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Attorneys for Plaintiff



IN THE SUPREME COURT FOR THE STATE OF IDAHO

RICHARD H. LEAVITT,)

Plaintiff,)

vs.)

OLIVIA CRAVEN, in her official capacity as)
Executive Director of the State of Idaho)
Commission of Pardons and Parole, and)
MARK FUNAIOLE, JANIE DRESSEN,)
NORMAN LANGAREK II, MIKE H.)
MATTHEWS, and BILL YOUNG, in their)
official capacities as Commissioners of the)
State of Idaho Commission of Pardons and)
Parole,)

Defendants.)
_____)

**VERIFIED COMPLAINT FOR WRIT OF
MANDAMUS AND ALTERNATE WRIT
AND REQUEST FOR STAY OF
EXECUTION**

COMES NOW Petitioner Richard A. Leavitt and complains of Respondents OLIVIA CRAVEN, in her official capacity as Executive Director of the State of Idaho Commission of Pardons and Parole, and MARK FUNAIOLE, JANIE DRESSEN, NORMAN LANGAREK II, MIKE H. MATTHEWS and BILL YOUNG, (hereafter "The Commission") in their official capacities as Commissioners of the State of Idaho Commission of Pardons and Parole, upon information and belief as follows:

GENERAL ALLEGATIONS

1. Petitioner Richard A. Leavitt is an inmate of the Idaho Department of Corrections under a final conviction and sentence of death.

2. On May 17, 2012, the State of Idaho, in an ex parte proceeding, obtained a death warrant for Mr. Leavitt setting an execution date of June 12, 2012. A copy of the warrant is attached hereto as Exhibit A.

3. On May 25, 2012, Petitioner sent a letter to Respondents, the Commission of Pardons and Parole, requesting the following in conjunction with his Petition for Commutation:

- a. a full hearing in open session on his commutation petition;
- b. that notice of the time and place of all hearings concerning Mr. Leavitt's commutation petition be published in a newspaper of general circulation at least once a week for four weeks prior to the hearing(s); and
- c. that the Commission recommend to the Governor that a reprieve of the June 12, 2012 execution date be granted so that the Commission could perform its ministerial duties and Mr. Leavitt's rights could be satisfied.

A copy of the letter is attached hereto as Exhibit B.

4. On June 5, 2012, in an executive session, the Commission denied Mr. Leavitt's commutation petition. We were advised of the decision at approximately 10:00 a.m. on June 6, 2012, via email.

JURISDICTION AND VENUE

Jurisdiction is proper in the Idaho Supreme Court for a Petition of Writ of Mandamus pursuant to Idaho Code § 7-302.

CLAIMS

- Claim 1. The Commission has a duty to hold a full hearing in open session on the denial of Petitioner's commutation petition;
- Claim 2. The Commission has a duty to Petitioner to give proper notice of the time and place of all hearings denying his commutation petition, by publishing in a newspaper of general circulation at least once a week for four weeks notice of that hearing; and
- Claim 3. The Commission has a duty to recommend to the Governor a grant of reprieve of the June 12, 2012 execution date so that it could fulfill its duties as set forth in Claim 1 and 2.
- Claim 4. By ignoring these mandates, the Commission has violated Mr. Leavitt's right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution. See, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-290 (1998) (O'Connor, J.)

PRAYER FOR RELIEF

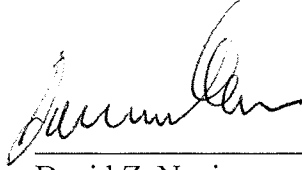
WHEREFORE Petitioner prays for the following relief:

1. That he be granted a full hearing in open session on his commutation petition;
2. That notice of the time and place of all hearings concerning Petitioner's commutation petition be published in a newspaper of general circulation at least once a week for four weeks prior to the hearing(s);
3. That, in the alternative, this Court set a date for hearing where the Commission can show cause why the Commission has not complied to date;

4. That this Court file this Original Writ without requiring the payment of filing fees as Petitioner is indigent; and

5. That this Court stay the June 12, 2012 execution so that these rights can be satisfied.

Dated this 6th day of June, 2012.



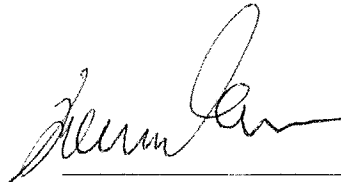
David Z. Nevin
Andrew Parnes
Attorney for Richard A. Leavitt

VERIFICATION OF CONTENTS

David Nevin being first duly sworn upon oath hereby deposes and says:

1. That I am the attorney for the Plaintiff.
2. That I have personal knowledge of the above.
3. That I have reviewed the contents of the above Complaint and state that they are true

to the best of my knowledge.



