjunction with a legal challenge to the method of execution, holding:

> Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

(Citations omitted.) *See also Nooner v. Norris*, 491 F.3d 804, 808 (8th Cir. 2007) ("Once a state inmate's sentence of death has become final on direct review in the state's courts, there is no impediment to filing a § 1983 action challenging the constitutionality of a state's lethal injection protocol as long as lethal injection is the established method of execution [and] the protocol is known."); *Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006) ("[The condemned] is not entitled to equitable relief due to his dilatory filing.").

Leavitt's challenge to the Commission's action on his request for commutation is exactly the type of eleventh hour pursuit designed to delay his execution that does not warrant extraordinary relief from this Court or a stay of his execution.

Leavitt was originally sentenced to death in 1985. Although Leavitt's original death sentence was reversed, he again received the death penalty following subsequent proceedings and that sentence was affirmed by this Court and a death warrant issued in 1992. Leavitt was free to file a petition for commutation at any point during his incarceration. "The Commission may consider but one (1) application from any one (1) person in any twelve month period." IDAPA 50.01.01.450(d). Even calculating from the issuance of the death warrant in 1992, as opposed to the original judgment entered in 1985, Leavitt has had 20 years to file a commutation petition and raise any challenge he wished to the Commission's commutation procedures. Leavitt, however, waited until May 25, 2012, just 18 days prior to his scheduled execution, to

file his petition. "There is no good reason for this abusive delay," *Gomez*, *supra*, and this Court should reject Leavitt's request for a writ at this juncture.

E. LEAVIT HAS FAILED TO ESTABLISH A RIGHT TO DUE PROCESS IN THE COMMUTATION PROCESS

Leavitt filed his petition for commutation with the Commission on May 25, 2012 seeking: a full open hearing, notice of the time and place of all hearings and a recommendation to the Governor for a stay of execution during the Commission's consideration of his commutation petition. Verified Complaint, Ex. B. Because Leavitt has no right to due process in the commutation process, his claims fail as a matter of law. Furthermore, the actions by the Commission were done in compliance with state law and were constitutionally permissible.

1. Leavitt Has No Constitutional Right To Due Process In A Commutation Proceeding

In an opinion by the Idaho Attorney General's Office in 1994 the discretion afforded the Commission was discussed as follows:

> There is no explicit right to or liberty interest in clemency created either by art. 4, § 7, or Idaho Code §§ 20-213 or 20-233.
>
> This being so, the next step is to look to the implementing legislation to see if the state has somehow created a liberty interest through "substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L. Ed. 2d 813 (1983). "The search is for *relevant* mandatory language that expressly requires the decision-maker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 464, n.4, 109 S.Ct. 1904, 1910, n.4, 104 L. Ed. 2d 506 (1989).
>
> Reviewing the Idaho Constitution and Idaho Code § 20-213, as well as section 50.08 of the Policy and Procedures of the Idaho Commission for Pardons and Parole, one finds nothing that "expressly" requires anything of the commission that could be considered a limitation on its discretion. Indeed, no limitations are even implied. In truth, Idaho law only creates a "unilateral hope," which affords no due process protection. *Connecticut Boards of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 2465, 69 L. Ed. 2d 158 (9181) (the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or entitlement).

Idaho Att'y Gen. Opinion 94-3[2]. "The commission has the ability to be selective about which applications it hears and, indeed, may summarily refuse to hear applications that, in its discretion, are determined to be unworthy of review." *Id.*

