IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. RICHARD A. LEAVITT, Defendant/Appellant.	)	Supreme Court No. 39941

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Seventh
Judicial District of the State of Idaho,
In and For the County of Bingham

HONORABLE JON J. SHINDURLING
Presiding Judge

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II. STATEMENT OF THE CASE

Appellant Richard A. Leavitt was convicted of murder in 1985 and sentenced to death by the trial court sitting without a jury. This Court affirmed his conviction but reversed the death sentence in 1989. *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989). After remand, the sentencing judge reimposed a sentence of death. On appeal, this Court affirmed the sentence. *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523, *cert. denied,* 506 U.S. 972 (1992).

The trial court issued a death warrant on February 5, 1992, setting the execution for February 28, 1992, and Mr. Leavitt's motion to stay that warrant was denied by this Court on February 13, 1992. On February 14, 1992, Mr. Leavitt requested a stay from the United States Supreme Court, which was granted on February 25, 1992. That stay by its own terms expired on the denial of certiorari on November 9, 1992. Thereafter, the State did not seek a new death warrant and no date for Mr. Leavitt's execution was set.

Mr. Leavitt thereafter filed a timely Petition for Writ of Habeas Corpus in the United States District Court on April 29, 1993. At that time, Mr. Leavitt filed no application for a stay of execution because the State did not seek the issuance of a new death warrant and there was no impending execution date to stay.

The State filed its answer to the habeas petition in the federal court and after extensive litigation, on December 14, 2000, Judge Winmill granted habeas relief because of a jury instruction, widely condemned, which instructed the jury that the requirement for proof beyond a reasonable doubt simply did not apply in the case of a person who was "guilty in fact," or "actually guilty." He ordered the State to retry Mr. Leavitt within 120 days.

The State filed an appeal and obtained a stay of Judge Winmill's order for relief.

Thereafter, the Ninth Circuit Court of Appeals reversed on the ground that federal courts were procedurally barred from granting relief on the erroneous instruction. The Court also remanded the matter to the district court to determine if there had been a Sixth Amendment violation at Mr. Leavitt's resentencing hearing in 1989.

Upon remand, Judge Winmill conducted a five day evidentiary hearing in 2007 and thereafter again granted habeas relief enjoining the State of Idaho from seeking a death sentence unless a new sentencing hearing was conducted. The State again appealed and was granted a stay of Judge Winmill's order for a new sentencing hearing. In 2011, the Ninth Circuit reversed the district court in a 2-1 decision. The United States Supreme Court denied Mr. Leavitt's Petition for Certiorari on May 14, 2012.

The Ninth Circuit issued the mandate to the United States District Court on May 16, 2012 at 4:09 p.m. MDT. Prior to the issuance of the mandate Mr. Leavitt filed a Motion for Reconsideration pursuant to Rule 60(b) in the federal district court. That motion is currently pending with the State scheduled to file a Response on May 23, 2012.

On May 15, 2012, Mr. Leavitt filed in the state district court a Notice of Demand for Opportunity to be Heard Regarding the Issuance of Death Warrant. On May 17, 2012, at 10:50 a.m., the district court denied that motion,[1] and almost immediately thereafter signed the death warrant, which was then filed in the Bingham County Court on May 17, 2012, at 11:28 a.m.

No record was made of the in-chambers proceedings regarding the denial of Mr. Leavitt's motion to be heard and the issuance of the death warrant. Counsel for Mr. Leavitt have been

[1]While Mr. Leavitt's case was charged and remains in Bingham County, the order denying the motion was filed in the chambers of Judge Shindurling in Idaho Falls, in Bonneville County.

informed that LaMont Anderson, Deputy Attorney General, met with Judge Shindurling, ex parte, in his chambers in Idaho Falls the morning of May 17, 2012. No representative of the Bingham County Prosecuting Attorney's Office was part of the in-chambers proceedings. Other than that fact, counsel for Mr. Leavitt have no knowledge of what transpired during that in-chambers, ex parte meeting between Mr. Anderson and the judge.

