

PETITION FOR COMMUTATION  
RICHARD A. LEAVITT  
May 25, 2012

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# NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

May 25, 2012

Commissioners  
Commission of Pardons and Paroles  
3056 Elder Street  
Boise, Idaho 83705

Re: Petition for Commutation of Richard A. Leavitt

To the Commissioners:

Upon a tortured and lengthy procedural record, reflecting the deep divisions and misgivings of the many judges who have reviewed the case, Richard A. Leavitt approaches the Commission of Pardons and Paroles on the eve of his execution. Mr. Leavitt's commutation petition invokes the clemency power reposed in this Commission by art. 4, § 7 of the Idaho Constitution. "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," and acts as "the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390, 411-412, 415 (1993).

Mr. Leavitt was convicted of the murder of Danette Elg in 1984. The case against him was entirely circumstantial, with no eyewitnesses and no DNA evidence. Mr. Leavitt has maintained his innocence throughout the ensuing twenty-eight years, during which he has been regarded by staff as "a model prisoner" on Idaho's death row.

Two days ago, in an examination conducted over the objection of the Idaho Attorney General's office, Mr. Leavitt passed a polygraph examination administered by the foremost polygrapher in the United States, which demonstrates that he did not stab Ms. Elg, did not mutilate her body, and was not present when these acts occurred. *See* Exhibit E, Report and CV of Charles R. Honts, Ph.D. The judicial and executive branches of the State of Idaho are now on the brink of the unthinkable – the execution of an innocent man. We are deeply troubled by this prospect, and we implore the Commission to prevent it from happening by commuting Mr. Leavitt's sentence to life imprisonment.

This case has also deeply troubled the many judges who have reviewed it. Mr. Leavitt was sentenced to death by a trial judge sitting alone, a procedure which has since been found to be unconstitutional, *see Ring v. Arizona*, 536 U.S. 584 (2002). On the first appeal, the Idaho

Supreme Court reversed the death sentence. It held,

*the instant case presents a defendant who is atypical to any that this Court has viewed in the context of a death penalty case. As stated by the sentencing court, the defendant comes from “a law abiding family, and he is presently married; has a child and was steadily employed prior to his arrest. He is a son, a husband, a father who has conducted himself much of the time within the norms of society.” Such a recitation gives us pause.*

*State v. Leavitt*, 116 Idaho 285, 293, 775 P.2d 599, 607 (1989) (emphasis added). After remand, the trial court again imposed a death sentence and this time the Idaho Supreme Court affirmed over a dissent and a special concurrence, *see State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991).

When the case was reviewed on federal habeas corpus Chief United States District Judge B. Lynn Winmill made an important ruling. First, he held that Mr. Leavitt’s trial was flawed by an incorrect jury instruction defining the requirement for proof beyond a reasonable doubt. Remarkably, the jury was told that this bedrock principle of American law did not apply to a person who was “in fact guilty,” but rather only to “an innocent person.” In other words, the jury instruction effectively substituted the concept of “guilt in fact” for the requirement for proof beyond a reasonable doubt. Judge Winmill ordered a new trial.

On appeal, the State argued for the first time that a procedural technicality prevented the federal Courts from addressing the reasonable doubt instruction. Even though the appellate court agreed that the instruction was wrong, it held that Mr. Leavitt had raised the issue too late. But the Ninth Circuit also held that Judge Winmill had been wrong to prevent Mr. Leavitt from arguing that his lawyer at the resentencing was ineffective, and remanded for further proceedings.

Mr. Leavitt had indeed been genuinely prejudiced by his lawyer’s incompetence at the resentencing hearing. At the first sentencing, mental health evidence had been presented which seemed to establish that Mr. Leavitt suffered from Intermittent Explosive Disorder and Anti-social Personality Disorder. The sentencing judge, however, had refused Mr. Leavitt’s then-counsel’s request to perform an MRI to see if he had physical brain damage. On resentencing, Mr. Leavitt’s newly court-appointed lawyer failed to renew the request for an MRI or even to consult on his own with a mental health expert. When he re-sentenced Mr. Leavitt to death the sentencing judge revealed deep misgivings about his task. He wrote, the “fact that an [sic] generally law abiding citizen, a father, husband and son would do this act leaves one’s [sic] asking why.” Because of the lawyer’s failure to explore mental health evidence, however, the judge was deprived of some very important mitigating information which would have answered