In *Connecticut Board of Pardons, et. al, v. Dumschat, et. al.*, 452 U.S. 458, 101 S. Ct. 2460 (1981), Dumschat applied for a commutation of his sentence on several occasions prior to filing suit. 452 U.S. at 461. The Board of Pardons rejected Dumschat's application without explanation. *Id.* Dumschat filed a § 1983 action alleging his right to due process under the Fourteenth Amendment had been violated. *Id.* Connecticut's statutes provide neither a presumption in favor of pardon nor a list of factors to be considered. *Id.* at 462. The Board is granted unfettered discretion in the exercise of its power. *Id.* The court in Connecticut relied on the *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), which states "unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id.* at 464; Cf. *Meachum v. Fano*, supra, at 225, 96 S. Ct. at 2538. A commutation decision shares some of the same characteristics as a decision whether to grant parole. *Id.*; See *Greenholtz*, 442 U.S., at 9-10, 99 S.Ct., at 2104-2105. "Far from supporting an 'entitlement,' *Greenholtz* therefore compels the conclusion that an inmate has 'no constitutional or inherent right' to commutation of his sentence." *Id.*

> The petition in each case is nothing more than an appeal for clemency. See *Schlick v. Reed*, 419 U.S. 256, 260-66, 95 S.Ct. 379, 382, 385, 42 L.Ed.2d 430 (1974). In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is not more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope. *Greenholtz, supra*, at 11, 99 S.Ct., at 2106, see *Leis v. Flynt*, 439 U.S., at 443-444,

[2] Attached hereto.

> 99 S.Ct., at 701-702. A constitutional entitlement cannot "be created-as if by estoppels-merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past." *Id.*, at 444, n.5, 99 S.Ct., at 701-702, n. 5. No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution. The ground for constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency.

Id. at 456. The Connecticut commutation statute provides for no definitions, no criteria and no mandated "shalls" and therefore created no analogous duty or constitutional entitlement. *Id.* at 466. The power vested in the Connecticut Board to commute sentences "conferred no rights on respondents beyond the right to seek commutation." *Id.* at 467.

In *Baze v. Thompson*, 302 S.W.3d 57 (Ky. 2010), Baze argued he was denied due process in preparation of his petition for clemency when he was denied access to interview guards and inmates. Baze relied on *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) holding "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Baze*, 302 S.W.3d at 58; citing *Woodard*, 523 US, at 276, 118 S.Ct. 1244 (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981). "While the court agreed that a clemency *decision* is not subject to judicial review, it was divided as to whether any level of due process attached to the clemency *procedure*." *Id.* Thus, accepting the Court's narrowest majority holding, some minimal level of procedural due process applied to clemency proceedings." *Id.*; (citations omitted). This minimal application requires only that a death row prisoner receive the clemency procedures explicitly set forth by state law." *Id.*; (citations omitted). In Kentucky "no [clemency] procedures are even arguably mandated." *Id.* at 60. In *Baze,* the court found Baze failed to show that he did not receive the clemency procedures explicitly set forth by Kentucky law. *Id.* Kentucky only mandates the filing of an application and the Governor file a statement

of the reasons for his decision. *Id.* There are no other constitutional provisions or statutes establishing specific procedures. *Id.* The decision to grant clemency is left to the unfettered discretion of the Governor. *Id.*

Similar to the foregoing authorities, Leavitt has no right to commutation under Idaho law. Idaho Att'y Gen. Opinion 94-3. There is no mandatory language in the statutes which create a liberty interest in commutation. Even assuming, as in *Baze*, that Leavitt be afforded any kind of process set forth by statute, the only process he would be due is an open hearing and published notice of the hearing, only upon the Commission making a recommendation to the Governor to grant the commutation petition. "The granting of a commutation hearing shall not be interpreted as intent to commute a sentence." IDAPA 50.01.01.450.03(b). Otherwise, the Commission is left with the unfettered discretion to grant or deny a hearing. The Commission has no authority to grant or deny the commutation petition for murder and there are no mandatory provisions to be exercised by the Commission in the commutation process. Therefore, because Leavitt does not have a liberty interest in a commutation, the decision not to provide him with an open hearing does not violate any alleged due process rights.

