

IDAHO COUNTY DISTRICT COURT
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KATHY M. ACKERMAN
CLERK OF DISTRICT COURT
[Signature] DEPUTY

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

)	CASE NO. CR-1985-22075
)	
STATE OF IDAHO)	
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	ORDER ON MOTION TO
v.)	PRECLUDE ISSUANCE OF
)	DEATH WARRANT AND MOTION
GERALD ROSS PIZZUTO, JR.,)	TO CORRECT DEATH SENTENCE
)	UNDER I.C.R. 35(a)
Defendant.)	
)	

This matter came before the Court on the Defendant’s Motion to Preclude Issuance of Death Warrant and Motion to Correct Death Sentence under I.C.R. 35(a). The Defendant was represented by Jonah Horwitz, of the Federal Defender Services of Idaho. The State was represented by LaMont Anderson, of the Idaho Attorney General’s Office. The Court heard argument on January 20, 2022. The Court, being fully advised in the matter, hereby renders its decision.

PROCEDURAL BACKGROUND

Pizzuto was convicted of two counts of first-degree murder and one count of robbery and grand theft and sentenced to death in 1986. See *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991). The judgment of conviction was affirmed by the Idaho Supreme Court. *Id.* There has

been extensive litigation over Pizzuto's convictions and sentence. Pizzuto has filed a total of five petitions for post-conviction relief, all of which were dismissed.¹

The Idaho Supreme Court affirmed the district court's summary dismissal of the fifth petition for post-conviction relief in *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642 (2008).²

Pizzuto's fifth petition raised the issue of whether Pizzuto's death sentence was unconstitutional in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), wherein the United States Supreme Court held that the execution of a murderer who was mentally retarded³ at the time of the killing constituted cruel and unusual punishment in violation of the Eighth Amendment.

There was also significant federal litigation resulting from Pizzuto's conviction and sentence.⁴ Most recently, the Ninth Circuit Court of Appeals affirmed the District of Idaho Court's order denying habeas relief. *See Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir. 2019).⁵ The

¹ Pizzuto's first post-conviction claim was reviewed in conjunction with the appeal of his judgment of conviction in *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991). Pizzuto's second petition for post-conviction relief was dismissed by the District Court; the Idaho Supreme Court affirmed this decision in *Pizzuto v. State*, 127 Idaho 469, 903 P.2d 58 (1995). Pizzuto's third petition for post-conviction relief was summarily dismissed by the District Court; the Idaho Supreme Court also affirmed this decision. *See Pizzuto v. State*, 134 Idaho 793, 10 P.3d 742 (2000). Pizzuto's fourth petition for post-conviction relief addressed issues arising from the United States Supreme Court case *Ring v. Arizona*, 536 U.S. 584 (2002). This post-conviction appeal was consolidated with several others. In *Rhoades et al. v. State*, 149 Idaho 130, 233 P.3d 61 (2010), the Idaho Supreme Court affirmed the post-conviction court, concluding that *Ring* is not retroactive under Idaho law.

² The procedural history and summary of details from each of Pizzuto's post-conviction cases are set forth at 146 Idaho at 723-34, 202 P.3d at 645-646. In its most recent opinion, the Idaho Supreme Court referred to the fifth petition for post-conviction relief as "*Pizzuto 2008*."

³ At the time *Atkins* was decided, "mental retardation" was the common phrase used to describe intellectual disability. This Court will use the phrase "intellectual disability" or "ID" for purposes of this order, unless specifically quoting older material.

⁴ Pizzuto's first habeas petition is located at *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002), *dissent amended and superceded in part by* 385 F.3d 1247 (9th Cir. 2004).

⁵ Pizzuto's federal cases are intertwined with the United States Supreme Court's rulings in *Atkins* and its progeny, including *Hall v. Florida*, 572 U.S. 701 (2014). In *Pizzuto v. Blades*, 2012 WL 73236 (D. Idaho 2012), Judge Winmill determined that Pizzuto was not entitled to habeas relief. This decision was reviewed and affirmed in *Pizzuto v. Blades*, 729 F.3d 1211 (9th Cir. 2013); however, as a result of *Hall v. Florida*, the case was vacated and remanded. *See Pizzuto v. Blades*, 758 F.3d 1178 (9th Cir. 2014). Judge Winmill again considered the matter and determined that *Hall v. Florida* did not alter the previous decision denying the successive petition. This decision was affirmed at *Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir. 2019).

