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Attorneys for Defendant Gerald Ross Pizzuto, Jr.

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

STATE OF IDAHO	)	<b>Case No. CR-1985-22075</b>
	)	
Plaintiff,	)	<b>MEMORANDUM IN SUPPORT OF</b>
	)	<b>MOTION TO PRECLUDE</b>
v.	)	<b>ISSUANCE OF DEATH WARRANT</b>
	)	
	)	<b>(CAPITAL CASE)</b>
GERALD ROSS PIZZUTO, JR.,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	

As detailed below, Defendant Gerald Ross Pizzuto, Jr. respectfully asks the Court to refrain from signing a death warrant until the serious issues involving his commutation proceedings have been fully resolved by the judiciary, or at least until the instant motion has been briefed, heard, and adjudicated.<sup>1</sup>

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<sup>1</sup> Mr. Pizzuto is filing the present motion now because the Court has already authorized the State to seek a death warrant ex parte and without notice to opposing counsel, which the Attorney

## I. Background

Mr. Pizzuto was convicted of murder and sentenced to death in Idaho County District Court in 1986. *See State v. Pizzuto*, 810 P.2d 680, 687 (Idaho 1991), *overruled on other grounds by State v. Card*, 825 P.2d 1081, 1088 (Idaho 1991). His death sentences were affirmed on direct appeal. *See id.* at 716. After further collateral litigation in state and federal court, which is not relevant to the present motion, this Court signed a death warrant on May 6, 2021, setting an execution for June 2, 2021. On May 18, 2021, the Idaho Commission of Pardons and Parole (hereinafter “the Commission”) decided to hold a hearing on Mr. Pizzuto’s clemency petition. At the parties’ joint suggestion, this Court stayed Mr. Pizzuto’s execution “until the conclusion of the commutation proceedings related to Mr. Pizzuto’s current commutation petition.” A full clemency hearing was held on November 30, 2021 and streamed live on Idaho public television’s website.

On December 30, 2021, the Commission announced that a four-person majority of its members had voted in favor of commuting Mr. Pizzuto’s death sentences to life without the possibility of parole. *See Ex. 1* at 1.<sup>2</sup> Three members dissented and both sides explained their rationales. *See id.* at 1–2. The Commission characterized its determination as a recommendation to the Governor and forwarded the decision to him. *See id.* at 1. Governor Little purported to “deny the Commission’s recommendation” on the same day it was advanced to him, supposedly “[a]fter a thorough review of the voluminous records” at issue. *Ex. 2.*

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General did in May 2021, so the undersigned will presumably have no opportunity to submit anything in opposition to a request for a death warrant. *See Order*, dated Jan. 13, 2021, at 9.

<sup>2</sup> Exhibits 1 and 2 are true and correct copies of documents sent to undersigned counsel by the Executive Director of the Commission. They are also available on the Commission’s website at <https://parole.idaho.gov/commission-hearing-review-decisions/>. To the extent it is necessary, Mr. Pizzuto respectfully asks the Court to take judicial notice of the documents.

## II. Argument

It would not be appropriate for the Court to sign a death warrant at the present juncture for two related reasons. The underlying premise behind both reasons is that Mr. Pizzuto's death sentences have effectively been reduced to life under the Idaho Constitution as a result of the Commission's favorable vote on his clemency petition.

A commutation is "[t]he executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant." Black's Law Dictionary (11th ed. 2019) (hereinafter "Black's"). Article IV, Section 7 of the Idaho Constitution places the commutation power exclusively in the hands of the Commission. It states that the Commission<sup>3</sup> has the "power to remit fines and forfeitures, and, only as provided by statute, 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." Section 7 further provides that "no commutation or pardon" shall be "granted, except by the decision of a majority of" the Commission, "after a full hearing in open session." Finally, Section 7 states that "[t]he proceedings and decision of the board shall be reduced to writing and with their reasons for their action in each case, and the dissent of any member who may disagree, signed by him."