2. The Commission's Legal Authority In Commutation Proceedings

In 1947 the Commission was granted the power to grant commutations and pardons "in all cases against the state except treason or conviction on impeachment." Idaho Constitution, Art. 4, § 7 (1947). Idaho Code § 20-213 was implemented and set up the notification procedures if applications for commutations were scheduled to be heard. Idaho Att'y Gen. Opinion 94-3. In 1986 the legislature passed Senate Joint Resolution No. 107 which proposed a constitutional amendment to art. 4, § 7. *Id.* The resolution provided that the Commission's power to pardon

and commute would be as provided by statute. *Id.* In November 1986 the proposed resolution was ratified by the citizens of Idaho. *Id.*

Art. 4, §7, as written and amended provides in part:

> Such board as may hereafter be created or provided by legislative enactment shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have power to remit fines and forfeitures, and, only as provided by statute, to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment. The legislature shall by law prescribe the sessions of said board and the manner in which application shall be made, and regulated proceedings thereon, but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks. The proceedings and decision of the board shall be reduced to writing and with their reasons for their action in each case, and the dissent of any member who may disagree, signed by him, and filed, with all papers used upon the hearing, in the office of the secretary of state.

(Emphasis added).

In 1947 Idaho Code § 20-240 was enacted giving the governor the power to grant respites or reprieves in all cases. In 1988, Idaho Code § 20-240 was significantly amended to add a section specifically dealing with commutations. Idaho Code § 20-240 as amended provides in part:

> The commission shall have full and final authority to grant commutations and pardons except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances. The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons or commutations. With respect to commutations and pardons for the offenses named above, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor.

(Emphasis added). The amendment gave the Commission the power to commute and pardon in all except six classes of sentences.

In 1986, Idaho Code § 20-213A set forth that commutation deliberations and decisions may be made in executive session. Idaho Codes § 20-213A, states in part:

> (1) All meetings of the commission of pardons and parole shall be held in accordance with the open meeting law as provided in Chapter 23, Title 67, Idaho Code, except:
>
> (a) Deliberations and decisions concerning the granting, revoking, reinstating or refusing of paroles, or the granting or denying of pardons or commutations, may be made in executive session;

Pursuant to the Idaho Administrative Procedures Act (IDAPA) the Commission has enacted administrative rules. IDAPA 50.01.01, Rules of the Commission of Pardons and Parole. Section 450 of the Commission rules sets forth the commutation process for the Commission. IDAPA rules and regulations are traditionally afforded the same effect of law as statutes. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001).

A commutation petition may be considered by the Commission once every twelve (12) months. IDAPA 50.01.01.450.01(d). Petitions may be considered at any time by the Commission. IDAPA 50.01.01.450.01(e). "Review or deliberation on the petition by the Commission will be conducted in executive session. IDAPA 50.01.01.450.01(g). "The scheduling of a hearing is at the complete discretion of the Commission; if a commutation hearing is scheduled." IDAPA 50.01.01.450.02. "The Commission has full and final authority to grant commutations except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of a controlled substance." IDAPA 50.01.01.450.04 (Emphasis added). A decision with respect to a commutation petition for a murder conviction "shall constitute a recommendation only to the governor." IDAPA 50.01.01.450.04(a).

3. The Commission Has No Duty To Conduct An Open Hearing On Leavitt's Petition For Commutation, Nor Publish Notice Of A Hearing