United States Supreme Court denied certiorari on November 2, 2020. *Pizzuto v. Yordy*, 141 S.Ct. 661 (Mem. 2020).

Pizzuto came before this Court seeking to reopen the fifth petition for post-conviction relief pursuant to I.R.C.P. 60(b)(6) in Idaho County Case CV2003-34748 (*Pizzuto* 2008). Pizzuto's motion was denied by this Court on January 6, 2020. Pizzuto appealed that order to the Idaho Supreme Court; the Court affirmed this Court's order on February 3, 2021. *Pizzuto v. State*, 2021 WL 358204 (February 3, 2021). The Idaho Supreme Court denied a petition for rehearing on April 29, 2021, and issued the Remittitur to this Court on the same date. With the issuance of the Remittitur, the stay of execution was no longer required. This Court, upon request from the State, issued the death warrant on May 6, 2021, and the warrant was filed on May 10, 2021. Pizzuto filed a motion to stay execution pending certiorari proceedings, and that motion was denied on May 14, 2021.

On May 18, 2021, the parties stipulated to an order staying execution as a result of the Idaho Commission of Pardons and Parole (hereinafter "Commission")⁶ granting Pizzuto's request for a commutation hearing. A full clemency hearing was held on November 30, 2021. On December 30, 2021, the Commission announced that a four-person majority of its members had voted in favor of commuting Pizzuto's death sentences to life without the possibility of parole. *Memorandum in Support of Motion to Preclude Death Warrant, Ex. 1*. The Commission characterized its determination as a recommendation to the governor and forwarded the decision

⁶ "The Commission of Pardons and Parole was originally known as the Board of Pardons." *Bates v. Murphy*, 118 Idaho 239, 243, 796 P.2d 116, 120 n.3. This Court will use "Commission" for this opinion, unless citing case law that does otherwise.

to him. *Id.* Governor Little denied the Commission’s recommendation shortly thereafter.
Memorandum in Support of Motion to Preclude Death Warrant, Ex. 2.

There are two motions pending before this Court: Pizzuto’s motion to preclude the issuance of a death warrant and motion to correct sentence under I.C.R. 35(a).

ANALYSIS

1. Motion to Correct Sentence Under I.C.R. 35(a)

Pursuant to I.C.R. 35(a), “The court may correct a sentence that is illegal from the face of the record at any time.”

A sentence is “illegal” within the meaning of Rule 35 only if it is in excess of statutory limits or otherwise contrary to applicable law. *State v. Alsanea*, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct.App.2003); *State v. Lee*, 116 Idaho 515, 516, 777 P.2d 737, 738 (Ct.App.1989). Recently, the Idaho Supreme Court has interpreted the term narrowly as “a sentence that is illegal on the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing.” *State v. Clements*, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009). The Court further stated that “Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal....” *Id.*

State v. Peterson, 148 Idaho 610, 613, 226 P.3d 552, 555 (Ct. App. 2010).

a. Whether the Rule 35(a) motion is timely.

As set forth above, I.C.R. 35(a) allows a movant to pursue relief from an illegal sentence at any time. Cases involving the death penalty must follow the procedures set forth in I.C. §19-2719.⁷ Rule 35 motions must be filed in compliance with the timelines that apply to post-conviction proceedings under I.C. § 19-2719(3).

⁷ I.C. §19-2719 provides special appellate and post-conviction procedures in capital cases. This statute “shall be interpreted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence.” *Id.* The statute requires the court follow strict timelines.

(3) Within forty-two (42) days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known. The defendant must file any

In *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), this Court upheld the requirement in I.C. § 19-2719(4) that “[a]ny remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in [that] section and within the [42-day] time limitations of subsection (3)...” Lankford's motion to reduce sentence was not filed within 42 days of the judgment imposing the death penalty and accordingly, the trial court did not err in denying defendant's motion for reduction of sentence on the grounds that it was not timely filed.

State v. Lankford, 115 Idaho 796, 797, 770 P.2d 805, 806 (1989). The Idaho Supreme Court has determined that with respect to post-conviction proceedings “a reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless the petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.” *Pizzuto v. State*, 146 Idaho 720, 727, 202 P.3d 642, 649 (2008).

