

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,

Petitioner,

v.

A.J. ARAVE, Warden, Idaho Maximum  
Security Institution,

Respondent.

Case No. 1:93-cv-0024-BLW

**ORDER**

**INTRODUCTION**

Before the Court is Petitioner's Emergency Motion for Access to Petitioner by Expert. (Dkt. 325.) Petitioner seeks an order requiring the Idaho Department of Correction (IDOC) to allow Dr. Charles Honts, a retained expert, to interview him as part of the development of Petitioner's application for commutation to the Idaho Commission of Pardons and Parole.<sup>1</sup>

According to Petitioner's counsel, the "Warden's Office" had previously agreed to allow Dr. Honts to visit Petitioner on May 18, 2012, at 1:00 p.m., but a representative of

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<sup>1</sup> Petitioner originally requested that the Court order the visit to occur as scheduled on May 18 at 1:00 p.m., but given the timing of the Motion – which was filed 30 minutes before the appointment – it was not possible for the Court to solicit a response from Respondent and render a decision before the appointment. Therefore, Petitioner's request for a May 18 visit has become moot, but the Court set an expedited briefing schedule on the question of whether Dr. Honts will be permitted access to Petitioner on some other date.

IDOC called counsel on May 17 to inform him that the visit would be cancelled because a death warrant had been issued for Petitioner that afternoon. (Dkt. 325-1, p. 4.) In objecting to Petitioner's Motion, Respondent contends that Idaho statute and IDOC policy prohibit contact visits between death sentenced prisoners and defense experts after a death warrant has been filed. (Dkt. 327, p. 4.)

The issue presented to the Court involves an apparent conflict between Petitioner's right to seek commutation under state law with the assistance of counsel and Idaho's rules governing access to a prisoner after a death warrant has been served. For the reasons that follow, the Court resolves that conflict in Petitioner's favor, and the Motion will be granted.

### **DISCUSSION**

Idaho law grants prisoners the right to submit a petition for commutation with the Commission of Pardons and Parole (the "Commission"). *See* Idaho Const. Art. IV, sec. 7 (granting the power of pardon and commutation to the board of pardons); Idaho Code § 20-240 (the Commission "shall conduct commutation and pardon proceedings"); Idaho Admin. P. Act ("IDAPA") 50.01.04 (establishing rules governing the consideration of commutation petitions and hearings). In any case in which the prisoner has been sentenced for murder, the Commission's decision constitutes a recommendation to the governor, who may grant or deny the recommendation. IDAPA 50.01.04(b). And although the Commission has the authority to conduct an independent investigation into a death sentenced prisoner's case, the prisoner or his legal counsel have the burden of

initiating the formal commutation process by filing a petition with the Commission.  
IDAPA 50.01.05(c).

In *Harbison v. Bell*, 556 U.S. 180, 194 (2009), the Supreme Court held that petitioners who are financially unable to obtain adequate representation in state clemency or commutation proceedings are entitled to the assistance of federally-funded counsel pursuant to 18 U.S.C. § 3599. Under § 3599(f), a court may also authorize investigative, expert, or other services “reasonably necessary” for the representation of the petitioner. This Court is unaware of any Idaho law or practice that provides for the appointment and funding of counsel for indigent petitioners in commutation matters. The Court therefore has concluded that Petitioner is entitled to reasonably necessary resources to assist his federally-appointed counsel in pursuing clemency relief. (Dkt. 316.) One funding request that the Court approved was for Dr. Honts, a psychologist, to conduct an examination of Petitioner. *Id.*

The crux of the parties’ disagreement arises from the limited access afforded to a prisoner under Idaho law after a death warrant has been issued. Specifically, Idaho Code § 19-2705(3) requires the Warden “to keep the condemned person in solitary confinement until execution,” and “[p]ersons under death warrant will be allowed contact with their attorneys of record and the agents of their attorneys of record. No other contact visits shall be permitted.” *Id.* The statute defines “agents of attorneys of record” to include “employees of the attorneys of record including investigators, paralegals, legal interns and mitigation specialists but does not include retained experts or other independent

contractors of the attorneys of record.” Idaho Code § 19-2705(5). IDOC’s written execution protocol appears to incorporate these limitations and definitions. *See* IDOC Standard Operating Procedure 135.02.01.001 (adopted January 6, 2012), p. 19.