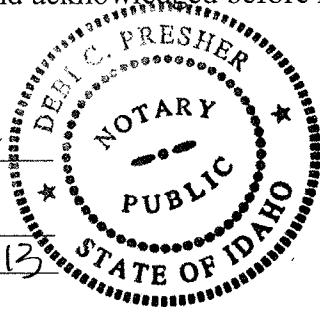
David Nevin

NOTARY

STATE OF IDAHO)
) ss.
County of Ada)

Subscribed, sworn to and acknowledged before me by David Z. Nevin, this 6th day of June, 2012.

Debi C. Presher
Notary Public for Idaho
Residing at: Caldwell
Commission Expires: 11-8-13



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of June, 2012, I served the foregoing document on:

Mark Kubinski
Krista Howard
Deputy Attorneys General
Department of Corrections
Statehouse Mail
PO Box 83720
Boise ID 83720-0010
Facsimile: 208-327-7485

U.S. Mail
 Hand Delivery
 Facsimile
 Federal Express

David Z. Nevin
David Z. Nevin

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
BINGHAM COUNTY, IDAHO

2012 MAY 17 AM 11:28

CASE# CR 85-4110
SARA STAUB CLERK

BY  DEPUTY

 ORIGINAL

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

STATE OF IDAHO)	CASE NO. CR-1985-4110
)	
Plaintiff,)	
)	
vs.)	DEATH WARRANT
)	
RICHARD A. LEAVITT,)	
)	
Defendant.)	
_____)	

TO: Brent Reinke, Director of the Idaho Department of Correction, and Randy
Blades, Warden, Idaho Maximum Security Institution:

WHEREAS, the above-named Defendant, on the 25th day of September, 1985,
was found guilty by a jury of the crime of First-Degree Murder as charged in the
prosecutor's Amended Information; and,

WHEREAS, on the 19th day of December, 1985, this Court made and entered its Pronouncement of Sentence, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death; and,

WHEREAS, on the 8th day of January, 1986, this Court made and entered its Judgment of Conviction, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death; and,

WHEREAS, on the 1st day of May, 1987, this Court entered an order denying Defendant's Petition for Post-Conviction Relief; and,

WHEREAS, on the 30th day of May 1989, the Idaho Supreme Court issued its opinion upholding the conviction and denial of post-conviction relief stemming from conviction, but reversing the death sentence and remanding for resentencing; and,

WHEREAS, after a resentencing hearing, on the 25th day of January, 1990, this Court signed its Memorandum Decision and Findings of the Court in Considering the Death Penalty, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death, which was filed on the 29th day of January, 1990; and,

WHEREAS, on the 15th day of March, 1990, this Court signed the Judgment of Conviction and Sentencing Order, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death, which was filed on the 6th day of April, 1990; and,

WHEREAS, on the 27th day of November, 1991, the Idaho Supreme Court issued its opinion upholding the death sentence; and,

WHEREAS, this Court has entered orders denying all of Defendant's successive and subsequent petitions for post-conviction and other state collateral relief; and,

WHEREAS, the Idaho Supreme Court has affirmed the denial of Defendant's successive and subsequent petitions for post-conviction and other state collateral relief; and,

WHEREAS, on the 14th day of December, 2000, the Honorable B. Lynn Winmill entered Judgment granting Defendant federal habeas relief and ordering the state to initiate new trial proceedings; and,

WHEREAS, on the 14th day of June, 2004, the United States Court of Appeals for the Ninth Circuit, reversed the granting of federal habeas relief requiring the initiation of new trial proceedings, but remanded for consideration of Defendant's ineffective assistance of counsel claims arising from his resentencing; and,

WHEREAS, on the 28th day of September 2007, the Honorable B. Lynn Winmill entered Judgment granting Defendant federal habeas relief and ordering the state to initiate new sentencing proceedings; and;

WHEREAS, on the 17th day of May, 2011, the United States Court of Appeals for the Ninth Circuit reversed the granting of federal habeas relief requiring the initiation of new sentencing proceedings; and,

WHEREAS, on the 14th day of May, 2012, the United States Supreme Court denied Defendant's petition for certiorari, and;


WHEREAS, on the 16th day of May, 2012, the United States Court of Appeals for the Ninth Circuit issued its Mandate, which automatically lifted any stay imposed by Judge B. Lynn Winmill; and,

WHEREAS, Idaho Code § 19-2715(2) mandates that upon a remittitur or mandate being issued after a sentence of death has been affirmed, the district court shall set a new execution date; and,

WHEREAS, the Court is not aware of the existence of any stay of execution or other legal impediment to execution of the judgment.

