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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,	)	
	)	CASE NO. CV-93-0024-S-BLW
Petitioner,	)	
	)	<b>CAPITAL CASE</b>
vs.	)	
	)	<b>REPLY IN SUPPORT OF</b>
A.J. ARAVE, Warden of the Idaho State	)	<b>EMERGENCY MOTION FOR</b>
Maximum Security Prison,	)	<b>ACCESS BY EXPERT TO</b>
	)	<b>PETITIONER</b>
Respondent.	)	
_____	)	

**1. Statement of Facts**

To briefly summarize recent proceedings, Mr. Leavitt was granted relief by this Court, which ordered a resentencing in 2007. Respondent was granted a stay of this Court’s order to pursue its appeal. The Ninth Circuit reversed this Court’s grant of relief in a 2-1 decision, over a strenuous dissent. Mr. Leavitt then filed a timely Petition for Writ of Certiorari in the United States Supreme Court.

On Monday, May 14, 2012, at approximately 8:00 a.m. mountain time, the Supreme Court issued its order denying certiorari. Mr. Leavitt's counsel immediately made arrangements with Dr. Charles Honts to conduct an examination of Mr. Leavitt. Dr. Honts was available on May 18, 2012, and the warden's office at the Idaho Maximum Security Institution confirmed that Mr. Leavitt would be made available for an interview to be conducted on that day at 1:00 p.m.

On May 15, 2012, Mr. Leavitt's counsel also filed a Notice of Demand to be Heard Regarding Issuance of Death Warrant in Mr. Leavitt's Bingham County cases, Nos. CR1985-4110 and CV2008-857. That Notice was served on the Attorney General and the Bingham County Prosecutor's Office.

On May, 16, 2012, at approximately 4:10 p.m. (MDT), the Ninth Circuit issued its Mandate.

Without notice, even informal notice, to Mr. Leavitt's counsel, the State, apparently represented by LaMont Anderson, Deputy Attorney General, appeared in district court in the chambers of Hon. Jon J. Shindurling, then sitting in Bonneville County in Idaho Falls, and obtained a Death Warrant, which was filed on May 17, 2012 at the hour of 11:28 a.m.

That warrant was not provided to counsel until 4:00 p.m. that day by the Clerk of the Idaho Supreme Court.<sup>1</sup> According to the Idaho Department of Corrections (IDOC) website, the warrant was served on Mr. Leavitt at 4:00 p.m. on May 17, 2012, and it is not disputed that Mr. Leavitt was then moved to separate housing.

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<sup>1</sup>Mr. Anderson's office had contacted counsel earlier in the afternoon to informally notify counsel that a death warrant had been issued that day.

On May 18, 2012, a representative of the IMSI Warden's office contacted Mr. Leavitt's counsel and informed him that the previously scheduled interview by Dr. Honts had to be canceled because of the service of the warrant the night before and the statutory scheme. Mr. Leavitt's emergency motion was then filed.

## 2. **Argument**

In its Response to Petitioner's Motion for Access, filed May 21, 2012 at 8:25 a.m. (hereafter Response), the State first argues that "[a]t the time Leavitt's death warrant was obtained, the state was unaware Dr. Honts had even been retained, let alone that an appointment had been made for him to interview Leavitt the following day," Response at p. 3. It is unclear who "the state" refers to; the warden's office at IMSI was fully aware of Dr. Honts and had approved his visit. While Respondent now argues that Dr. Honts should not have been permitted access to Mr. Leavitt "without a proper court order," Response at p. 4, it does not contest that an appointment for Dr. Honts had been arranged prior to the issuance of the death warrant, and should be barred from now asserting that IMSI's prior agreement was somehow invalid. More importantly, Mr. Leavitt is seeking the very court order which the State complains is necessary.

Thus, the State's sole argument now is that the statute prohibits contact between Mr. Leavitt and "a retained expert," even though a person employed by Mr. Leavitt's counsel, even an expert, may have continued contact with Mr. Leavitt up to the time of his execution. The State does not respond to the constitutional challenges to this policy raised by Mr. Leavitt in initial motion for access and he will not repeat those challenges here.

Next, the State argues that it does not want to deviate from its “Execution Protocol” because of the existing challenges now pending before this Court, citing the Ninth Circuit criticism of exercise of discretion given the Arizona courts in following its own execution protocols. However, the State concedes that Idaho will follow an order from this Court. Response at p. 5.

Finally, the State appears “concerned” about the timing of the expert. However, the request was timely made before the issuance of the warrant. The State has not shown how a maximum three hour interview one day after the issuance of the warrant and more than three weeks before the scheduled execution should be of any “concern” to the State. The only proper interest of the State in this process is fairness and accuracy: assuming, that is, that a person sentenced to death is accorded all the rights necessary to ensure that the sentence is correct and appropriate, including clemency and commutation.

### **3. Conclusion**

For these reasons, this Court should immediately issue an order permitting Dr. Honts to have access to Mr. Leavitt as early as this afternoon, and at a time consistent with Dr. Honts’s schedule.

DATED this 21<sup>st</sup> day of May, 2012.

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/s/  
David Z. Nevin

CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of May, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

\_\_\_\_\_/s/  
David Z. Nevin