On May 18, 2012, Mr. Leavitt filed a Motion to Reconsider in the district court. On May 21, 2012, at 11:57 a.m., Judge Shindurling sent an email to the parties stating, "I will assume that the Motion to Reconsider as well as the Appeal will be heard in the Supreme Court. I have taken the position that I have done my ministerial duty with regard to the lifting of the federal stay and the issuance of the warrant, but have no jurisdiction to hear other matters. Those must be raised in the Supreme Court. If The Supreme Court wishes me to address the motion to reconsider before they address the case, please advise."

The parties are unaware whether the Supreme Court provided any such advice to Judge Shindurling, but in any event, later that day at 2:20 p.m., the Judge Shindurling issued an order denying the motion for reconsideration.

A timely Notice of Appeal was filed on May 21, 2012.

III. ISSUES PRESENTED ON APPEAL

1. Whether the ex parte issuance of a death warrant after a request by Defendant's counsel to be present and to be heard denies Defendant his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.
2. Whether the District Court failed to apply Idaho Code § 19-2715(4) in determining that he only had jurisdiction to sign the death warrant.
3. Whether a Deputy Attorney General who has not appeared in the case has authority to apply for a death warrant before the District Court.
4. Whether the issuance of the death warrant violated Idaho Criminal Rule 38(a) because review of the death sentence is still pending in United States District Court.
5. Whether the District Court erred in failing to make a verbatim transcript of the in-chambers proceedings in regard to the issuance of the death warrant.

IV. ARGUMENT

A. The Ex Parte Issuance of the Death Warrant Violated Mr. Leavitt's Constitutional Rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 1, § 13 of the Idaho Constitution

The District Court's issuance of the death warrant without providing Mr. Leavitt notice so that his counsel could appear and contest the issuance of the death warrant violated his constitutional rights to due process of law, his right to the representation of counsel, and his right against cruel and unusual punishment under the United States and Idaho Constitutions.

In capital cases, the courts give heightened scrutiny to the rights afforded all criminal defendants. *See*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985); *State v. Leavitt*, *supra*, 116 Idaho at 288. Under the applicable statute and court rules, Mr. Leavitt had a right to assure that the district court made the proper legal findings upon which a death warrant should issue.

Yet, in this matter, the district court in conjunction with the Attorney General's Office acted to deprive Mr. Leavitt of any input during the inquiry of whether to issue a death warrant. Because Mr. Leavitt and his counsel were barred from appearing at the proceeding where the warrant was issued, this Court must vacate the warrant and remand the case to the district court with instructions to permit counsel for Mr. Leavitt to be heard. Had counsel been permitted to address the court, they would have raised all of the specific issues addressed below which would have resulted in the district court's denial of the State's application for a warrant at this time and for the date now set.

B. The District Court Erred in Not Applying I.C.§ 19-2715(4) and Inquiring into Any Legal Reason Not to Execute the Judgment

The last death warrant in this case was issued in 1992, after completion of Mr. Leavitt's direct appeal before this Court. This Court denied Mr. Leavitt's motion for further stay of execution to permit him to file a Petition for Certiorari. Mr. Leavitt did obtain a stay from the United States Supreme Court which by its own terms expired automatically upon the denial of certiorari on November 9, 1992. After that stay expired, the State of Idaho did not seek a death warrant until this month on May 17, 2012.

During the ensuing twenty years after November 9, 1992, there was no stay of execution as defined by I.C. § 19-2715(6), which in relevant part defines "stay of execution" as a "temporary postponement of an execution as a result of a court order."[2] The sole court order related to Mr. Leavitt's death sentence was an order issued in 2007 by Judge Winmill which "enjoined [the State of Idaho] from carrying out a death sentence against [Mr. Leavitt] unless it initiates a new sentencing proceeding within 120 days of the date of this Judgment." *(Leavitt v. Arave*, No. CV-93-024-BLW, dated September 28, 2007.)

