

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 39941
)
 vs.)
)
 RICHARD A. LEAVITT,)
)
 Defendant-Appellant.)
)
 _____)

SUPPLEMENTAL BRIEF OF RESPONDENT

**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
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4539**

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

**DAVID Z. NEVIN
Nevin, Benjamin, McKay &
Bartlett, LLP
P.O. Box 2772
Boise, Idaho 83701
(208) 343-1000**

**ANDREW PARNES
Law Office of Andrew Parnes
P.O. Box 5988
Ketchum, Idaho 83340
(208) 726-1010**

**ATTORNEY FOR
DEFENDANT-APPELLANT**

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE CASE..... | 1 |
| Nature Of The Case | 1 |
| Statement Of Facts And Course Of Proceedings..... | 1 |
| ISSUES | 2 |
| ARGUMENT | 3 |
| I. The District Court Lacked Jurisdiction To Consider Leavitt's Motion To Quash Death Warrant When There Was An Appeal Pending From The Issuance Of The Warrant..... | 3 |
| A. Introduction..... | 3 |
| B. Standard Of Review..... | 3 |
| C. The District Court Did Not Have Jurisdiction To Consider Leavitt's Motion To Quash The Death Warrant..... | 3 |
| II. Leavitt Has Waived Any Claim Challenging The Proceedings On The District Court's Order Denying His Motion To Quash The Death Warrant | 6 |
| III. If This Court Concludes The District Court Had Jurisdiction To Consider Leavitt's Motion to Quash Death Warrant, The Hearing On That Motion Renders Leavitt's Claimed Constitutional Violation Moot..... | 7 |
| IV. Leavitt Has Failed To Establish Error In The Denial Of His Motion To Quash Death Warrant | 8 |
| CONCLUSION..... | 8 |
| CERTIFICATE OF SERVICE | 9 |

TABLE OF AUTHORITIES

CASES

H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers
and Land Surveyors, 113 Idaho 646, 747 P.2d 55 (1987) 3

State v. Barclay, 149 Idaho 6, 232 P.3d 327 (2010) 7, 8

State v. Creech, 132 Idaho 1, 966 P.2d 1 (1998) 7

State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999)..... 7

State v. Kavajecz, 139 Idaho 482, 80 P.3d 1083 (2003)..... 3

State v. Urrabazo, 150 Idaho 158, 244 P.3d 1244 (2010)..... 6

State v. Wilson, 136 Idaho 771, 40 P.3d 129 (Ct. App. 2001) 5, 6

State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996) 7

Verska v. Saint Alphonsus Regional Medical Center,
151 Idaho 889, 265 P.3d 502 (2011)..... 6

STATUTES

I.C. § 19-2601 4

RULES

I.A.R. 13(c) 3, 4, 5, 6

I.C.R. 33(c) 5

I.C.R. 35 5

STATEMENT OF THE CASE

Nature Of The Case

Defendant-Appellant Richard A. Leavitt appeals from the district court's order denying his Motion to Quash Death Warrant.

Statement Of Facts And Course Of Proceedings

On May 17, 2012, a Death Warrant was filed in Bingham County Case No. CR-1985-4110, scheduling Leavitt's execution for June 12, 2012. (R., pp.12-4.) Although the Death Warrant was not a final, appealable order, on May 21, 2012, Leavitt filed a timely Notice of Appeal from issuance of the Death Warrant. (R., pp.24-27.) Issuance of the Death Warrant is currently on appeal before this Court.

On May 23, 2012, Leavitt filed a Motion to Quash Death Warrant.¹ The state filed an objection and supporting memorandum, asserting (1) the court lacked authority to consider the motion, and (2) the motion failed on the merits. On May 30, 2012, the district court conducted a hearing on Leavitt's Motion to Quash Death Warrant and orally denied his motion. (Tr., pp.5-38.) Leavitt filed a Notice of Appeal the same day. A written order was filed May 31, 2012.

¹ Because the state has not been served with a supplemental Clerk's Record stemming from Leavitt's Motion to Quash Death Warrant, page references to the various pleadings cannot be provided.

ISSUES

Leavitt has not submitted additional briefing in conjunction with the Order denying his Motion to Quash Death Warrant, instead relying on the brief previously submitted following the issuance of the Death Warrant.