Respondent has relied on these rules to cancel the previously scheduled appointment with Dr. Honts.

Under Idaho law, though, if a prisoner’s “attorney of record” employed an expert like Dr. Honts on his staff, that expert would be deemed an “agent” of the attorney and would be permitted access to the prisoner up to the date of execution. This Court doubts that there is a rational basis supporting the distinction that is drawn by Idaho law between an attorney’s “agent” and a consulting expert who has been retained by that same attorney to assist the defense team in an identical fashion, and Respondent has offered no explanation for that distinction. But the Court finds it unnecessary to make a broad ruling striking directly at Idaho statute and policy because it concludes that, under the unique facts and circumstances presented here, Petitioner’s right to due process of law will be violated unless IDOC allows this particular visit to occur. *See, e.g., Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring) (finding, by a plurality of justices on the narrowest grounds to support the judgment, that minimal due process safeguards apply to clemency proceedings as a means of preventing arbitrary decisionmaking).

The facts and circumstances leading to the Court’s conclusion are as follows.

Idaho law grants Petitioner the right to pursue clemency relief, and the Supreme Court has construed 18 U.S.C. § 3599 as authorizing federal funding for appointed counsel to develop state clemency petitions. This Court has found the services of Dr. Honts to be reasonably necessary for the development of Petitioner's state clemency petition, and state officials agreed to the visit without opposition before the death warrant was issued. While it is clear that IDOC's execution protocol contemplates a different status for a condemned prisoner whose execution date has been set, the visit in this case was scheduled to occur only one day after the warrant had been issued, nearly four weeks before the execution date. In fact, had the death warrant been signed and issued on the afternoon of the 18th instead of the afternoon of the 17th, apparently an arbitrary matter of timing, the scheduled visit would have proceeded without interruption. Undoubtedly, the State's interest in avoiding disruption, maintaining security, and preparing for an execution increases as the execution date nears, but because Dr. Honts is based in Boise, an interview can still take place nearly three weeks before the June 12 execution date. The State has offered no reason why this visit would prejudice its ability to prepare for Petitioner's execution or otherwise affect the execution date. Other deviations or disruptions closer to the scheduled date might call for a different conclusion.

Finally, Respondent contends that because Petitioner is challenging the legality of IDOC's execution protocol in a separate civil action, *see Creech et al. v. Reinke, et al*, 1:12-cv-00173-EJL, "the state is unwilling to deviate from the protocol unless, of course,

the Court orders otherwise.” (Dkt. 327, p. 5.) The Court is confident that a minor deviation that is granted *at Petitioner’s request* relatively early in the process, and which has no other apparent relation to the implementation of the lethal injection protocol, would not support his claims against the IDOC in that case.

For these reasons, the Court will grant Petitioner’s Emergency Motion.

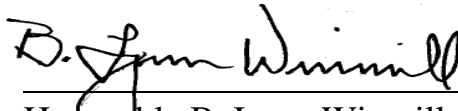
**ORDER**

**IT IS ORDERED** that Petitioner’s Emergency Motion for Access to Petitioner by Expert and for Order Shortening Time for Response (Dkt. 325) is GRANTED. The Warden shall allow Dr. Charles Honts access to interview Petitioner before May 25, 2012.

**IT IS FURTHER ORDERED** that Dr. Honts shall be accompanied by Petitioner’s counsel, and he shall be permitted to bring appropriate testing materials; namely an aluminum briefcase containing CPS instrument and attachments, a laptop computer, camera and power cord, a legal pad for notes, and such other incidental supplies that are needed for the testing. Respondent may take whatever other reasonable measures he deems necessary to ensure security.



DATED: May 21, 2012

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