Leavitt believes he has a right to have advance notice of a commutation hearing published in a newspaper of general circulation, once a week for four (4) weeks. Leavitt's belief is misplaced, however. The purpose of the four (4) week notice publication requirement prior to holding a commutation hearing is not to benefit the convicted offender, but instead is to provide notice to the public. A commutation, by definition, "is a process whereby clemency may be considered and granted to modify a sentence imposed by the sentencing jurisdiction." IDAPA 50.01.01.450. That is no small request. In effect, a commutation request seeks to undo or alter a criminal sentence that was judicially imposed by the State of Idaho. As such, it is imperative that the state of Idaho, i.e., the public, elected officials, the judiciary, and importantly crime victims, have notice of such a request. In fact, the notice provisions of Idaho Code § 20-213 state that "notice shall immediately, upon the first publication thereof, be mailed to each prosecuting attorney of any county from which any such person was committed ...." Additionally, Article I, Section 22 of the Idaho Constitution and Idaho Code § 19-5306 grant crime victims the right to participate in the judicial process, including the opportunity to be heard in proceedings affecting the offender's sentence. *See* Idaho Code § 19-5304(e)(i) (victim includes "the immediate family of the actual victim in homicide cases.") Therefore, the notice provisions related to a commutation petition are not intended to benefit the offender, but are to provide notice to the public. Accordingly, Leavitt's attempt to bootstrap the notice requirement into some type of right designed for his personal benefit is misplaced and without merit. Leavitt is not entitled to a commutation hearing, much less an open hearing and published notice, before the Commission.

The Idaho Constitution sets out that the delegated authority of the Commission to grant or deny a commutation is "only as provided by statute". Art. 4, § 7. "The scheduling of a hearing is at the complete discretion of the Commission, if a commutation hearing is scheduled." IDAPA 50.01.01.450.02. Leavitt himself concedes this point in his letter dated May 25, 2012. Verified Complaint, Ex. B, p.2. If the Commission elects to hold a hearing the Commission will determine the date, publish the notice in a newspaper of general circulation in Boise, once a week for four (4) consecutive weeks. IDAPA 50.01.01.450.02(a).

Leavitt was convicted of murder. Idaho Code § 20-240 sets forth the authority of the Commission in granting, denying and making recommendations with respect to commutations. There are six crimes listed in Idaho Code § 20-240 in which the Commission does not have the authority to grant or deny a commutation. Idaho Code § 20-240 states in part:

> The commission shall have full and final authority to grant commutations and pardons except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances. The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons or commutations. With respect to commutations and pardons for the offenses named above, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor.

(Emphasis added). Because Leavitt was convicted of murder, this is one of the offenses identified in Idaho Code § 20-240 in which the Commission has no authority to grant or deny a commutation petition. Idaho Code § 20-240 only grants the Commission the authority to make a recommendation to the Governor on his commutation petition because he was convicted of murder. The Commission made a recommendation to the Governor to deny the commutation petition. Since the recommendation was to deny the commutation petition, there was no need to

exercise the Commission's discretionary authority to grant an open hearing and publish notice for 4 consecutive weeks.

Had the Commission made a recommendation for commutation, the Idaho Constitution states "and no commutation or pardon granted, except by the decision of a majority of said board, after a full hearing in open session." At that point, the Commission would have been under a statutory obligation to provide for an open hearing and publish its notice as requested by Leavitt. Again, since the Commission made a recommendation for denial of the commutation petition, no hearing was granted.

4. The Decision Not To Grant A Hearing Did Not Violate The Open Meeting Law

Assuming that Leavitt is contending the Commission's decision whether to grant a hearing should have been done in an open meeting, there is no basis for this argument. I.C. § 20-213A specifically states: "deliberations and decision concerning the granting, revoking, reinstating or refusing of paroles, or the granting or denying of pardons or commutations, may be made in executive session." Idaho Code § 20-213A(1)(a) (Emphasis added). Despite the plain language of this section, Leavitt chooses to ignore it, instead arguing that under the Idaho Open Meeting Law, "[n]o executive session may be held for the purpose of taking any final action or making any final decision." Idaho Code § 67-2345(4). In making this argument, however, Leavitt disregards basic principles of statutory construction.

Idaho Code § 67-2345, provides for executive sessions in certain limited circumstances, including "[b]y the commission of pardons and parole, as provided by law." Idaho Code § 67-2345(1)(g) (emphasis added). The "as provided by law" language is in direct reference to Idaho Code § 20-213A, which expressly provides that "[d]eliberations and decisions concerning the granting, revoking, reinstating or refusing of paroles, or the granting or denying of pardons or

commutations, may be made in executive session." Idaho Code § 20-213A(1)(a) (emphasis added). It is a fundamental principle of statutory construction that "where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute." *State v. Barnes*, 133 Idaho 378, 382, 987 P.2d 290, 294 (1999) (citations omitted). Therefore, because Idaho Code § 20-213A specifically relates to executive sessions of the Parole Commission, it is controlling over the more general executive session provisions of Idaho Code § 67-2345, including subsection (4).