The procedural posture of this case falls squarely within the dictates of § 19-2715(4). After Judge Winmill's Judgment was reversed by the Ninth Circuit, the original *judgment of death* "remained in force" but "ha[d] not been executed." Thus, the district court was required to follow the procedures set forth in this subsection. The legislature established two distinct procedures for setting a new death warrant. Under basic principles of statutory interpretation, any other reading of this section of the statute would read it out of existence. Statutes must be

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[2] Indeed, in the Bill Title to the Act, one of the purposes is "to define a phrase." *See*, Senate Bill No. 1266, Sixty-First Legislature, Second Session, 2012.

read to give effect to every word, clause and sentence and courts must not construe a statute in a way which makes mere surplusage of its provisions. *See Wright v. Willer*, 111 Idaho 474, 7476, 25 P.2d 179, 181 (1986); *see also Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 116, 233 P.3d 38, 47 (2009) (courts will not construe a statute in a way which makes mere surplusage of provisions included therein); *Sweitzer v. Dean*, 118 Idaho 568, 571-72, 798 P.2d 27, 30-31 (1990) (same); *University of Utah Hospital and Medical Center v. Bethke*, 101 Idaho 245, 611 P.2d 1030 (1980) (same).

Since by the terms of the statute, the State had not sought a death warrant at any point since 1992, there was never a temporary stay of execution in existence and the district court was required to apply section (4) of the statute before issuing the warrant. While that section no longer requires that the defendant be brought before the Court, the Court is permitted to "inquire into the facts, and if no legal reason exists against the execution of the judgment, [it] must make an order that the warden execute the judgment at a specified time."

But in this case, the district court misinterpreted the statute and improperly applied the incorrect section. As a result, the district court felt compelled to simply sign a death warrant setting an execution date within thirty days pursuant to I.C. § 19-2715(2). By applying this section and ignoring subsection (4), the district court misinterpreted the statute, resulting in an abuse of discretion because the court erroneously concluded it had no discretion. "[W]hether the district court abused its discretion [is determined] by examining: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *State v. Shackelford*, 150 Idaho 355, 363, 247

P.3d 582, 590 (2010).

Here, the district court acted under the mistaken belief that it had no discretion, and did not reach its decision to issue the death warrant "by an exercise of reason." Therefore, the district court abused its discretion in issuing the warrant on May 17, 2012.

The district court's error prejudiced Mr. Leavitt in a number of ways. First, the court never made an inquiry into the facts surrounding the status of the case. An inquiry is defined as "the act or an instance of seeking truth, information, or knowledge about something ..." Webster's Third New International Dictionary (Merriam Webster, Inc. 1986) at p. 1167. Second, the district court made no verbatim record of the matter so neither Mr. Leavitt nor this Court can properly review the issuance of the warrant to ensure that the district court followed the law. Third, the district court refused to allow counsel for Mr. Leavitt to appear or raise any objections to the issuance of the warrant. Had the district court permitted counsel to respond to the inquiry, counsel for Mr. Leavitt would have raised the challenges they bring in this appeal, including the improper application of the statute, the fact that there is no requirement that the execution date be set within thirty days, and that there is still pending "review" of the death sentence in federal court, and I.C.R. 38(a) mandates that the courts of Idaho stay an execution until that review is completed.

Furthermore, the court's mistaken belief that the warrant had to be set within thirty days prejudiced Mr. Leavitt compelling him to continue his challenges to the death sentence in federal court on an expedited basis and by forcing him to prepare for commutation within this short period of time. Mr. Leavitt has never delayed the proceedings in federal court; rather, the State both in 2000 and 2007 sought a stay of the relief which had been granted by the federal district

court. Moreover, since 1992, the State never felt a need to set a new date and made a decision to allow the federal courts to fully process the case. Now twenty-seven years after the conviction, the State has rushed in to seek a warrant, apparently claiming that one need be set within thirty days, when in fact, the statute permits the court to set a date in a more reasonable time frame, thereby allowing the federal court to resolve the motion currently pending before it.

C. The Attorney General's Office Had No Authority to Apply for the Death Warrant and the Warrant must Be Vacated

The Idaho Legislature has created a statutory scheme which sets forth with specificity which governmental agency bears the responsibility of prosecuting *all* felony and *all* misdemeanor criminal cases. Idaho Code § 31-2227 states that:

> Irrespective of police powers vested by statute in state, county, and municipal officers, it is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing *all* the penal provisions of any and *all* statutes of this state, in any court, is vested in the sheriff and *prosecuting attorney* of each of the several counties. . . .