The Commission’s decision regarding commutation occurred on December 30, 2021. This motion was filed within forty-two days of that decision. Pizzuto could not have known about this claim prior to the time the Commission issued its decision, therefore the motion is timely.⁸

claims of ineffective assistance of appellate counsel within forty-two (42) days of the Idaho supreme court issuing the final remittitur in the unified appeal from which no further proceedings except issuance of a death warrant are ordered.

(4) Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.

Idaho Code Ann. § 19-2719(3)-(4). Here, the motion to correct sentence was filed within forty-two days of the announcement of the Commission’s decision, which is the soonest Pizzuto could have known of his current claim.

⁸ The State asserts the motion is not timely because Pizzuto was aware of the Commission’s reliance on I.C. § 20-2016 regarding the process the Commission would follow once the commutation decision was made. While this may be accurate, Pizzuto could not know what decision the Commission would make, or how the Governor would respond to that decision until the Commission proceedings were concluded. Therefore, the Court does not find that the letter provided to counsel regarding the Commission’s procedure provided sufficient facts to file a post-conviction proceeding, or a motion pursuant to I.C.R. 35, as asserted by the State.

MEMORANDUM OPINION AND ORDER
ON MOTION TO PRECLUDE ISSUANCE
OF DEATH WARRANT AND MOTION
TO CORRECT DEATH SENTENCE
UNDER I.C.R. 35(a)

b. Whether the death sentences are illegal as a result of the Commission recommending commutation to life in prison without parole.

Pizzuto argues that the death sentences in his case are illegal as a result of the Commission voting to commute his sentences to life in prison without parole. Pizzuto contends that Article IV, Section 7 of the Idaho Constitution places the commutation power exclusively in the hands of the Commission. The State argues that Article IV, Section 7 should be interpreted to require the Commission to follow I.C. § 20-1016, a statute that limits the Commission's authority.

Article IV of the Idaho Constitution sets forth the powers of the Executive Department. Section 7 of this article sets forth the executive department's pardoning power. This section states in its entirety:

Such board as may hereafter be created or provided by legislative enactment shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have 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. The legislature shall by law prescribe the sessions of said board and the manner in which application shall be made, and regulated proceedings thereon, but no fine or forfeiture shall be remitted, and no commutation or pardon 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 of such hearing and the release applied for shall have been given by publication in some newspaper of 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 in each case, and the dissent of any member who may disagree, signed by him, and filed, with all papers used upon the hearing, in the office of the secretary of state. The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment, but such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or determine such respite or reprieve, or they may commute or pardon the offense, as herein provided. In cases of conviction for treason the governor shall have the power to suspend the execution of the sentence until the case shall be reported to

the legislature at its next regular session, when the legislature shall either pardon or commute the sentence, direct its execution, or grant a further reprieve.

Idaho Const. art. IV, § 7. In 1986, this section was amended to include the language, “only as provided by statute,” which is highlighted above. S.L. 1986, p. 867, S.J.R. No. 107 (1986).

i. The plain language of Article IV, Section 7 gives the power of commutation to the Commission and the power to grant respites and reprieves to the Governor.

The issue before the Court, one of constitutional interpretation, is an issue of first impression in the State of Idaho.⁹

When interpreting constitutional provisions, the fundamental object “is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters.” *Sweeney v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990) (citations omitted). Where the constitutional provision is “clear and unambiguous,” the expressed intent of the drafters must be given effect. *Leavitt v. Craven*, 154 Idaho 661, 667, 302 P.3d 1, 7 (2012) (quoting *McNeal v. Idaho Pub. Utils. Comm'n*, 142 Idaho 685, 690-91, 132 P.3d 442, 447-48 (2006)).

State v. Winkler, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020).