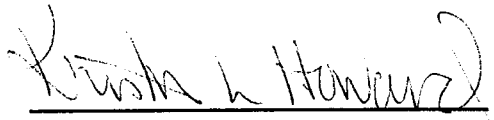
Furthermore, it is a "well-settled rule in Idaho that where an irreconcilable inconsistency exists between statutes *in pari materia,* the latest expression of the legislature will control." *Grand Canyon Dories v. Idaho State Tax Comm'n.*, 124 Idaho 1, 5, 855 P.2d 462, 466 (1993) (citation omitted). Idaho Code § 67-2345(4) was enacted in 1974 as part of the original open meeting statute. 1974 Idaho Sess. Laws, Ch. 187, § 6, p. 1492. Idaho Code § 20-213A was added by the Legislature as a new statute in 1986. 1986 Idaho Sess. Laws, Ch. 59, § 1, 167. Significantly, Idaho Code § 67-2345(1)(g) was added as part of the very same bill. *Id.*, § 2. Therefore, the inescapable conclusion is that the Legislature clearly intended for § 20-213A to authorize the Commission to deliberate and decide concerning commutations in executive session. Because § 20-213A was enacted after Idaho Code § 67-2345(4), it is controlling. Consequently, Leavitt's claim that any decision to grant a commutation hearing was required to be made in open session is without merit.

CONCLUSION

Based on the foregoing, the Respondents respectfully request that the Court deny the Petitioner's Verified Complaint for a Writ of Mandamus and Alternate Writ and Request For Stay of Execution.

DATED this 7th day of June, 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KRISTA L. HOWARD
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of June, 2012, I caused to be served a true and correct copy of the foregoing RESPONDENTS' RESPONSE TO PETITIONER'S VERIFIED COMPLAINT FOR WRIT OF MANDAMUS AND ALTERNATE WRIT AND REQUEST FOR STAY OF EXECUTION on the following persons:

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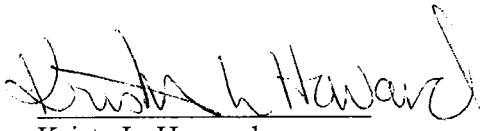

Krista L. Howard

ATTORNEY GENERAL OPINION NO. 94-3

To: Olivia Craven, Executive Director
Commission for Pardons and Parole
280 N. 8th Street, Suite 140
STATEHOUSE MAIL
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the Idaho Commission for Pardons and Parole commute a sentence during a fixed term under the Unified Sentencing Act?

CONCLUSION

The commission does have the power to commute a sentence during a fixed term.

ANALYSIS

In 1984, the attorney general issued an opinion stating that the Idaho Commission for Pardons and Parole had the power to commute fixed sentences under then existing law. 1984 Idaho Att'y Gen. Ann. Rpt. 75. The opinion was based in part on State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979), which held that then existing Idaho Code § 19-2513A (creating a fixed sentence structure) was intended solely to limit the commission's power of parole and did not restrict either the power of pardon or of commutation. This was so because the parole power is a creature of statute, whereas the power to pardon or commute was found in the Idaho Constitution as it then existed:

> [The commission], or a majority thereof, shall have power to grant commutations and pardons after conviction of a judgment, either absolutely or upon such conditions as they may impose in all cases against the state except treason or conviction on impeachment.

Art. 4, § 7 (1947). The statutory implementation of this section was Idaho Code § 20-213, which set up procedures for notification if applications for commutation were scheduled to be heard by the board.