With respect to the district court's Order denying the Motion to Quash Death Warrant, the state likewise relies upon its briefing previously submitted to the Court, but also submits the following additional issues for the Court's consideration on appeal:

1. Has Leavitt failed to establish the district court lacked jurisdiction to consider the Motion to Quash Death Warrant?
2. Has Leavitt waived any claim of error specific to the proceedings on the district court's Order denying the Motion to Quash Death Warrant since he has failed to articulate any error in relation to those proceedings, much less provide argument or authority to support any claim of error?
3. If this Court finds the district court had authority to consider Leavitt's Motion to Quash Death Warrant, did the hearing on that motion render Leavitt's claim that his constitutional rights were violated by the court's failure to conduct a hearing prior to issuing the Death Warrant moot?
4. If this Court finds the district court had authority to consider Leavitt's Motion to Quash Death Warrant, has Leavitt failed to establish error in the denial of that motion?

ARGUMENT

I.

The District Court Lacked Jurisdiction To Consider Leavitt's Motion to Quash Death Warrant When There Was An Appeal Pending From The Issuance Of The Warrant

A. Introduction

Leavitt filed his Motion to Quash Death Warrant while his appeal from the issuance of the death warrant was pending. Pursuant to I.A.R. 13(c), the district court had no authority to consider that motion during the pendency of the appeal. This Court should, therefore, declare the order void.

B. Standard Of Review

“A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal.” State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Id. at 483.

C. The District Court Did Not Have Jurisdiction To Consider Leavitt's Motion To Quash The Death Warrant

Idaho Appellate Rule 13(c) sets forth the limits of a district court's jurisdiction during the pendency of an appeal in a criminal case. *See* H & V Engineering, Inc., 113 Idaho at 647, (citation omitted) (“Once a notice of appeal has been perfected the district court is divested of jurisdiction and the proceedings are stayed during the pendency of the

appeal. There are exceptions to this general rule, and they are specifically enumerated in I.A.R. 13(c), which provides:

In criminal actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency of an appeal:

- (1) Settle the transcript on appeal.
- (2) Rule upon any motion for a new trial.
- (3) Rule upon any motion for arrest of judgment.
- (4) Conduct any hearing, and make any order, decision or judgment allowed or permitted by § 19-2601, Idaho Code.
- (5) Conduct any hearing and make any order, decision or judgment with regard to an originally withheld judgment upon a plea or verdict of guilty.
- (6) Place a defendant upon probation, modify or revoke such probation, or sentence a defendant upon revocation of probation.
- (7) Determine and order whether there shall be a stay of execution of a judgment of conviction upon an appeal to the Supreme Court, except where the sentence is capital punishment, in which case execution of the sentence shall be automatically stayed pending appeal.
- (8) Determine whether the defendant should be allowed bail
- (9) Determine whether the defendant is entitled to a transcript and court appointed attorney on appeal at public expense, and if so, appoint an attorney for the defendant and upon the filing of a notice of appeal, order the preparation of the transcript and record at county expense.

- (10) Enter any other order after judgment affecting the substantial rights of the defendant as authorized by law.
- (11) Rule upon a motion to correct or reduce a sentence under Rule 35 I.C.R.
- (12) Sentence a defendant for a crime which the defendant had been found guilty and which has been appealed.

A motion to quash is not included within the enumerated powers retained by the district court during the pendency of an appeal. Nor does the so-called “catch-all” provision found in subsection (10) encompass such authority. The Idaho Court of Appeals interpreted that provision in State v. Wilson, 136 Idaho 771, 773, 40 P.3d 129 (Ct. App. 2001), and concluded, “the words ‘as authorized by law’ [contained in I.A.R. 13(c)(10)] merely require that the matter upon which the district court is asked to render an order during the pendency of an appeal must be a type of motion, petition or other matter that is authorized by law.” At issue in Wilson was whether a motion to withdraw a guilty plea fell within the “catch-all” exception. Because there is a specific rule authorizing the filing of a motion to withdraw a guilty plea, I.C.R. 33(c), and because “such a motion affects ‘the substantial rights of the defendant,’” the district court’s consideration of that type of motion while an appeal was pending was proper under I.A.R. 13(c)(10). Wilson, 136 Idaho at 773.