When considering Article IV, Section 7 in its entirety, the plain meaning of the words give the Commission the power “to grant commutations and pardons after conviction and judgment” and the governor the power to “grant respites or reprieves in all cases of convictions for offenses against the state....” If the drafters intended to allow the governor to have the power of commutation, which is greater than the power to grant respites and reprieves, the drafters

⁹ This Court is aware of only one other instance where the Commission granted clemency for an inmate on death row since the amendment to Article IV, Section 7 occurred in 1986. In 1996 the Commission voted to commute the death sentence of Donald Paradis from death to life in prison without parole. This decision was confirmed by then Governor Phil Batt, which rendered moot any possible litigation over the issue in this case, whether the Commission or the governor has the ultimate authority to commute a death sentence. See Adam M. Gershowitz, Rethinking the Timing of Capital Clemency, 113 Mich. L. Rev. 1, 35 (2014); Appendix A Cases of Innocent and Probably Innocent Persons Sentenced to Death Since 1972, 27 N.Y.U. Rev. L. & Soc. Change 476, 488 (2002).

could have specifically stated this when they drafted Article IV, Section 7. There are constitutions that give commutation power to the governor. *See* Tex. Const., Art. IV, § 11(b); Okla. Const. Art. VI, § 10; Pa. Const., Art. IV, § 9(a); Ariz. Const. Art. 5 § 5.

ii. The language “only as provided by statute” is ambiguous regarding whether the legislature can usurp the Commission’s power to commute a death sentence to life in prison without parole.

The issue in this case arises from interpreting the 1986 amendment to Idaho Const. art. IV, § 7 that added the phrase “only as provided by statute.” Article IV, Section 7 articulates the powers of the Commission and the powers of the Governor. Does the language “only as provided by statute” mean the legislature may define the procedures the Commission follows with respect to the Commission’s power to grant commutations? Or, is this language meant to allow the legislature to completely override the Commission’s power if the legislature chooses to do so?

The language “only as provided by statute” from the 1986 amendment to Article IV, Section 7 is ambiguous. A constitutional provision “is ambiguous where reasonable minds might differ or be uncertain as to its meaning.” *State v. Winkler*, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020); *citing City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018) (quoting *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)).

“Generally, the statutory rules of construction apply to the interpretation of constitutional provisions.” *Leavitt*, 154 Idaho at 667, 302 P.3d at 7 (quoting *State ex rel. Kempthorne v. Blaine Cnty.*, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003)). Where the language of a constitutional provision is ambiguous, the debates from the constitutional convention may be resorted to for the purpose of interpretation. *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Constitutional provisions should also be viewed in the context of the time in which they were adopted. *See City of Pocatello v. State*, 145 Idaho 497,

502, 180 P.3d 1048, 1053 (2008) (interpreting an Act of 1888 regarding water rights in the historical context of its enactment).

Article IV, Section 7 of the Idaho Constitution was adopted at the 1889 constitutional convention without debate or amendment. *Proceedings and Debates of the Constitutional Convention of Idaho* 421 (I. W. Hart ed., 1912).

State v. Winkler, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020).

The original version of Article IV, Section 7 established a board of pardons which consisted of the governor, secretary of state, and attorney general.

The governor, secretary of state, and attorney general shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have power to remit fines and forfeitures, and 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 of said board and the manner in which application shall be made, and regulate proceedings thereon; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except by the decision of the majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks.

Idaho Const. Art. IV, § 7 (1889). The Idaho Supreme Court discussed the broad power of the governor, secretary of state, and attorney general in their roles on the board of pardons in *Ex Parte Prout*, 12 Idaho 494, 86 P. 275 (1906).

The board of pardons belongs to the executive department of the state, and its privilege and prerogative is that of granting clemency. It is a board of clemency, rather than a punitive body. Instead of pronouncing judgment and sentence, and imposing punishment, its prerogative and authority is that of forgiving offenses and remitting penalties, wiping out judgments and sentences of conviction either in whole or in part.

Id., 86 P. at 276. The *Prout* Court explained that once clemency was given, it could not be rescinded.

In so far as a clemency has once been received and enjoyed, it would seem impossible to recall or revoke it. The revocation could only extend to that part not

yet enjoyed. Pardon or executive clemency is a gift. One who promises to make a gift may keep his promise in whole or part or he may decline entirely, but after the delivery he cannot recover the thing given, and even if he should again come into possession of it he cannot retain it. 1 Page on Contracts, § 281. He may decline at any time he pleases to give any more, but that fact does not divest the donee of title to that which he has already received. In that view of the case, while the pardoning board would have unquestionable authority to recall their parole and return the prisoner at any time, it seems equally clear that they cannot wipe out or obliterate the clemency the prisoner has already received and enjoyed. It would seem strange if they can turn round and punish him the same length of time that he has been enjoying their clemency.

