IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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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A. This Court has Jurisdiction to Reach the Merits of the Appeal

Arguing that the act of signing the warrant did not affect Mr. Leavitt's substantial rights, the State first claims that he has no right to appeal under I.A.R. 11(c), relying on *State v. Gardner*, 234 P.3d 1104 (Utah 2010). But the Utah statute[1] does not contain language similar to I.A.R. 11(c)(6), authorizing appeals in death penalty cases only "after the death warrant is issued as provided by statute."

Moreover, the State fails to acknowledge that in *Gardner*, the Utah Supreme Court treated the appeal as an extraordinary writ and reached the merits of the claims made by Mr. Gardner.

> [W]e conclude that the issuance of a warrant is not an appealable order. In view of this conclusion, it is apparent that a defendant would have no legal remedy for the issuance of a warrant not in compliance with the law unless it could be reviewed pursuant to a petition for extraordinary writ. The State concedes that this "court has extraordinary writ jurisdiction to review" whether Judge Reese's ruling that denied Mr. Gardner's application for relief under 77-19-9 "was an abuse of discretion." Based on this concession, we will consider the appeal as a petition for extraordinary writ under rule 65B of the Utah Rules of Civil Procedure.

Id. at 1104-1005.

In *Gardner*, pursuant to statute, the defendant was present in court, represented by

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[1] Utah Code Ann. §77-18a-1. reads in relevant part, "Appeals -- When proper.
(1) A defendant may, as a matter of right, appeal from:
(a) a final judgment of conviction, whether by verdict or plea;
(b) an order made after judgment that affects the substantial rights of the defendant;
(c) an order adjudicating the defendant's competency to proceed further in a pending prosecution; or
(d) an order denying bail, as provided in Subsection 77-20-1(7).

counsel and a complete record of the proceedings was made.[2] Gardner argued only that he was permitted to challenge the basis for his conviction under the phrase "legal reason" to oppose the issuance of the warrant. Gardner made none of the due process, notice and ex parte challenges raised by Mr. Leavitt here, because he was afforded all those rights during the Utah district court hearing which resulted in the issuance of the warrant.

The State also relies on *State v. Campbell*, 770 P.2d 620, 622 (Wash. 1989) to support its claim that an appeal does not lie in this instance. But again it does not relate the full holding of that case. In *Campbell*, the court noted that a defendant could abuse the system because review by the Washington Supreme Court could not be completed within the thirty day period the death warrant was in effect and a defendant could therefore continually delay the execution by

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[2]Utah Code Ann. § 77-19-9. Judgment of death not executed -- Order for execution

(1) If for any reason a judgment of death has not been executed and remains in force, the court where the conviction was had, on application of the prosecuting attorney, shall order the defendant to be brought before it or, if the defendant is at large, issue a warrant for the defendant's apprehension.

(2) When the defendant is brought before the court, it shall inquire into the facts and, if no legal reason exists against the execution of judgment, the court shall make an order requiring the executive director of the Department of Corrections or the executive director's designee to ensure that the judgment is executed on a specified day, which may not be fewer than 30 nor more than 60 days after the court's order, and may not be a Sunday, Monday, or a legal holiday, as defined in Section 63G-1-301. The court shall also draw and have delivered another warrant under Section 77-19-6.

(3) The Department of Corrections shall determine the hour, within the appointed day, at which the judgment is to be executed.

appealing. *Id.* at 190.[3]

Nevertheless, the Washington Supreme Court exercised their right to discretionary review and proceeded to reach the merits of the case. Here, this Court has established an expedited briefing schedule and will reach the merits of the appeal before the current death warrant expires. Nor has Mr. Leavitt abused the system; he requested to have counsel present in the district court *before* any warrant was even sought and has briefed the matters in this Court on an expedited basis.

If there is no right to appeal in this instance, this Court should adopt the holdings in the two out-of-state cases relied upon by the State and treat the Notice of Appeal as a request for extraordinary relief under I.A.R. 3 and 5, in order to reach the merits of the matter in an expedited manner.[4]

By opposing the appeal solely on the basis that there is no right to appeal and not advising this Court that, in both cases it relied upon, the state supreme courts reached the merits of the claims raised, Respondent itself is seeking further delays in the case. For these reasons, this Court should address the merits of the claims raised.

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[3] "Absent extraordinary court intervention, the death warrant would almost certainly expire by the time the appeal were considered. This means the trial court would be required to issue another warrant from which the defendant could again appeal. RCW 10.95.200. 'If such a practice were tolerated, it would result in an endless chain, which would involve an absurdity in the administration of the law that would justly bring it into disrepute and totally destroy its efficacy[.]'" *State v. Boyce*, 25 Wash. 422, 425-26, 65 P. 763 (1901). *Id.* at 190.

[4]To show that he is not seeking delay but vindication of fundamental rights including access to the state courts, Mr Leavitt will file a Petition for an Extraordinary Writ on or before May 29, 2012, pursuant to the Court's scheduling order of May 17, 2012.

