

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

2012 MAY 23 PM 1:02

CLERK OF DISTRICT COURT

BY _____ DEPUTY

Andrew Parnes, ISB # 4110
P.O. Box 5988
671 N. 1st Avenue
Ketchum, ID 83340
Tel: 208-726-1010
Fax: 208-726-1187

David Nevin, ISB #2280
Nevin, Benjamin, McKay & Bartlett LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
Tel: 208-343-1000
Fax: 208-345-8274

IN THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, COUNTY OF BINGHAM

STATE OF IDAHO,)	Case No. CR1985-4110 AND
)	CV2008-857
Plaintiff-Respondent,)	
)	
v.)	MOTION TO QUASH
)	DEATH WARRANT
RICHARD A. LEAVITT,)	
)	
Defendant-Petitioner.)	
_____)	

The Defendant Richard A. Leavitt, through his attorneys, moves the Court for its Order quashing that certain death warrant, filed May 17, 2012, and directing that Mr. Leavitt be executed on June 12, 2012.

This motion is made because

1. Pursuant to Idaho Criminal Rule 38 (a), an "appeal or review" of Mr. Leavitt's conviction and sentence is "pending." In particular, there is presently pending in Mr. Leavitt's

federal habeas corpus litigation, a motion for relief pursuant to Fed. R. Crim. P. 60(b), which argues that under a recent United States Supreme Court case, *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (March 20, 2012), the District Court erred in dismissing Claim 9 of Mr. Leavitt's Petition for Writ of Habeas Corpus on grounds of procedural default. *See* Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), Application for Further Stay of Execution, and Supporting Memorandum, Docket No. 318, filed May 11, 2012, in *Leavitt v. Arave*, United States District Court for the District of Idaho Case No. CV-93-0024-S-BLW. I.C.R. 38(a) provides in mandatory and unequivocal terms that "[a] sentence of death *shall* be stayed pending *any* appeal or review." (Emphasis added).

2. Upon information and belief,

a.) the attorney who represented the State in obtaining the death warrant was Deputy Attorney General Lamont Anderson.

b.) Mr. Anderson is neither the Bingham County Prosecuting Attorney nor one of his deputies.

c.) Mr. Anderson obtained the warrant alone, that is, without the presence of the Bingham County Prosecuting Attorney, or any of his deputies.

d.) Mr. Anderson presented the warrant to the Hon. Jon J. Shindurling, District Judge of the Seventh Judicial District in and for the County of Bingham, on the morning of May 17, 2012 at Judge Shindurling's chambers in Idaho Falls, Idaho. Judge Shindurling signed the warrant at that time. Mr. Anderson thereafter transported the signed warrant to the Bingham County Clerk's office in Blackfoot, Idaho, for filing and conformation. The warrant was filed at 11:28 am on May 17, 2012.

e.) The meeting between Mr. Anderson and Judge Shindurling was not verbatim recorded.

f.) Neither Mr. Leavitt nor his counsel were permitted to be present at the meeting between Mr. Anderson and Judge Shindurling, despite counsel having filed a specific request to be allowed to do so.

g.) Mr. Anderson has not appeared as counsel of record in the present case, whether pursuant to appointment as a “special prosecutor,” or a “special assistant attorney-general” pursuant to I.C. § 31-2603(a) and/or (b), by direction of the Attorney General pursuant to I.C. § 67-1401(7), or otherwise.

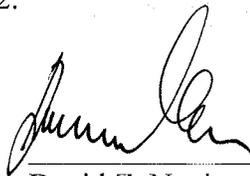
As a result, Mr. Anderson was not a properly appearing representative of the Plaintiff, the State of Idaho, and acted without authority in responding to the Court’s inquiry, if any, “into the fact of an existing death sentence and the absence of a valid stay of execution,” I.C. § 19-2715(5), and the death warrant was therefore issued without proper authority.

3. As stated in Mr. Leavitt’s Motion to Reconsider Order Denying Demand for Opportunity to Be Heard Regarding Issuance of Death Warrant, filed May 18, 2012, prior to the issuance of the Ninth Circuit’s mandate on May 16, execution of Mr. Leavitt was barred by the permanent injunction of the federal court, which is not “a temporary postponement of an execution,” I.C. § 19-2515(6). As a result, the Court should have analyzed the State’s request for a death warrant under I.C. § 19-2715(4), under which the Court “may inquire into the facts” Instead, the Court incorrectly concluded that a previous death warrant was not executed because of the pendency of a stay of execution, and the case was therefore governed by I.C. § 19-2715(3). Accordingly, the Court misunderstood the correct basis for the exercise of its discretion, and as a

result the death warrant should be quashed.

4. As noted above in paragraph 2(e) and (f), upon information and belief, the meeting between Mr. Anderson and Judge Shindurling was not verbatim recorded. Furthermore, neither Mr. Leavitt nor his counsel were present at this meeting, nor otherwise provided an opportunity to be heard on the question whether the death warrant should issue, despite having filed a specific request to be allowed to do so. As a result, the issuance of the death warrant was in derogation of Mr. Leavitt's rights to due process of law, the assistance of counsel, a fair trial and sentencing hearing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution.

DATED this 23RD day of May, 2012.



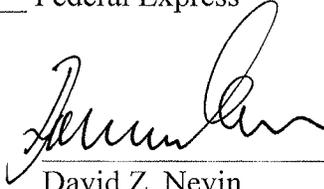
David Z. Nevin
Andrew Parnes
Attorney for Defendant-Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of May, 2012, I served the foregoing document on all interested parties as follows:

J. Scott Andrew
Bingham County Prosecuting Attorney
501 North Maple, #302
Blackfoot, ID 83221-1700
Facsimile: 208-785-5199

U.S. Mail
 Hand delivery
 Facsimile
 Federal Express



David Z. Nevin