Id., 86 P. at 277.

In 1945, Article IV, Section 7 was amended. As a result of this amendment, the governor, secretary of state, and attorney general no longer comprised the membership of the board of pardons. The new version of the article stated:

Such board as may hereafter be created or provided by legislative enactment shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have power to remit fines and forfeitures, and 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 of said board and the manner in which application shall be made, and regulated proceedings thereon, but no fine or forfeiture shall be remitted, and no commutation or pardon 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 of such hearing and the release applied for shall have been given by publication in some newspaper of 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 in each case, and the dissent of any member who may disagree, signed by him, and filed, with all papers used upon the hearing, in the office of the secretary of state.

The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment, but such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or determine such respite or reprieve, or they may commute or pardon the offense, as herein provided. In cases of conviction for treason the governor shall have the power to suspend the execution of the sentence until the case shall be reported to

the legislature at its next regular session, when the legislature shall either pardon or commute the sentence, direct its execution, or grant a further reprieve.

Idaho Const. art. IV, § 7 (1947).

This amendment substantially changed the body of the board of pardons to a board created by legislative enactment.¹⁰ Pursuant to the new amendment, the legislature enacted I.C. § 20-210 to create the State Board of Correction. In 1969, the legislature created the State Commission of Pardons and Parole. 1969 Idaho Sess. Laws, Ch. 97, § 5. The commission is now composed of seven members that serve at the pleasure of the governor. Not more than four members shall be from any one political party. I.C. § 20-1002.

The last amendment to Article IV, Section 7 happened in 1986 and added the language “only as provided by statute” as discussed above. *See infra, p. 6.* The issue this Court must determine is whether this amendment sufficiently allows the legislature to usurp the Commission’s power and convert that power solely to the governor, as occurred in the foregoing matter when the governor decided to not follow the Commission’s decision to commute Pizzuto’s sentence from death to life in prison without parole.

Title twenty, chapter ten of the Idaho Code created the Idaho Commission of Pardons and Paroles. The duties of the Commission are set forth in I.C. § 20-1004. Pertinent to the issue in this case, “The commission shall: (1) Have the powers relating to commutation, pardon and remission of fines and forfeitures as set forth in section 7, article IV, of the Idaho constitution[.]”

¹⁰ The Session Law introduced the 1945 amendment as follows:

Proposing amendment to Section 7 of Article 4 of the Constitution of the State of Idaho, and submitting to the electors of the state for their approval or rejection the question of whether or not said section shall be so amended as to provide that the pardoning power now vested in the Governor, the Attorney General and the Secretary of State shall from and after July 1, 1947 be vested in such board as may hereafter be created and provided by legislative enactment in all cases of offense against the State except treason or conviction by impeachment.

I.C. § 20-1004(1).¹¹ This section is in accord with the requirements of Article IV, Section 7 of the Idaho Constitution.

This chapter also sets forth the power of the governor to grant respites and reprieves, which is also consistent with the powers enumerated in Article IV, Section 7 of the Idaho Constitution. I.C. § 20-1015 sets forth the powers of the governor as follows:

(1) The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or imprisonment on impeachment, but such respites or reprieves shall not extend beyond the next session of the commission; and such commission shall at such session continue or determine such respite or reprieve, or may commute or pardon the offense as herein provided.

(2) In cases of conviction of treason, the governor shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature at its next regular session, when the legislature shall either pardon or commute the sentence, direct its execution or grant a further reprieve.

Id.