The requirements of Section 7 were all satisfied by the Commission's favorable vote on Mr. Pizzuto's clemency petition. As mentioned earlier, a full hearing was held and made accessible to the public. Afterwards, a majority of the Commission voted to commute Mr.

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<sup>3</sup> Section 7 refers to "the board of pardons" rather than the Commission, but the two are the same. *See Bates v. Murphy*, 796 P.2d 116, 120 n.3 (Idaho 1990) ("The Commission of Pardons & Parole was originally known as the Board of Pardons."). For simplicity's sake, Mr. Pizzuto uniformly uses the word "Commission" here.

Pizzuto's death sentences to life. *See* Ex. 1 at 1. The majority and the dissent both set forth the bases for their positions in writing. *See id.* at 1–2. Section 7's process was followed in its entirety. Because the terms of Section 7 were met, Mr. Pizzuto's death sentences were commuted to life under the state constitution.

It is true that the Governor has claimed to have overruled the Commission's determination, *see* Ex. 2, but he had no authority to do so under the Idaho Constitution. Section 7 is the only place in the Idaho Constitution that addresses commutations, and it gives the Governor no role in deciding who gets or doesn't get them. Instead, as described above, it is the Commission alone that has the "power" under Section 7 "to grant commutations." Section 7 says nothing to suggest that the Governor has the ability to erase a commutation lawfully awarded by the Commission. *See* Molly Clayton, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. Rev. 751, 760 n.95 (2013) (listing Idaho as one of "five death penalty states that vest the clemency power solely in a group or an administrative board," rather than involving the Governor, and citing Article IV, Section 7).

The remainder of Section 7 reinforces the limited role the Governor has in the commutation process, and it does not include the capacity to undo work done by the Commission. Although the first paragraph of Section 7 resolves the question presented here directly, by conferring the commutation power on the Commission alone, the second paragraph is helpful in reaffirming the same conclusion. *See Rudeen v. Cenarrusa*, 38 P.3d 598, 605 (Idaho 2001) ("The general rules of statutory construction apply to constitutional provisions as well as

statutes.”); *see also In re Doe*, 484 P.3d 195, 200 (Idaho 2021) (“Provisions should not be read in isolation, but must be interpreted in the context of the entire document.”).<sup>4</sup>

Pursuant to the second paragraph of Section 7, the Governor only has the “power to grant respites or reprieves” in certain cases, “but such respites or reprieves shall not extend beyond the next session of the” Commission, which must then determine whether it will “commute or pardon the offense.” In other words, the Governor is involved in commutations solely when he issues a respite or a reprieve, i.e., “[a] temporary suspension of a death sentence.” Black’s. And even then, the Governor’s part extends only to the reprieve—it is still the Commission that ultimately “commute[s] . . . the offense” or elects not to. Read in tandem, the first and second paragraphs make plain that the Governor has one narrow function under Section 7: to postpone an execution. Every step taken to actually commute a sentence rests with the Commission.

Despite the straightforward constitutional language, the Governor cited Idaho Code § 20-1016 to justify his intervention in the commutation proceedings. *See* Ex. 2. Section 20-1016(2) indicates that, with respect to death-eligible offenses, the Commission’s “determination shall only constitute a recommendation subject to approval or disapproval by the” Governor. The statute further instructs that “[n]o commutation . . . for such offenses shall be effective until presented to and approved by the” Governor. *Id.* Nevertheless, it is axiomatic that a statute cannot stand if it contradicts the state constitution. *See, e.g., Reclaim Idaho v. Denney*, 497 P.3d 160, 179 (Idaho 2021) (striking down a statute because it was inconsistent with the state constitution and reiterating that “[p]assing on the constitutionality of statutory enactments, even

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<sup>4</sup> In this pleading, unless otherwise noted, all internal quotation marks and citations are omitted and all emphasis is added.

enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*”).

By seeking to give the Governor a veto over the Commission’s judgment in a commutation, § 20-1016 runs afoul of Article IV, Section 7, and is therefore constitutionally invalid. The Governor’s veto here was consequently unlawful, and had no legal effect on the Commission’s decision, which commuted Mr. Pizzuto’s death sentences under Section 7.