his question.<sup>1</sup>

By the time Judge Winmill reviewed the matter in 2007, two MRIs had been performed – one at the request of counsel for Mr. Leavitt, and one at the request of the Idaho Attorney General. Both revealed that Mr. Leavitt had a *physical brain injury*, which ruled out the findings of Intermittent Explosive Disorder and Anti-Social Personality Disorder. See Exhibits F, G, H, I, J, and K to this Petition. The brain injury was thought to have arisen as a result of Mr. Leavitt's premature birth, because of a childhood head injury he suffered in an accident, because of inhalation of toxic fumes during employment – or for other unknown reasons. What's more, the presence of the physical brain injury (as opposed to a personality disorder) was shown to predict that Mr. Leavitt would be easy to manage in prison – which has very much turned out to be the case. As a result, Judge Winmill found that Mr. Leavitt had been prejudiced by his lawyer's ineffectiveness at the resentencing hearing and ordered a new sentencing hearing.

Again the State appealed, and again the Ninth Circuit reversed. It held, over a vigorous dissent, that even though the lawyer did nothing to detect and prove Mr. Leavitt's brain injury, he was not *legally* ineffective because he was able to articulate a reason for his inaction (namely, that he was afraid the sentencing judge would be aggravated if he so much as asked to consult an expert and to have an MRI performed). The net result is that 2 of the 4 judges who reviewed the re-sentencing hearing believed that Mr. Leavitt was denied the effective assistance of counsel, and that this deprived the sentencing judge of important explanatory information about Mr. Leavitt's condition.

The United States Supreme Court declined to review the case, and the federal courts' mandates were received in Idaho last Wednesday, May 16, 2012. The next day, the state district judge to whom the case is now assigned issued a new death warrant, setting Mr. Leavitt's execution for June 12, 2012.

Mr. Leavitt is 53 years of age. The charge of murder on which he is sentenced to death is the first and only felony on his record. Prior to his incarceration 28 years ago on this charge he had been married and had maintained full-time employment throughout his adult life. He has two children, parents, brothers and sisters, and friends who love and support him. See Letters of Support, Exhibit M. Mr. Leavitt writes poetry as a hobby.

Mr. Leavitt has an excellent institutional record, consistent with the mental health

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<sup>1</sup> In the lawyer's sentencing argument, which consumed a mere 3 pages of the transcript, he stated that he could not remember the cases which obligated the Court to consider Mr. Leavitt's behavior in prison, could not recall whether Mr. Leavitt was entitled to an updated presentence report, and could not recall what aggravating circumstances the judge had found.

findings referred to above. As the attached records reveal, he has worked as a tier janitor and is regarded as a genial and helpful inmate.

In 1989 Correctional Officers who testified at Mr. Leavitt's re-sentencing hearing universally described him as "very easy to deal with," and "never a management problem." (Robert Cheney, Exhibit C, p. 7) and "friendly." (Richard Baldwin, *id.*, p. 14). CO Kathy Lillybridge described telling Mr. Leavitt in passing that her sister was getting married, after which Mr. Leavitt provided her with a poem, "a very nice poem," written in honor of her wedding. *Id.*, p. 18.<sup>2</sup>

A brief psychological assessment in April of 2000 showed him to be frank, candid, pleasant, cooperative, and congruent. *See* Exhibit L. Reports in September of 2000 and April of 2001 were similar. In February 2002 Mr. Leavitt was moved off of death row and was recommended for placement in general population. In August of 2002, a Correctional Officer wrote, "Leavitt does an outstanding job for me. He always does what I ask from him and remains respectful to staff and other inmates." By June of 2003 he scored at a minimum custody level on a reclassification score sheet. A July 12, 2005 Status Report described his "appropriate attitude and behavior," and stated that he "has held work assignments and is cooperative with staff." and that the staff believed he would be successful in general population. In June of 2006, the Central Office Administrative Review Committee recommended that Mr. Leavitt be released to general population, "based on behavior, attitude towards staff and inmates and his desire to become a productive member of IMSI's population."

In 2007 during proceedings in federal court, Correctional Officer Rolando Tamez, testifying for the State, described Mr. Leavitt as "pretty much a model inmate," who didn't get mad or upset, despite being surrounded by inmates with behavior problems. Exhibit D, at pp. 480-1. CO Richard Gerber described Mr. Leavitt as "a very well behaved ... model inmate." *Id.*, p. 491. In fact, CO Gerber described Mr. Leavitt's useful cooperation with a disciplinary investigation of a skinhead clique which had attacked him – as CO Gerber put it, "[t]o get someone to cooperate with us and actually give us information and work with us is pretty – it's rare." *Id.*, p. 493.