I.C. §20-1016 addresses commutations and pardons specifically. This section initially states that the commission shall have full and final authority to grant commutations after conviction and judgment in all cases of offenses against the state except treason or impeachment,

¹¹ I.C. § 20-1004 in its entirety:

The commission shall:

- (1) Have the powers relating to commutation, pardon and remission of fines and forfeitures as set forth in section 7, article IV, of the Idaho constitution;
- (2) Subject to and consistent with the provisions of this chapter and section 19-2513, Idaho Code, decide whether any prisoner who is eligible for parole may be released on parole;
- (3) Subject to and consistent with the provisions of section 7, article IV, of the constitution of the state of Idaho; chapter 2, title 20, Idaho Code; and section 19-2513, Idaho Code; and in compliance with chapter 52, title 67, Idaho Code, promulgate rules to establish the procedures to carry out the provisions of this chapter, including procedures under which any eligible prisoner may be released on parole;
- (4) Specify in writing the conditions of parole for every prisoner released on parole and provide every prisoner released on parole with a copy of the conditions of parole;
- (5) Subject to and consistent with the provisions of this chapter, issue orders of final discharge from parole for eligible parolees; and
- (6) Carry out all other duties and powers relating to the commission as set forth in Idaho Code.

which is consistent with the requirements of Article IV, Section 7 of the Idaho Constitution.

This statute reads in its entirety:

(1) The commission shall have full and final authority to grant commutations and pardons after conviction and judgment in all cases of offenses against the state except treason or impeachment and as otherwise provided in this section.

(2) With respect to commutations and pardons for offenses, or conspiracies to commit any offense, for which the maximum punishment allowed by law at the time of sentencing is death or life imprisonment, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor. No commutation or pardon for such offenses shall be effective until presented to and approved by the governor. Any commutation or pardon recommendation not so approved within thirty (30) days of the commission's recommendation shall be deemed denied.

(3) Notwithstanding subsection (2) of this section, the commission shall have full and final authority to grant pardons and commutations for:

(a) Any offense in violation of chapter 27, title 37, Idaho Code, for which the maximum punishment allowed by law at the time of sentencing is life imprisonment; and

(b) Any offense for which the maximum punishment allowed by law at the time of sentencing is enhanced by chapter 25, title 19, Idaho Code, to life imprisonment.

(4) The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons or commutations.

I.C. § 20-1016. This statute first states the Commission has full and final authority to grant commutations, then in the next section the statute limits the Commission's authority with respect to death penalty cases, by giving the Commission's power to issue a commutation solely to the governor. I.C. § 20-1016(2) is not consistent with the powers granted in Article IV, Section 7 of the Idaho Constitution.

There is scant guidance regarding the 1986 amendment to Article IV, Section 7 to include the language "only as provided by statute." At the inception of statehood, the founders established a board of pardons which included the governor, secretary of state, and attorney general. Because the governor was part of this board, the governor had one-third decision

making power regarding commuting death sentences. In 1946, Article IV, Section 7 was amended which resulted in the governor, secretary of state, and attorney general no longer comprising the membership of the board of pardons. The board (later “Commission”) became a creation of legislative enactment, and that board (“Commission”) was given the same power to grant commutations after conviction of a judgment, except in cases of treason and conviction on impeachment. The governor had the power to grant respites and reprieves in 1946, and this power still remains today.

The question proposed here is whether the 1986 amendment significantly changed the power granted to the Commission and the governor. In reviewing the history of Article IV, Section 7, there is no indication that the founders, or the people of the State of Idaho in 1986, intended to give the governor the ultimate decision making authority with respect to whether a death sentence should be commuted. Even at the inception of statehood, the governor, as part of the board of pardons, only had one-third say in a decision of this magnitude. This Court is not convinced that the addition of the words “only as provided by statute” intended such result. As stated above, *see infra*, pg. 8, if the founders, and later at the time of amendment the people of the State of Idaho, meant to give the governor the ultimate decision making power with respect to the commutation of death sentences, they could have done so by drafting and voting on that specific issue. Therefore, this Court finds that while I.C. § 20-1004 and § 20-1015 are consistent with Article IV, Section 7, I.C. § 20-1016(2) is not.

This Court is aware that the Idaho Supreme Court did recently mention the 1986 amendment to Article IV, Section 7 in *State v. Winkler*, 167 Idaho 527, 473 P.3d 796 (2020). The Idaho Supreme Court considered whether a pardon, issued in a DUI case, prevented the State

from later seeking a sentencing enhancement under I.C. § 18-8005(9). *Id.* at 528, 473 P.3d at 797. The *Winkler* Court stated:

Before Article IV, Section 7 was amended, the executive branch had mostly unfettered discretion in determining whether to grant a pardon. *See* Idaho Const. art. IV, § 7 (1890) (vesting a largely unrestricted pardon power in the executive branch with the exception of pardons for treason and conviction on impeachment). However, Article IV, Section 7 was amended in 1986, limiting the executive branch's power to grant pardons “only as provided by statute.” Idaho Const. art. IV, § 7.