Mr. Pizzuto acknowledges the clarification in Section 7 that the Commission is to grant commutations “only as provided by statute.” However, this clause did not permit the legislature to insert an entirely different executive actor (the Governor) into a process carefully left by the Constitution in the hands of a particular agency (the Commission). In context, the caveat is properly understood as confirming that the legislature is entitled to regulate the *process* by which the Commission exercises its power, not to take that power and give it to someone else. *Cf. Gregg v. Rauner*, 124 N.E.3d 947, 960 (Ill. 2018) (considering a state constitution that made the Governor responsible for clemency and interpreting a clause in the constitution regarding how “[t]he manner of applying” for clemency “may be regulated by law” as “allow[ing] the legislature to regulate the application” but not as “a limitation of the Governor’s power”). For instance, Idaho Code § 20-1018 outlines the formal procedure the Commission must follow when a commutation or other type of clemency is granted, such as the filing of the official document with the secretary of state and the courts. Similarly, Idaho Code § 20-1017 directs the Executive Director of the Commission to publish notice in a newspaper of an upcoming commutation hearing. These are legitimate legislative acts filling out the details of the commutation process in the manner envisioned by Section 7. A statute subjugating the will of the Commission to a distinct office is a much different matter, especially when the Commission

is the single entity entrusted with the decision by the state constitution. Such a statute cannot be reconciled with Section 7, and accordingly cannot survive constitutional scrutiny.

Because the veto procedure outlined in § 20-1016 is unconstitutional, the Governor's intervention in Mr. Pizzuto's commutation proceeding was void. Mr. Pizzuto's sentences were commuted as a matter of constitutional law as soon as a majority of the Commission released its decision to reduce them to life. The Idaho Constitution gave the Governor no say in the matter.

Had the drafters of Section 7 wished to endow the Governor with the prerogative he is asserting here, they easily could have done so. Other state constitutional drafters have. *See* Tex. Const., Art. IV, § 11(b) (establishing that “the Governor shall have power . . . on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishments”); Okla. Const., Art. VI, § 10 (“It shall be the duty of the [Pardon and Parole] Board to . . . by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.”); Pa. Const., Art. IV, § 9 (“[T]he Governor shall have power . . . to grant . . . commutation of sentences . . . but no . . . sentence [is to be] commuted, except on the recommendation in writing of a majority of the Board of Pardons”). Section 7 contains no comparable language. In fact, it contains the opposite—a signal, in the second paragraph, that when it comes to commutation proceedings the Governor can only grant reprieves. Courts presume that drafters choose their words carefully, and the framers of Section 7 are due the same respect. *See Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cty.*, 356 P.3d 377, 382 (Idaho 2015) (“[T]his Court has been reluctant to second-guess the wisdom of a statute and has been unwilling to insert words into a statute that the Court believes the legislature left out, be it intentionally or inadvertently.”).

Having revealed the illegitimate nature of the Governor's objection to the commutation, Mr. Pizzuto now turns to the two reasons why the objection's invalidity compels an order granting the motion at hand to preclude issuance of the death warrant.

First, Idaho law expressly authorizes the Court to stay an execution "as part of a commutation proceeding." Idaho Code § 19-2715(1). The Court exercised that power on May 18, 2021, when it stayed Mr. Pizzuto's execution "until the conclusion of the commutation proceedings." Mr. Pizzuto submits that the commutation proceedings are not over. When a commutation has been granted, the Executive Director of the Commission is obligated to file the official document with the Secretary of State, give it to the petitioner, and provide "notice with the state courts." Idaho Code § 20-1018(2), (3), (4). In the present case, the Commission has not done so, nor has it taken any measures to formalize Mr. Pizzuto's commutation. Its refusal is unsurprising, for the Commission shares the Governor's unconstitutional view that he wields veto power under § 20-1016. Thus, the commutation process is still ongoing. It will remain ongoing until this Court resolves whether Mr. Pizzuto's underlying theory about the commutation process is correct. This is so because, if the Court eventually sides with Mr. Pizzuto, it will nullify the Governor's action and order the Commission to take the steps necessary to bring the commutation to fruition. Until that point, the commutation will be in progress, the existing stay will be in force, and no death warrant should issue in the meantime. *Cf. Constitution Bank v. Tubbs*, 68 F.3d 685, 691–92 (3d Cir. 1995) (discussing how courts are prevented from taking any action in cases when they are inconsistent with automatic bankruptcy stays); *Hall v. Ramirez*, No. 1:18-cv-218, 2018 WL 3633916, at \*3 (D. Idaho July 31, 2018) (implying that a stay of execution prohibits the State from acquiring a death warrant).