3. The Constitutional Claims are not Waived and Are Meritorious

Mr. Leavitt cited the federal and state constitutions as well as United States Supreme Court cases as authority. The State argues that an appellant must present "authority that is directly relevant to the issue before this Court." (Resp. Brief, at 9.) It then argues that "none exists," but goes on to rely on cases from Florida. But Respondent fails to inform this Court that the Florida cases relied upon arise in an entirely different process than the issuance of a death warrant in Idaho.

The issuance of a Florida death warrant stems solely from the authority granted to the Governor in the *clemency* proceedings under the Florida Constitution.

> In Florida, the clemency process is derived solely from the Florida Constitution and is strictly an executive branch function. *Parole Comm'n v. Lockett*, 620 So. 2d 153, 154-55 (Fla. 1993). The Florida Supreme Court has interpreted the Florida Constitution to mean that the "people of [Florida] chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977).

Marek v. McNeil, 2009 WL 2488296, *3 (Aug. 13 2009).

In contrast, the Idaho Legislature has granted the judiciary of this State authority over the issuance of death warrants, and set forth a hearing process to be held in the state district court. While it is understandable that the Attorney General, a representative of the executive branch under the Idaho Constitution might prefer to have the Idaho governor issue the warrant, that is not the constitutional or statutory scheme adopted by the people of this state.

Instead, Idaho has made the issuance of the warrant a function of the judiciary and provided that the state shall apply to the courts for a warrant. Having done so, Idaho has established that a defendant must have due process rights in a court's issuance of a warrant.

Respondent takes the startling stand that a defendant has absolutely no rights during the issuance of a death warrant and has no access to the courts of this state to seek review of that process. In effect, Respondent's position means that at any time when no stay is in effect, the State can ex parte approach a district court judge and have an execution date at any time within a thirty day period, even the day after the warrant is issued, and no other court in this State could stop that execution. Down Respondent's rabbit hole, a district court could issue an immediate death warrant for the *wrong* person, and that person would have no access to the Idaho courts to correct that injustice. Only the good graces of the executive branch would bar that person's execution. Hopefully, the State of Idaho has not abandoned the constitutional role of the judiciary and this Court retains an integral role in reviewing the actions of the district court and the executive branch.

Respondent cites to no other state in which a defendant is not brought before the court for the issuance of the warrant or entitled to have counsel present when the death warrant is signed by a judge. The Idaho statute requires the district court to make certain findings before issuance of the warrant; thus, even though the statute describes issuance of a death warrant as "a ministerial act," it also requires the court to consider the application of the warrant by the State and to find that no temporary stay is then in effect. Since the proceedings in this case were done ex parte and off the record, the burden of proving that the statute was complied with must be placed on the State, and the preposterous claim that Mr. Leavitt has failed to establish the court did not make such an inquiry must be rejected. (Resp. Brief, at 13.)

C. The Role of the Idaho Attorney General

Respondent argues, as Appellant assumed he would, that the change of the language in

the statute necessarily means that the Attorney General has the power to represent the state in the warrant proceedings and attaches minutes of his own testimony before the Legislature; however, the precise issue of who represents the "state" was never addressed in this testimony.

If the Legislature wanted the Attorney General to represent the State in these proceedings it should have said so. Such a change would have been easy to make and would at least have provided clarity regarding the legislature's intention in this difficult areas of separation of powers in Idaho. But the language of the bill and the resulting statute refers only to "the state." Of course, "the State" is the plaintiff in all criminal cases, and a very fine-grained and clear statutory scheme provides, absent appropriate applications and findings, that the county prosecuting attorney represents "the State."

Respondent contends that because the Attorney General represents the State in federal habeas matters, that office should handle all subsequent state cases in the same matter as it is "more efficient." But Respondent does not address the statutes which direct that the prosecuting attorney represents "the state" in all criminal matters.

In this instance, the local prosecutor may have been willing to provide notice to counsel had he himself represented the State. But the Attorney General, apparently without a request from the prosecuting attorney or authorization from the district court, rushed to Idaho Falls. Because he acted without proper authority, the death warrant must be vacated.

A Verbatim Transcript Should have Been Prepared

Without citation to case law or statute, Respondent argues that "a verbatim transcript was neither mandated nor warranted" and that the state "vehemently denies" that the ex parte conference should have been recorded. And then Respondent goes so far as to say that any claim

of error in those proceedings must be "speculative" because Mr. Leavitt and his counsel, barred from the hearing and then provided no record, cannot specify the error. (Resp. Brief, at 17-18.)

Of course, this is the problem with due process violations – neither counsel nor this Court can determine the propriety of lower court proceedings when no record has been made of proceedings from which counsel for a party has been barred. Respondent asks this Court to assume that the court made a proper inquiry, applied the correct law and then made proper findings – all without any record. This is particularly troubling in a situation such as the present one, in which an advance request for a hearing was specifically made, and in which counsel who "appeared" for "the state" himself could have requested such a record.