At the time *Winkler* was pardoned, Idaho Code section 20-240 was the statute used by the legislature to provide for the Commission's pardon power. *See* I.C. § 20-240 (1988) (amended 2020). Consistent with the 1986 amendment to Article IV, Section 7, Idaho Code section 20-240 provided the Commission with “full and final authority to grant commutations and pardons” except with respect to pardons for a number of listed offenses. Because driving under the influence is not one of the offenses for which the legislature has explicitly limited the Commission's pardon power under section 20-240, *Winkler*'s pardon carries with it the full effect of a pardon as envisioned under the Idaho Constitution.

State v. Winkler, 167 Idaho 527, 530, 473 P.3d 796, 799 (2020). The *Winkler* Court discussion indicates that the 1986 amendment to Article IV, Section 7 of the Idaho Constitution does allow the legislature to limit pardons in a number of listed offenses, that are currently set forth in I.C. § 20-1016(3). The Court also states that this code section (currently I.C. § 20-1016) “provided the Commission with ‘full and final authority to grant commutations and pardons’ . . .” *Id.*

The *Winkler* Court was addressing a parole issue, and not a commutation issue, so it has limited guidance, if any, to the issue before this Court. The issue this Court faces is a more subtle distinction. This Court agrees that the “only as provided by statute” language does permit the legislature to limit the Commission’s authority regarding the types of cases that should be considered for commutation and parole. However, this Court does not find that this language is sufficient to allow the legislature to not only limit the powers of the Commission, but to go a step

further and actually take away the Commissions' authority and transfer that authority instead to the governor.

When considering the language of Article IV, Section 7, this Court finds that the Commission's power to issue commutations applies to all cases of offenses against the state except treason or conviction on impeachment.

Such board as may hereafter be created or provided by legislative enactment shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have 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.

Idaho Const. Art. IV, Section 7. This Court does not read this provision, or the words "only as provided by statute" to allow the governor to have the power to issue commutations in any criminal case as that power lies solely with the Commission. Article IV, Section 7 specifies the powers the governor has, and limits those powers to respites and reprieves.

The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment, but such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or determine such respite or reprieve, or they may commute or pardon the offense, as herein provided.

Id.

This Court has reviewed the development of Article IV, Section 7 from adoption at the 1889 constitutional convention through the amendment in 1986. One constant of the Article is the specificity regarding which actors are embodied with the power to issue commutations. The governor had a portion of this power originally, but only as part of a board consisting of the governor, attorney general, and secretary of state. The Idaho Constitution has never directed that one individual has the power to decide matters of commutation in any criminal matter, let alone a

case with the ultimate penalty of death. Further, the Idaho Constitution only distinguished crimes of treason and conviction on impeachment; the Constitution never extracted commutation powers from a board of decision makers based upon the ultimate penalty of death. Had the founders or the people of the State of Idaho intended to vest the sole power of commutation of death sentences with the governor alone, Article IV, Section 7 could have been drafted with this specific language, just as was done in other states like Texas, Oklahoma, Pennsylvania, and Arizona. Further, this Court is reminded of the determination from *Ex Parte Prout*, that once clemency is given, it cannot be rescinded. 12 Idaho 494, 86 P. 275, 277(1906).

Therefore, this Court finds that I.C. §20-1016(b) contradicts the language of Article IV, Section 7. Policy considerations behind the implementation of I.C. § 20-1016 must yield to the Idaho Constitution. The Commission voted 4-3 to commute Pizzuto's sentences from death to life in prison without parole. Article IV, Section 7 of the Idaho Constitution does not provide the governor of the state with the power of commutation, therefore, the current state of Pizzuto's death sentences—in light of the Commission's decision that the sentences should be commuted to life in prison without parole—are illegal.

c. Whether the illegality is evident on the face of the record.