Second, as soon as his counsel are able to make the necessary arrangements, which they expect to happen in the next few days, Mr. Pizzuto intends to file in this Court a petition for post-conviction relief under Idaho Code § 19-2719 and the Uniform Post-Conviction Procedure Act (Idaho Code § 19-4901 et seq.), attacking his death sentences at least partly on the ground that it is unconstitutional now that it has been commuted under Section 7.<sup>5</sup> When an inmate in Idaho pursues “a post-conviction challenge to the conviction or sentence,” a death warrant is impermissible “until the order deciding such post-conviction challenge is filed.” Idaho Code § 19-2719(2). Furthermore, an automatic stay of execution is in effect when the prisoner is pursuing post-conviction relief pursuant to § 19-2719. *See* Idaho Code § 19-2719(12); *see also* § 19-2715(1) (authorizing stays “during an appeal taken pursuant to section 19-2719”).

Under the analysis adopted by this Court when it acknowledged an automatic stay earlier in the case, the foregoing provisions dictate the same result now. On January 13, 2021, this Court granted a motion by Mr. Pizzuto to preclude the issuance of a death warrant until a then-pending post-conviction appeal was fully disposed of on appeal. The post-conviction petition in that proceeding was not Mr. Pizzuto’s first. *See Pizzuto v. State*, 484 P.3d 823, 825 (Idaho), *cert. denied*, --- S. Ct. ----, 2021 WL 5763190 (2021). It was, though—as correctly observed by this Court—timely, since it was commenced within a reasonable period of when the claim became available. *See* Order, dated Jan. 13, 2021, at 5–6. So, too, is the post-conviction petition Mr. Pizzuto plans to file soon regarding the commutation issue. A capital post-conviction petition is timely when it is submitted within forty-two days of the claim being known or reasonably knowable. *See Pizzuto v. State*, 202 P.3d 642, 649 (Idaho 2008). The claim at issue now was

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<sup>5</sup> In addition to the post-conviction proceedings, Mr. Pizzuto will likely pursue other avenues for litigating the effect of the commutation as well, after his attorneys have sufficient time to study his options and make the appropriate preparations.

plainly unknowable until the Commission and the Governor rendered their commutation decisions, which occurred on December 30, 2021. *See* Exs. 1, 2. Mr. Pizzuto will file his petition well within forty-two days of then. There will, accordingly, be an automatic stay upon the submission of the petition. It would be both inequitable and inefficient to sign a death warrant only for it to be immediately stayed.

Lastly, and perhaps most critically, Mr. Pizzuto will have a powerful underlying claim in his post-conviction petition. Post-conviction claims are cognizable when, as pertinent here, the sentence violates the state constitution, “the sentence exceeds the maximum authorized by law,” or the petitioner is “unlawfully held in custody or other restraint.” Idaho Code § 19-4901(1), (3), (5). Mr. Pizzuto has substantial arguments on all three provisions. His punishment is at odds with the state constitution because the pardon-power clause rendered the Commission’s decision a commutation, thereby nullifying the death sentences. For the same reasons, the sentences exceed the legal maximum and Mr. Pizzuto is being held unlawfully as a death-row inmate. Because Mr. Pizzuto will make out a credible case for post-conviction relief, he should not be executed before he is able to do so.