In 1986, the legislature passed the Unified Sentencing Act. Idaho Code § 19-2513. In so doing, the legislature created a sentencing system whereby each convicted felon would be sentenced to a fixed term to be followed by an optional indeterminate

term. This system was created in large part because of the legislature's sense that there was little certainty in Idaho's sentencing and release process:

> There are two major policy justifications for this proposal. First, by making the minimum period fixed and not subject to reduction, greater truth in sentencing is achieved. At the time of sentencing everyone knows the minimum period which must be served. Second, greater sentencing flexibility is achieved. . . . The court can impart the specific amount of punishment it feels to be just and still impose an indeterminate period to be used by the Commission for Pardons and Parole for rehabilitation and parole purposes.

Statement of Purpose, H.B. 524 (1986).

Consonant with this intent, the legislature appears to have attempted to affect not only parole during the fixed term, but other methods whereby a felon could have his or her incarceration time reduced. Idaho Code § 19-2513 states in pertinent part:

> During a minimum term of confinement, the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct except for meritorious service.

The 1986 legislature also passed Senate Joint Resolution No. 107. That Resolution proposed a constitutional amendment to art. 4, § 7. The resolution provided in pertinent part that the board's power to pardon and commute would only be "as provided by statute." The Statement of Purpose to the resolution stated in its entirety:

> This legislation proposed [*sic*] to amend the Constitution of the State of Idaho by removing outdated language and provides that the power of the Board of Pardons to grant commutations and pardons after conviction and judgment shall be only as provided by statute.

The people of the state ratified the amendment in the election of November 1986. The Statement of Meaning and Purpose on the ballot forms from that election gives significant guidance as to the intent of the amendment:

> Meaning and Purpose. The purpose of this proposed amendment . . . is to remove from constitutional status the powers of commutation and pardon, which are held by the Board of Pardons, and to make the powers of commutation and pardon subject to amendment by statute by the Legislature.

> Effect of Adoption. Presently, the Board of Pardons has the constitutional powers of commutation and pardon. Because these powers are constitutional, they cannot be amended or changed by statutory enactment and are not subject to review. If SJR 107 is adopted, the commutation and pardon power will no longer have a constitutional status; they will be subject to amendment by statutory enactment. The Legislature would have the authority to set policies and procedures for commutations and pardons and could also review Board commutation and pardon decisions.

Assuming that the amendment transmuted the commission's power to commute from constitutional to statutory power, two questions remain: (1) Has the legislature passed any statute designed to regulate the previously unlimited power of the commission to commute any and all sentences? (2) Can the Unified Sentencing Act be interpreted to mean that the power to commute only exists for indeterminate sentences?

Idaho Code § 20-213, which merely sets up time and notification procedures for the commission regarding pardon or commutation proceedings, has remained unchanged. In 1988, the legislature passed a significant amendment to Idaho Code § 20-240. This section had previously dealt with respites, reprieves and pardons by the governor. The legislature added a section to the statute dealing with commutation:

> The commission shall have full and final authority to grant commutations and pardons except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances. The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons and commutations. With respect to commutations and pardons for the offenses named above, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor. No commutation or pardon for such named offenses shall be effective until presented to and approved by the governor. Any commutation or pardon recommendation not so approved within thirty (30) days of the commission's recommendation shall be deemed denied.

Plainly, the commission's power to commute is left unfettered in all except six classes of cases. Even as to those types of cases, no attempt has been made to limit the commission's discretion beyond the requirement for gubernatorial approval.

Can Idaho Code § 19-2513's prohibition against credit, discharge or reduction for good conduct be interpreted as such a limitation? Applying general rules of statutory construction, there are several reasons why this question must be answered in the negative. First, the statute doesn't mention commutation or pardon. Nor was commutation or pardon addressed in the act's statement of purpose. Generally, where a statute specifies certain things, the designation of such things excludes all others. Peck v. State, 63 Idaho 375, 120 P.2d 820 (1942).