Respondent does rely on some language from *State v. Lovelace*, 140 Idaho 53, 65 (2003) where this Court found that the Appellant, *whose counsel was a party to the unrecorded telephone calls*, could only speculate about what happened during those calls. But had counsel for Mr. Leavitt been provided an opportunity to appear, counsel would have requested a verbatim transcript or at least been in a position to settle the record under I.A.R. 29. When the Attorney General appeared ex parte, did not request a record, and makes no attempt to settle the record, he certainly should not be heard to fault Mr. Leavitt and his counsel for not being able to address particular events which occurred in the privacy of chambers. Fundamental fairness requires this Court to condemn these actions by setting aside the warrant obtained in this back-room proceeding.

D. The Required Inquiry Necessary Before a Death Warrant May Issue

When Mr. Anderson testified before the House Judiciary, Rule and Administration Committee on February 15, 2012, a member asked him about the change in the language from

"must" to "may" regarding the inquiry by the judge before issuing the warrant. According to the minutes, "Mr. Anderson said §4 line 35 changed from "must" to "may" because the death sentenced inmate is not actually brought into court. In the case that the district court wants to inquire why the warrant was not carried out, this change removes the requirement that the inmate has to be present during this inquiry. In regards to whether a judge would want to make an inquiry, he clarified that the judge *must make an inquiry . . .*" (Resp. Brief., App. A.) (Emphasis added.)

Thus, even the Respondent concedes that an inquiry is required despite the change in the statutory language, and this Court must be able to review that inquiry to assure that there was no errors committed in the district court.

E. Rule 38(a) Applies in this Case

Respondent contends that Rule 38 refers solely to stays or review issued by the state courts. But the clear language of the rule is not so limited and respondent never sought a death warrant throughout the long pendency of the federal proceedings, despite the fact that no stay was ever entered by the federal courts. Nor does Respondent deny that Mr. Leavitt's first and only federal habeas petition is still pending in the federal courts; indeed, respondent remains silent on whether he informed the state district judge that the federal district court proceedings were ongoing or that no federal stay had been granted in the prior twenty years.[5]

In a rush to execution, Respondent may not have fully explained the factual record to the

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[5]Interestingly, the death warrant, presumably drafted by Respondent, does not refer to any particular stay issued by the federal courts. Instead, it refers obliquely to the Ninth Circuit's issu[ance] of its Mandate, which automatically lifted *any stay* imposed by Judge B. Lynn Winmill . . . ." (Death Warrant, p.3.) (Emphasis added.)

district court, and had the district court known the facts, it might well not have issued the warrant. If we had a record, this Court would know whether the district court understood that Judge Winmill still had authority to reverse not only the sentence of death but also the conviction. Under these circumstances no warrant should have been issued.

Respondent also claims that Rule 38 is controlled by I.C. § 19-2708 because the rules applicable to death penalty cases are "substantive" rather than "procedural," citing *State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891 (1992). But if these rules set forth substantive rules because of "the stringent constitutional protections afforded to a person sentence to death," then Mr. Leavitt's constitutional rights regarding the issuance of the warrant should be fully protected at least by the presence of counsel at the issuance of the new death warrant. Respondent cannot claim that the statute is a mere "ministerial" act, on the one hand, and then claim on the other than it is a "substantive" rule based on the enhanced protections afforded capital defendants.

F. Mr. Leavitt has Demonstrated Prejudice

Respondent argues that Mr. Leavitt can show no prejudice from the ex parte issuance of the warrant. But the pendency of the death warrant has thrown the parties into a last-minute rush to conclude pending litigation in the federal courts and prepare and submit a clemency petition. The Idaho Commission on Pardons and Parole will have less time to consider his petition. Furthermore, the district court might not have issued a new death warrant once counsel for Mr. Leavitt had a full opportunity to be heard. Indeed, the district court has set a hearing for May 30, 2012 on Mr. Leavitt's motion to quash the death warrant.

On the other hand, the State can show no prejudice if a new warrant for a later date is issued upon remand. The State did not seek a death warrant in the past twenty years, and

provides no reason why it rushed to seek one now while the federal court proceedings are still pending. The State itself bears the burden of showing that its acts in seeking the warrant in the manner it did were supported by law. Not having ever sought a warrant for the past twenty years, the State cannot possibly be harmed by allowing Mr. Leavitt's pending motion, based on a new United States Supreme Court case issued less than two months before the State sought issuance of the warrant, to be heard.

III. CONCLUSION

For these reasons, and those contained in the Opening Brief, it is respectfully requested that this Court vacate the death warrant issued on May 17, 2012.

DATED this 25th day of May, 2012.

David Z. Nevin
Andrew Parnes
Counsel for Appellant

CERTIFICATE OF SERVICE

I CERTIFY that on May 25th, 2012, I caused a true and correct copy of the foregoing document to be emailed to Lamont Anderson at lamont.anderson@ag.idaho.gov.

David Z. Nevin