“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.” *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993). It is an extraordinary occurrence that Mr. Pizzuto obtained a majority vote in his favor from the Commission. *See* Jay Clayton, *Vindicating the Right to be Heard: Due Process Safeguards Against Government Interference in the Clemency Process*, 88 U. Chi. L. Rev. 897, 903 (2021) (characterizing “clemency for prisoners on death row” as “exceedingly rare”). As such an important failsafe, and under such unusual and compelling circumstances, Mr. Pizzuto ought to be permitted to pursue his clemency

rights to the full extent of the law, which means here that he should be allowed to present a colorable theory that his death sentences were commuted under the state constitution. At a bare minimum, Mr. Pizzuto has a credible account of the clemency process, and it would be improper for the State to execute him before the courts can resolve the question one way or the other.

### **III. Conclusion**

In light of the above, Mr. Pizzuto respectfully asks the Court to refrain from signing a death warrant until the significant questions concerning clemency have been finally resolved or at least until the present motion has been fully briefed and decided.

DATED this 3rd day of January 2022.

/s/ Jonah J. Horwitz  
Jonah J. Horwitz  
Deborah A. Czuba

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of January 2022, I served the foregoing document on all interested parties via iCourt file and serve:

L. LaMont Anderson  
Deputy Attorney General  
Statehouse Mail, Room 10  
PO Box 83720  
Boise, ID 83720-0010  
[Lamont.Anderson@ag.idaho.gov](mailto:Lamont.Anderson@ag.idaho.gov)

/s/ L. Hollis Ruggieri  
L. Hollis Ruggieri

# **EXHIBIT 1**



STATE OF IDAHO  
COMMISSION OF PARDONS AND PAROLE

**Brad Little**  
*Governor*  
**Ashley Dowell**  
*Executive Director*

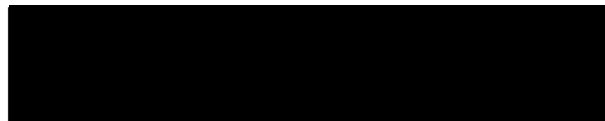
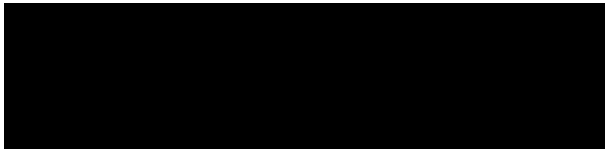
**IN THE MATTER OF GERALD ROSS PIZZUTO**  
**PETITION FOR COMMUTATION**  
Idaho County Case No. CR-1985-22075

This matter came before the Commission on November 30, 2021, to consider the request by Mr. Pizzuto to commute his imposed sentences of death to life without possibility of parole. Mr. Pizzuto was convicted of two (2) counts of Murder I in 1986 for the murders of Berta and Del Herndon.

**DECISION OF THE MAJORITY**

The Commission is recommending by a majority decision that Governor Little grant the commutation of Gerald Ross Pizzuto's two (2) death sentences in Idaho County Case No. CR-1985-22075 to life in prison without the possibility of parole. This decision is not based on any doubt or question about Mr. Pizzuto's guilt or the horrific nature of his crimes. This recommendation is one of mercy due to Mr. Pizzuto's current medical condition and evidence of his decreased intellectual functioning. Mr. Pizzuto suffers from advanced terminal bladder cancer and other major medical conditions that leave him faced with impending death and confined to a wheelchair. The Commission also considered compelling evidence of Mr. Pizzuto's decreased intellectual functioning and deficits in adaptive functioning, identified through expert evaluations and brain scans. While his level of intelligence did not meet the legal threshold prohibiting the execution of individuals with mental retardation established by the U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Commission is not bound by that threshold. Mr. Pizzuto has served 35 years in prison and his physical condition, as well as the fact that he will never be released from prison, leaves him as very little threat to others. The Commission understands the difficulty of this decision for the family of Berta and Del Herndon and expresses our deepest sympathies for their loss and continued emotional impact from this crime.