Id. (emphasis added). Likewise, I.C. § 31-2604(2) which outlines the duties of county prosecuting attorneys provides that:

> It is the duty of the *prosecuting attorney* . . .[t]o prosecute *all* felony criminal actions, irrespective of whom the arresting officer is; to prosecute *all* misdemeanor or infractions actions for violation of all state laws or county ordinances when the arresting or charging officer is state or county employee; to conduct preliminary criminal examinations which may be had before magistrates; . . ."

Id. (emphasis added).

Although this statutory scheme mandates that county prosecuting attorneys bear original responsibility for the prosecution of all felony and misdemeanor charges, it does permit, when good cause exists, for county prosecutors to seek and obtain the assistance of the Idaho Attorney

General on a case by case basis. In *Newman v. Lance*, 129 Idaho 98, 922 P.2d 395 (1996), the Idaho Supreme Court explored the mechanics of this process. *Id.* at 103, 922 P.2d at 400.

In *Newman,* the Court reviewed the duties of the Idaho Attorney General, outlined in Idaho Code § 67-1401, as well as the statutory duties of the county prosecuting attorneys. The Court indicated that when these provisions are "read together" they provide "a process contemplated by the Legislature to ensure the effective enforcement of the penal laws of the State of Idaho." *Newman*, 129 Idaho at 103-04, 922 P.2d at 400-01. In describing this process the Court held that the "legislature has made it the primary obligation of the Prosecutor to enforce the state penal laws . . ." *Id.* However, it also indicated that the legislature had created "a method" for the Attorney General "to provide assistance to the Prosecutor or to obtain the enforcement of penal laws of the State of Idaho when the prosecutor fails to properly function." *Id.*

Idaho Code § 31-2603 is the backbone of "the method" referred to by the Court. Subsection (a) of that statute deals with situations where "the prosecutor [has] fail[ed] to properly function." As there are no allegations that the Bingham County Prosecutor has failed to properly function in this case, that section is not at issue. Subsection (b) is at issue, however, because it sets forth the requirements which must be met before a county prosecutor may obtain assistance from the Attorney General's Office. It states:

> The prosecuting attorney may petition the district judge of his county for the appointment of a special assistant attorney-general to assist in the prosecution of any criminal case pending in the county; and if it appears to the district judge to whom the petition is addressed that good cause appears for granting such petition, the district judge, may, with the approval of the attorney-general, appoint an assistant attorney general to assist in such prosecution.

Id.

This result is also supported by the Idaho Supreme Court's decision in *State v. Barber*, 13 Idaho 65, 88 P. 418 (1907). In that case, the Court ruled that a manslaughter conviction could not be upheld because the appointment of the "special prosecutor" who appeared before the grand jury and presided over the case was void. The issue presented in *Barber* was whether the district court's appointment of a special prosecutor, made because the County Prosecutor was "engaged in other matters," satisfied the requirements set forth in the statute, I.C. § 31-2603. The Court held that the non-specific reason relied upon by the district court in appointing a special prosecutor did not meet the specific statutory requirements. Consequently, the Court ruled that the appointment of the special prosecutor was void and ordered dismissal of the charges. *Barber*, 13 Idaho at 88, 88 P. at 421, 425. *See also Clark v. Meehl*, 98 Idaho 641, 642, 570 P.2d 1331, 1332 (1977) (recognizing that a deputy attorney general did not have authority to prosecute a forgery charge until he was properly appointed by the court as a special prosecutor under the terms of I.C. § 31-2603).

Similarly, in *Mills v. Board of Com'rs of Minidoka Cty.*, 35 Idaho 47, 304 P. 876 (1922), the Supreme Court ruled that the appointment of a special prosecutor was void because the district judge made the appointment in chambers, and not in open court as required by the statute. The Court stated:

> This order [referring to the appointment of the special prosecutor] was made by the district judge at chambers, and, inasmuch as no such power is granted to the district judges at chambers under the provisions of [the statute], we think the making of the order was clearly beyond the power of the judge, and the order is therefore void. The power to appoint a special prosecuting attorney is statutory, as well as the power to remove or suspend such officer. The court has no authority to make such appointment except in the manner prescribed by the

> statute, and, where the statute provides that the district court may make such appointment, it does not follow that the district judge may make the appointment at chambers. It must be the act of the court, and to be valid it must appear of record, for courts speak only by their records.