In addition, when the legislature first passed Idaho Code § 19-2513, it had no power to affect commutations. That power would not come until the ratification of the amendment to art. 4, § 7. The legislature is presumed to have full knowledge of existing law when it enacts or amends a statute. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

Finally, the legislature gave full discretion over commutations to the commission two years after the passage of the Unified Sentencing Act. To the extent that the Sentencing Act can be argued to conflict with the unlimited power of the commission found in Idaho Code § 20-240, the later expression of legislative intent will control over the earlier. Union Pacific R. Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982).

Given all the above, the informal letter sent to the commission in 1992, which was based solely on an interpretation of the Unified Sentencing Act without regard to other statutory provisions, must be retracted. Because there are no legislative enactments that limit the power to commute, the commission may commute fixed term sentences in its discretion.

It has been suggested that an opinion regarding the power to commute as being unaffected by the Unified Sentencing Act would "open the floodgates" to scores of applications from prisoners serving fixed terms who would seek commutations as a substitute for parole hearings. In order to address this concern, it is necessary to begin with an understanding of the commutation power itself and compare it to the power to parole:

> Parole and commutation are mutually exclusive powers.
>
> The Constitution speaks only of commutations or pardons. These differ from paroles. A pardon does away with both the punishment and the effects of a finding of guilt. A commutation diminishes the severity of a sentence, e.g. shortens the term of punishment. A parole does neither of these things. A parole merely allows a convicted party to serve part of his

> sentence under conditions other than those of the penitentiary. The party is not "pardoned" of his guilt, nor is a portion of his sentence "commuted."

Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975). The Idaho statute on parole makes it explicit that parole shall not be granted "as a reward of clemency and it shall not be considered to be a reduction of sentence or pardon." Idaho Code § 20-223(c).

Parole in Idaho has been described as a "mere possibility" which is not protected by due process rights. Vittone v. State, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988). This is so because no substantive limitations are placed upon the commission's decision-making regarding parole by either the constitution or by statute. Similarly, the same description must apply to commutations.

There is no explicit right to or liberty interest in clemency created either by art. 4, § 7, or Idaho Code §§ 20-213 or 20-233.

This being so, the next step is to look to the implementing legislation to see if the state has somehow created a liberty interest through "substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747, 75 L. Ed. 2d 813 (1983). "The search is for *relevant* mandatory language that expressly requires the decision-maker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 464, n.4, 109 S. Ct. 1904, 1910, n.4, 104 L. Ed. 2d 506 (1989).

Reviewing the Idaho Constitution and Idaho Code § 20-213, as well as section 50.08 of the Policy and Procedures of the Idaho Commission for Pardons and Parole, one finds nothing that "expressly" requires anything of the commission that could be considered a limitation on its discretion. Indeed, no limitations are even implied. In truth, Idaho law only creates a "unilateral hope," which affords no due process protection. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S. Ct. 2460, 2465, 69 L. Ed. 2d 158 (1981) (the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or entitlement).

Hence, the commission need not fear that it would be hamstrung by commutation applications. The commission has the ability to be selective about which applications it hears and, indeed, may summarily refuse to hear applications that, in its discretion, are determined to be unworthy of review.

AUTHORITIES CONSIDERED

1. **Constitutions:**

Idaho Constitution, art. 4, § 7 (1947).

2. **Idaho Code:**

§ 19-2513.
§ 20-213.
§ 20-223.
§ 20-240.

3. **Idaho Cases:**

Peck v. State, 63 Idaho 375, 120 P.2d 820 (1942).

Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975).

State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979).

Union Pacific R. Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982).

Vittone v. State, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

4. **Other Cases:**

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

5. **Other Authorities:**

1984 Idaho Att'y Gen. Ann. Rpt. 75.

Idaho Commission for Pardons and Parole Policy and Procedures § 50.08.

Senate Joint Resolution No. 107.

Statement of Purpose, H.B. 524 (1986).

DATED this 6th day of July, 1994.

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