Conversely, Leavitt’s Motion to Quash Death Warrant was not filed pursuant to any particular rule or statute. Rather, Leavitt’s Motion to Quash Death Warrant was premised on the same arguments he raised in his opening brief on appeal from the issuance of the Death Warrant. None of the powers retained by the district court during the pendency of an appeal contemplate having the district court consider the same

arguments raised on appeal by virtue of a motion, particularly a motion that is not authorized by law. Surely the purpose of Rule 13 is to promote judicial economy, not duplicate the efforts of the judiciary or authorize parallel proceedings in different forums; to do so would be a waste of resources. As explained in Wilson, the point of the catch-all provision of I.A.R. 13 is to allow the defendant the ability to pursue motions in the district court that affect the defendant's substantial rights and are authorized by law without having to wait for the appellate court to consider "other issues that have arisen in the criminal case." 136 Idaho at 773.

Because the district court lacked jurisdiction to consider Leavitt's Motion to Quash Death Warrant while the appeal from the issuance of the Death Warrant was pending, the court's order denying the motion to quash is void and the merits of the order are not reviewable on appeal. See State v. Urrabazo, 150 Idaho 158, 244 P.3d 1244 (2010) (dismissing appeal where court's order purporting to retain jurisdiction for a second time without an intervening period of probation was void, rendering the subsequent appeal untimely), *abrogated on other grounds by* Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 895, 265 P.3d 502 (2011).

II.

Leavitt Has Waived Any Claim Challenging The Proceedings On The District Court's Order Denying His Motion To Quash The Death Warrant

Leavitt has failed to raise any claim of error in relation to the specific proceedings surrounding his Motion to Quash Death Warrant, instead relying solely on his arguments in relation to the issuance of the Death Warrant. Leavitt has, therefore, waived any claims of error specific to the proceedings on the Motion to Quash Death Warrant and is

limited to the errors set forth in his opening brief on appeal. *See State v. Hairston*, 133 Idaho 496, 511, 988 P.2d 1170 (1999) (citing *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966 (1996)); *State v. Creech*, 132 Idaho 1, 19, 966 P.2d 1 (1998).

III.

If This Court Concludes The District Court Had Jurisdiction To Consider Leavitt's Motion to Quash Death Warrant, The Hearing On That Motion Renders Leavitt's Claimed Constitutional Violation Moot

“An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.” *State v. Barclay*, 149 Idaho 6, 8, 232 P.3d 327 (2010). In his opening brief on appeal from the issuance of the Death Warrant, Leavitt asserted his constitutional rights were violated as a result of the district court's failure to conduct a hearing prior to issuing the Death Warrant. The hearing Leavitt sought in relation to the issuance of the warrant has effectively been held in conjunction with his Motion to Quash Death Warrant because the court considered, at that hearing, the reasons Leavitt believed the warrant should not issue. Thus, if this Court concludes the district court retained authority to consider the Motion to Quash Death Warrant during the pendency of this appeal, Leavitt's claim of a constitutional violation based on the lack of a hearing is moot because “any judicial relief from this Court would simply create precedent for future cases and would have no effect on either party.” *Id.*

Although there are exceptions to the mootness doctrine,² Leavitt has not acknowledged the prospect that at least one of his claims is moot and has, therefore, not

² There are three exceptions to the mootness doctrine: “(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and

asserted any of the exceptions apply. The state will not respond to any anticipatory arguments regarding the applicability of these exceptions at this time but submits that none of the exceptions apply in this case.

IV.

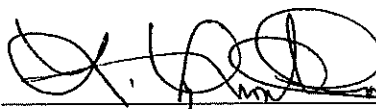
Leavitt Has Failed To Establish Error In The Denial Of His Motion to Quash Death Warrant

Leavitt relies on his prior briefing in support of his claim that the district court erred in denying his Motion to Quash Death Warrant. For the reasons set forth in the state's brief, filed May 24, 2012, Leavitt cannot establish any error in relation to either the issuance of the Death Warrant or in the district court's failure to quash the warrant.

CONCLUSION

The state respectfully requests Leavitt's appeal be dismissed or, alternatively, that issuance of the Death Warrant and the order denying the motion to quash the Death Warrant be affirmed.

DATED this 1st day of June, 2012.



L. LaMONT ANDERSON
Deputy Attorney General and
Chief, Capital Litigation Unit

(3) when an otherwise moot issue raises concerns of substantial public interest.” Barclay, 149 Idaho at 8, 232 P.3d at 329.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 1st day of June, 2012, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

David Nevin
Nevin, Benjamin, McKay & Bartlett
P.O. Box 2772
Boise, ID 83701

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 Electronic Mail

Andrew Parnes
Law Office of Andrew Parnes
P.O. Box 5988
Ketchum, ID 83340

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 Electronic Mail



L. LaMONT ANDERSON