Id. at___ , 47 P. at 878. Certainly, if the special appointments addressed by the Court in *Mills* and *Barber* were void as a result of the relatively minor errors committed by the district courts in making them, then the actions taken by the deputy attorney general in this case, which were not endorsed by the court or county prosecutor and are not in any way authorized by statute, are likewise unenforceable and void.

The record here discloses no request by the local prosecutor, no approval by the Attorney General, and no on the record order appointing the Attorney General in this case. Therefore, the actions of the Deputy Attorney General in seeking the death warrant are void.

Recently, the Legislature amended I.C. § 19-2715(2) in part by adding the section which reads "the state shall apply for a warrant from the district court." However, all prosecutions are made in the name of the State of Idaho, so that this section cannot override the other statutes set forth above which control the limited role of the Attorney General in all criminal cases. Had the Legislature stated that the "Attorney General" shall apply for the warrant, there might be a different result in the statutory interpretation, but the clear statutory scheme requires the local prosecuting attorney to represent the state in seeking a death warrant.

Moreover, the actions of the Deputy Attorney General violated the separation of powers set forth in the Idaho Constitution. Article II, § 1 of the Idaho Constitution provides for a separation of governmental powers. It states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of

> persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in the constitution expressly directed or permitted.

Id. This provision was included in the constitution to guard against the oppression which would inevitably occur if one branch of the government were allowed to become too powerful.

Article IV, § 1 of the Idaho Constitution instructs that the Attorney General is one of the executive officers of the State of Idaho. *Id. See also Newman*, 129 Idaho at 101-03, 922 P.2d 398-400. County prosecutors and district court judges are, in contrast, members of the Judicial branch of government. Art. V, §§ 18, 11. *See also State v. Wharfield*, 41 Idaho 14, 236 P. 862 (1925). As previously indicated, county prosecutors are invested with complete authority to prosecute all felony and misdemeanor charges in the state. The Attorney General's prosecutorial authority is generally limited, on the other hand, to very specific circumstances. For example, it may assist a county prosecutor on a pending case following proper request and judicial review pursuant to I.C. § 31-2603(b), or it may enforce the penal laws when "the Prosecutor fails to properly function," under I.C. § 31-2603(a). *Newman*, 98 Idaho at 103, 922 P.2d at 401. As no such specific circumstance is present in this case, the Attorney General's office had no power to seek the death warrant in this case. It, therefore, unconstitutionally usurped the power of the Judicial branch. Not only did it unconstitutionally employ the power to prosecute rightfully held by the county prosecutor, but it circumvented the review required by the district court under I.C. § 31-2603(b) before a special prosecutor may be assigned.

D. Idaho Criminal Rule 38(a) Mandates That this District Court Stay the Death Warrant as a Review of the Death Sentence Is Pending

I.C.R. 38(a) states that "A sentence of death shall be stayed pending any appeal or

review." Under this rule, as long as a "review" of the sentence of death is pending the courts of Idaho shall stay the sentence of death and not execute a defendant.

Mr. Leavitt's death sentence is currently under review in the federal district court as a properly filed motion pursuant to F.R.Civ.P. Rule 60(b) is pending. That motion was filed on May 11, 2012, one week before the Attorney General's Office obtained the death warrant in its ex parte unrecorded meeting with Judge Shindurling. Apparently the Attorney General never informed the district court that the federal court's review of the death sentence continued, as it is not reflected in the death warrant itself.[3] Because this Court is now aware that a review is still pending, this Court should vacate the death warrant and enter its own stay of execution under Rule 38(a).

Moreover, the rules of the courts of Idaho control over the statutes enacted by the Legislature when those rules concern procedural matters. *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942 (1985). Since section 19-2715, by its own terms, calls the actions of the district court "ministerial," the criminal rule mandates a stay until review of the sentence is completed. In fact, the State's previous decision not to seek a new death warrant until Mr. Leavitt completes his federal review of the sentence may have been based on its prior understanding of Rule 38(a) and the stay mandated until complete review of the case.