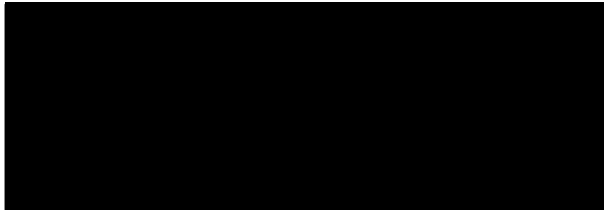
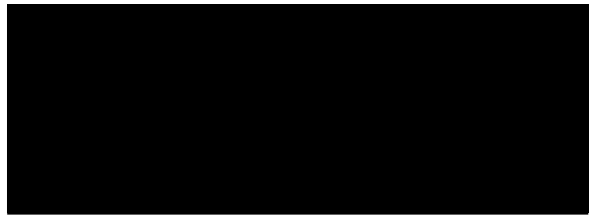
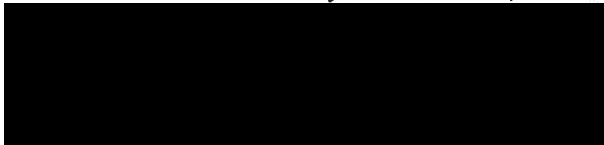
Issued this 30<sup>th</sup> day of December, 2021.



**DISSENT OF THE MINORITY**

The minority members of the Commission voted to deny the commutation of Gerald Ross Pizzuto's death sentence in Idaho County Case No. CR-1985-22075 to life in prison without the possibility of parole. The cruel and heinous nature of Mr. Pizzuto's crimes and his lack of responsibility, accountability, and credibility warrant imposition of the original sentence imposed and the execution of Mr. Pizzuto. Mr. Pizzuto's current medical condition does not outweigh or diminish the justification or value of the original sentence of death imposed in this case. That sentence was justified at the time of sentencing and is justified today. The dissenting Commissioners believe Mr. Pizzuto knew what he was doing when he committed these murders and fully understood the consequences of his actions. His actions were premeditated and void of any mercy for his victims. The victims of Mr. Pizzuto, and other victims of crime, must have confidence not only in the justice system, but in the original decision and imposition of the sentence.

Issued this 30<sup>th</sup> day of December, 2021.



# **EXHIBIT 2**



BRAD LITTLE  
GOVERNOR

December 30, 2021

Ashley Dowell  
Executive Director  
Idaho Commission of Pardons and Parole  
3056 Elder St.  
Boise, ID 83705

Dear Director Dowell,

I hereby advise you that I return without my approval the recommendation to commute Gerald Pizzuto's death sentences for the cruel and calculated 1985 murders of Berta and Del Herndon in Idaho County.

The Idaho Commission of Pardons and Parole voted 4-3 to commute Pizzuto's death sentences. Pursuant to Article IV, Section 7 of the Idaho Constitution and Section 20-1016, Idaho Code, the Commission's written decision constitutes a recommendation to the Governor. After a thorough review of the voluminous records submitted during the November 30 public hearing, I conclude commuting Pizzuto's death sentences would be inappropriate.

Pizzuto was convicted of robbery and four grisly murders, all committed within a year after his release from prison in Michigan for rape. He killed Rita Drury, a grandmother, after binding her hands and feet, brutally assaulting her, and violating her in a disgusting and humiliating manner. He fatally shot John Ray Jones in the face at near point-blank range. At Ruby Meadows in Idaho, Pizzuto bound Berta and Del, gruesomely bludgeoned their heads repeatedly, and concealed their bodies in a shallow grave. But for a brave Idaho jury and devoted law enforcement, Pizzuto would have certainly left countless other victims in his wake.

The severity of Pizzuto's brutal, senseless, and indiscriminate killing spree strongly warrants against commutation. Therefore, I respectfully deny the Commission's recommendation so that the lawful and just sentences for the murders of Berta and Del can be fully carried out as ordered by the court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brad Little".

Brad Little  
Governor of Idaho