NOW THEREFORE, YOU ARE HEREBY COMMANDED, pursuant to Idaho Code § 19-2716 and the Judgment of this Court, to receive said Defendant into your custody, and on the 17 day of June, 2012, you shall cause the execution of said sentence of death to take place, unless said sentence is stayed by law, and that you shall make a return upon this Death Warrant, showing the time, mode and manner in which it was executed pursuant to Idaho Code § 19-2718.

DATED this 17 day of May, 2012.


DISTRICT JUDGE

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

May 25, 2012

The Commission of Pardons and Parole
3125 S. Shoshone
Boise, Idaho 83705

The Commission of Pardons and Parole
P.O. Box 83720
Statehouse Mail
Boise, Idaho 83720-1807

Re: Richard A. Leavitt
Request for Compliance With Open Meeting Laws

Dear Commission of Pardons and Parole:

Today, Mr. Leavitt has filed his Petition for Commutation. By this letter Mr. Leavitt is requesting that you provide him his state constitutional right under Article IV, section 7¹ to a full hearing in open session. Mr. Leavitt is asking that you follow the procedural rights under Idaho Code § 20-213 and Rule 450.02.a of the Rules of the Commission of Pardons and Parole;² that notice of the time and place of all hearings concerning Mr. Leavitt's commutation petition be published in a newspaper of general circulation at least once a week for four weeks prior to the hearing(s).

¹Article IV section 7 provides in pertinent part:

Said board [of pardons] . . . , shall have power . . . to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment. The legislature shall by law prescribe the sessions off said board ind the manner in which application shall be mad, and regulated proceedings thereon, but . . . no commutation or pardon [shall be granted], except by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place off such hearing and the release applied for shall have been given publication in some newspaper off general circulation at least once a week for four weeks. The proceedings and decision of the board shall be reduced to writing and with their reasons for their action . . . , and the dissent of any member who may disagree, signed by him, and filed with all papers used upon the hearing, in the office off the secretary of the state.

²Hereafter referred to as IDAPA 50.01.01.

EXHIBIT B

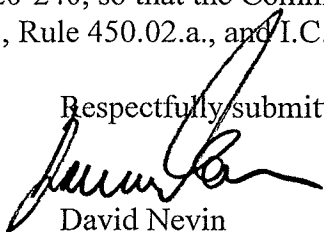
May 25, 2012

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It is Mr. Leavitt's position that while the Commission's decision to schedule a commutation hearing may be discretionary,³ this scheduling decision itself must nevertheless comply with the Idaho Constitution and Idaho's Open Meeting Laws as set forth in Idaho Code §§ 67-2340 to 67-2347. Under Article IV, section 7, "no commutation or pardon [may] be granted, except by the decision of a majority of said board, after a full hearing in open session." Should this Commission deny him a commutation hearing, that act is by its own terms a final decision on his commutation petition. Because, pursuant to Idaho Code § 67-2345(4), "[n]o executive session may be held for the purpose of taking any final action or making any final decision,"⁴ a decision by the Commission denying a commutation hearing must be reached and rendered in a full hearing in open session which has been properly noticed under Article IV, section 7 and IDAPA 50.01.01, rule 450.02.a.

June 12, 2012 is the execution date summarily chosen by the State in an ex parte proceeding. Given the meritorious bases for Mr. Leavitt's Petition and the legal requirements for a hearing, Mr. Leavitt is hereby requesting the Commission to recommend to the Governor that he stay the execution pursuant to I.C. § 20-240, so that the Commission is able to comply with the Idaho Constitution, IDAPA 50.01.01, Rule 450.02.a., and I.C. § 67-2345(4).

Respectfully submitted by



David Nevin
Attorney for Richard Leavitt

³See IDAPA 50.01.01, rule 450.02.

⁴While Idaho Code section 20-213A provides that all meetings of the commission of pardons and parole be held in accordance with the open meeting law as provided in chapter 23, title 67, Idaho Code, subsection (a) provides that "[d]eliberations and decision concerning the granting or denying of pardons or commutations, [which] may be made in executive session . . ." Mr. Leavitt contends this provision directly contradicts constitutional provision of Article IV section 7, and the procedural rules of IDAPA 50.01.01, rule 450.02.a., and I.C. section 67-2345(4), and that an open meeting is required as demanded above..

Mr. Leavitt's position is supported by the opinion of the Idaho Attorney General Lawrence Wasden. See *Idaho Open Meeting Law Manual*, Office of the Attorney General, November 2011, p. 20 ["It should be noted that the Open Meeting Law establishes circumstances where executive sessions are permissible. In other words, the act authorizes, but does not require, closed meetings. In addition, even though certain enumerated matters may be 'considered' in executive session, it must be emphasized that: "[N]o executive session may be held for the purpose off taking any final action or making any final decision." (Citing I.C. § 67-2345(4) and Attorney General Opinion No. 77-44; Attorney General Opinion No. 81-15.)