Mr. Leavitt has not abused the federal processes in any manner. He has pursued only one habeas petition, which was originally filed within four months of the denial of his petition for certiorari on his direct appeal. He obtained an order directing a new trial in 2000, which was

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[3]The need to speculate about what the Attorney General told the district court is a direct result of the district court's failure to make a verbatim record of the matters heard ex parte in chambers, and the failure to notify Mr. Leavitt's counsel of the hearing.

subsequently reversed, and an order directing a new sentencing hearing 2007, which was also reversed. Currently pending in the federal court is a motion based solely on a United States Supreme Court case decided in March 2012, which has a direct impact on prior decisions of the federal district court.

E. The Failure to Provide a Verbatim Transcript of the Proceedings Regarding the Issuance of the Death Warrant Violates Due Process and Requires Quashing the Warrant

It is well-settled that a defendant is entitled to due process throughout criminal proceedings. In a capital case, the courts have required a heightened scrutiny of the procedures employed because of the immutable result in death cases. *See*, *Woodson v. North Carolina*, *supra*.

> It is fundamental to our legal system that the State shall not deprive "any person of life, liberty, or property, without due process of law." *U.S. Const. amend. XIV, § 1*. Determining procedural due process rights involves a two-step analysis: first, determining whether a governmental decision would deprive an individual of a liberty or property interest within the meaning of the *Fourteenth Amendment's Due Process Clause*; and second, if a liberty or property interest is implicated applying a balancing test to determine what process is due. *Mathews v. Eldridge,* 424 U.S. 319, 333-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Schevers v. State,* 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) . . . Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the *Due Process Clause of the Fifth* or *Fourteenth Amendment*." *Mathews,* 424 U.S. at 332.

State v. Rogers, 144 Idaho 738, 741, 170 P.3d 881, 884 (2007)

> Due process is not a fixed concept requiring a specific procedural course in every situation. "[Due] process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Determination of the specific dictates of due process requires comparing the private interest which will be affected and the probable value of additional or alternative procedural safeguards with the risk of erroneous deprivation of the private interest through the procedures actually used and the governmental interest in the procedural safeguards utilized. *E. g., Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47

L.Ed.2d 18 (1976); *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Overman v. Overman, 102 Idaho 235, 238, 629 P.2d 127 (1980).

I.C. § 1-1103 requires that a "[court] reporter shall correctly report all oral proceedings had in said court . . . except, the supreme court, by rule may designate proceedings . . . in said court that may be recorded by an electronic device in lieu of stenographic means. The parties may, with the consent of the judge, waive the recording by such reporter of any part of the proceedings. . . ."[4]

A verbatim transcript is required by this Court to exercise its constitutional duty to review cases on appeal. Because Mr. Leavitt was denied notice of the hearing and an opportunity to be heard, the transcript of the proceedings becomes even more critical in this instance. This Court, through no fault of Mr. Leavitt's, is left to speculate about the events on the morning of May 17, 2012 when the motion for notice was denied and the death warrant signed within one hour after an ex parte un-recorded meeting between the court and a representative of the Attorney General's Office.

While due process does not mandate a complete verbatim transcript in situations where the record can be settled between the parties, this procedure is unavailable when one of the parties has been intentionally excluded from the hearing. See, I.A.R. 29 and *State v. Youngblood*, 117 Idaho 160, 786 P.2d 551 (1990).

To bar a defendant from a proceeding and then not make a suitable record for review by an appellate court denies a defendant the very basic notions of due process under both the federal

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[4]Since counsel for Mr. Leavitt were barred from appearing, they cannot be held to have waived this requirement.

and state constitutions. It is also a violation of I.C.R. 12(g). Because of this failure, this Court must set aside the death warrant and remand the matter to the district court to conduct a hearing on the application for a warrant employing methods which will permit review by this Court if the defendant should thereafter appeal the issuance of the warrant.

V. CONCLUSION

For the foregoing reasons, this court should vacate the death warrant issued on May 17, 2012, and remand to the District Court for further proceedings.

DATED this 23 day of May, 2012.

Dennis Benjamin for
David Z. Nevin
Andrew Parnes
Counsel for Appellant

CERTIFICATE OF SERVICE

I CERTIFY that on May 23, 2012, I caused a true and correct copy of the foregoing document to be emailed to Lamont Anderson at lamont.anderson@ag.idaho.gov.

Dennis Benjamin
David Z. Nevin