In order to prevail under I.C.R. 35(a), the movant must show that the illegality of the sentence is apparent “from the face of the record.” *Id.* This requirements limits the application of I.C.R. 35(a) to cases “that do not involve significant questions of fact nor an evidentiary hearing to determine their illegality.” *State v. Clements*, 148 Idaho 82, 87, 218 P.3d 1143, 1148 (2009). The State contends that there are factual issues with the record in this case because when a commutation is granted I.C. §20-1018 requires the Executive Director to file a copy of the

original commutation with the Secretary of State. This procedure did not happen here as a result of the governor's review and veto of the Commission's decision.

The issue before this Court involves questions of law as a result of the proceedings which occurred: the commutation hearing, the Commission's decision, and the governor's veto. The facts from these circumstances are not at issue. Further, this Court recognizes the narrow application of I.C.R. 35.

Idaho Criminal Rule 35 is a narrow rule that allows a trial court to correct an illegal sentence at any time, or to correct a sentence imposed in an illegal manner within 120 days. *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007); I.C.R. 35. "Generally, whether a sentence is illegal or whether it was imposed in an illegal manner is a question of law, over which we exercise free review." *Farwell*, 144 Idaho at 735, 170 P.3d at 400.

State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009). In the case at hand, the illegality is evident on the face of the record.

In conclusion, this Court recognizes that an appellate court exercises free review over questions of law addressed by I.C.R. 35. The appellate court also freely reviews constitutional principles. *See State v. Clarke*, 165 Idaho 393, 396, 446 P.3d 451, 454 (2019). I.C.R. 35 is an appropriate vehicle for the consideration of this constitutional issue, and the illegality at issue is evident on the face of the record. This Court is also cognizant of the often cited but rarely met goal of I.C. §19-2719 which strives to "accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence." When considering the ultimate penalty of death, this Court will err on the side of caution regarding which entity has the ultimate say in whether a sentence of death should be commuted. This Court is not satisfied that the 1986 amendment to Article IV, Section 7 "only as provided by statute" means that the legislature can not only limit the Commission's power regarding which crimes qualify for commutation or parole, but also that

the legislature can usurp the Commission's power and shift their decision making authority to the governor. Further, this Court finds that I.C.R. 35(a) allows for the most efficient manner for this issue to be considered by the highest court of our state. For the reasons set forth above, Pizzuto's motion for relief pursuant to I.C.R. 35(a) is granted.

2. Motion to Preclude Issuance of Death Warrant

This Court will not issue a death warrant in this matter while there are appeals pending in the case. I.C. § 19-2715(1) addresses ministerial actions relating to stays of execution.

Hereafter, no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted during an appeal taken pursuant to section 19-2719, Idaho Code, during the automatic review of judgments imposing the punishment of death provided by section 19-2827, Idaho Code, by order of a federal court or as part of a commutation proceeding pursuant to section 20-240, Idaho Code.

Id. This issue and the expected appeal are as a result of the commutation proceeding in this matter, thus, the motion to preclude the issuance of the death warrant is granted pending the finality of these proceedings.

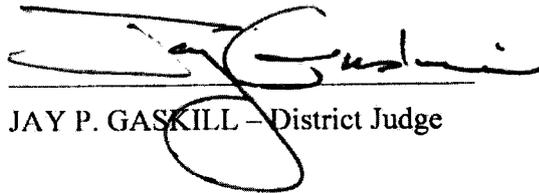
ORDER

The Defendant's Rule 35 Motion to Correct Sentence is hereby GRANTED.

The Defendant's Motion to Preclude Issuance of Death Warrant is hereby GRANTED.

IT IS SO ORDERED.

DATED Feb 4, 2022



JAY P. GASKILL – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON MOTION TO PRECLUDE DEATH WARRANT, IMMEDIATELY STAY EXECUTION, AND/OR FOR NOTICE AND AN OPPORTUNITY TO ADDRESS ANY REQUEST BY THE STATE FOR A DEATH WARRANT was delivered via electronic court filing by the undersigned at Lewiston, Idaho, this 2/4/22, on:

Jonah Horwitz
Federal Defender Services of Idaho
702 W. Idaho, Suite 900
Boise, ID 83702
Jonah_Horwitz@fd.org

LaMont Anderson
PO Box 83720
Boise, ID 83720
lamont.anderson@ag.idaho.gov

PATTY O. WEEKS, CLERK

By: 
Deputy