Back on death row, a review committee wrote on April 29, 2008, "[i]nmate has been well behaved in Ad-Seg. No problems or issues." *See* Exhibit L. On September 29, 2008 a 90-day Restrictive Housing Review reported "he has been appropriate/no issues."

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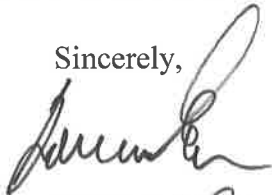
<sup>2</sup> Ms. Lillybridge, now Mrs. Caldwell, has recently provided a letter of support for Mr. Leavitt which echoes many of these same ideas. A representative selection of Mr. Leavitt's poetry is attached as Exhibit N.

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This model inmate has recently passed a polygraph examination by a leading polygrapher which completely exonerates him from guilt in the crime. It is not uncommon for the clemency process to repose considerable trust in the results of polygraph examinations – indeed then-Governor Douglas Wilder of Virginia proposed to commute the sentence of Roger Keith Coleman if he passed a polygraph which cleared him (Mr. Coleman he failed the polygraph and was executed).<sup>3</sup>

For all the reasons contained in this letter and in Mr. Leavitt's petition, we ask that the Commission set the matter for a hearing, and after receipt of testimony, commute Mr. Leavitt's sentence from one of death to one of life imprisonment.

Sincerely,



David Z. Nevin



Andrew Parnes

Attorneys for Richard A. Leavitt

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<sup>3</sup> See, e.g.,

[http://www.chron.com/CDA/archives/archive.mpl/1992\\_1056560/virginia-executes-coleman-fails-extraordinary-lie.html#](http://www.chron.com/CDA/archives/archive.mpl/1992_1056560/virginia-executes-coleman-fails-extraordinary-lie.html#).

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PETITION FOR COMMUTATION

NAME Richard A. Leavitt IDOC # 23081  
DATE May 25, 2012 INSTITUTION WHERE HOUSED Idaho Maximum Security Institution

A. Please complete the following:

- |                                 |                          |
|---------------------------------|--------------------------|
| (1) Crime <u>Murder 1</u>       | (2) Crime _____          |
| Length of Sentence <u>death</u> | Length of Sentence _____ |
| (3) Crime _____                 | (4) Crime _____          |
| Length of Sentence _____        | Length of Sentence _____ |

B. The following must be addressed in your petition or it may be returned.

- (1) Explain exactly how you are requesting the Commission commute or change your sentence, such as: reduce the length of the sentence, change a fixed sentence to indeterminate, change a consecutive sentence to concurrent, reduce the fixed portion of a sentence, or other.
- (2) Explain the reason(s) why you feel the circumstances warrant a change of sentence in your case.

C. You may attach two (2) pages (letters or other documents, **ONE sided only**) to the petition. **Beginning October 2010, please send the original petition only (no faxes or copies will be accepted). The original will be sent to the c-file after the Commission review is completed. All attachments will be filed with the Petition and will not be returned to the petitioner.**

NOTE: A Petition for Commutation may be considered at any time, but is usually reviewed at the quarterly sessions of January, April, July, and October without the petitioner being present. If the Commission elects to grant a hearing, the Commission will determine the date of the hearing. A petition must be received at the Commission office **on or before the first day of a quarterly session**. The petition must be readable, or it may be returned to the Petitioner.

The following witness signature is to acknowledge only that the Petitioner is submitting this Petition:

  
Inmate Signature

Counselor, Social Worker, or other Staff Witness – *Print Name along with the signature*

Title Date

(1) Explain exactly how you are requesting the Commission commute or change your sentence.

I am requesting that the Commission commute my sentence from one of death to one of life imprisonment.

(2) Explain the reasons why you feel the circumstances warrant a change of sentence in your case.

I did not murder Danette Elg. I am deeply sorry that she is dead, that she died a violent death, and that her family and friends have also had to suffer her loss. But I recently took and passed a polygraph test which found that I was being truthful when I said I did not stab her or mutilate her body, and that I was not present when someone else did.

I also know that I was found guilty of Ms. Elg's murder. Even though judges over the years have agreed with me and my lawyers that I should receive a new trial or a new sentencing hearing, I know that so far the courts have upheld my conviction and sentence. A few hearings are still going on, but even if they fail, I am asking the Commission to change my sentence to life.

I believe that if I am allowed to live out my life in prison it is still possible that more evidence of my innocence will come out - but that won't help me if I have been executed. I have been a good inmate over the past 28 years. Correctional officers have called me a "model inmate," and I'm proud of that. And I will continue to be a good inmate.

But I do respectfully ask that the Commission commute my sentence to life imprisonment.