ATTORNEY GENERAL OPINION NO. 93-12

To: Honorable Roger Madsen
Idaho State Senate
7842 Desert Ave.
Boise, ID 83709

Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the statute pertaining to automatic review of death penalties be amended in such a way as to delete the current provisions mandating proportionality review without rendering Idaho's capital sentencing scheme unconstitutional?

CONCLUSION

Such an amendment to the current law would not jeopardize Idaho's capital sentencing scheme and would therefore be constitutional.

ANALYSIS

I. Introduction

On October 8, 1993, you requested an opinion from this office regarding Idaho Code § 19-2827(c)(3). Specifically, you wanted to know whether the deletion of the "proportionality review" provisions of the subsection of the statute pertaining to automatic review of death penalties would be constitutional.

The current statute reads:

> (c) With regard to the sentence the court shall determine: . . . (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

You have proposed a bill which would amend the statute to read:

> (c) With regard to the sentence the court shall determine: . . . (3) Whether the sentence of death is excessive.

In addition, you have suggested deletion of the first sentence of subsection (e), which reads:

> (e) The court shall include in its decision a reference to those similar cases which it took into consideration.

Therefore, the issue you have presented is whether "proportionality review" is required by either the Idaho or United States Constitutions in order to ensure that Idaho's death penalty is valid.

II. Proportionality in General

In beginning an analysis of this issue it is important to note that there are two mutually exclusive concepts of proportionality. The first and more traditional form in which proportionality is discussed deals with "an abstract evaluation of the appropriateness of a sentence for a particular crime." Pulley v. Harris, 465 U.S. 37, 42-43 (1984). In this sense, the discussion centers around whether a sentence is cruel and unusual, considering the gravity of the offense and the severity of the penalty. As part of the analysis, sentences imposed for other crimes and sentencing practices of other jurisdictions are looked to. Hence, the federal courts have not hesitated to strike down punishments which have been found to be inherently disproportionate and, therefore, unconstitutional, when imposed for a particular crime or category of crime. See, *e.g.,* Enmund v. Florida, 458 U.S 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977).

The Idaho court has also spoken in terms of this type of proportionality when discussing the constitutionality of a sentence under art. 1, § 6, of the Idaho Constitution:

> [I]t is generally recognized that imprisonment for such a length of time as to be out of proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable men, is cruel and unusual within the meaning of the constitution.

State v. Evans, 73 Idaho 50, 58, 245 P.2d 788, 792 (1952).

The death penalty is not in all cases a disproportionate penalty in this sense. Gregg v. Georgia, 428 U.S. 153 (1976).

The proportionality review required by Idaho Code § 19-2827 and by some other states is of a different sort. "This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same

crime." Pulley v. Harris, 465 U.S. at 43. This second sort of review, known as comparative proportionality, is the subject of the remainder of this opinion.

III. Comparative Proportionality and the Federal Constitution

The issue of whether comparative proportionality review is required by the Eighth Amendment to the United States Constitution (concerning cruel and unusual punishment) was squarely presented in Pulley v. Harris, 465 U.S. 37 (1984). In that case, a man convicted of murdering two boys in order to steal their car (Harris) challenged California's scheme for the automatic appellate review of death penalties. Harris claimed that the scheme was flawed because it did not require comparative proportionality review. Therefore, the argument went, the death penalty could be imposed wantonly or freakishly in violation of the United States Constitution.

The United States Supreme Court first noted that "[n]eedless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable." *Id.* at 44-45. The fact that the Court had approved of earlier death penalty review schemes containing comparative proportionality review was not to be understood as mandating such review.

The Court then noted that it had already upheld a death penalty sentencing scheme which did not contain comparative proportionality review in Jurek v. Texas, 428 U.S. 262 (1976). The Court found in Jurek that Texas' narrowing of capital murders to those containing at least one aggravating circumstance, coupled with a separate sentencing hearing which allowed for whatever mitigating circumstances the defendant could adduce, provided adequate guidance to the sentencer. In addition, automatic judicial review provided a means to promote the evenhanded and consistent imposition of the death penalty.

The Court in Pulley then compared the California scheme to that approved in Jurek and found it to be constitutional because it, too, required the finding of at least one special aggravating circumstance beyond a reasonable doubt, and because that finding would be reviewed.

The Court concluded there was no basis in prior law to conclude that comparative proportionality review was required, and that schemes such as California's that adequately channel a sentencer's discretion are not violative of the Eighth Amendment despite the lack of such review. Since Pulley, the Supreme Court has reaffirmed the notion that comparative proportionality review is not constitutionally required. *See* McCleskey v. Kemp, 481 U.S. 279 (1987), and Walton v. Arizona, 497 U.S. 639 (1990).

In Beam v. Paskett, 744 F. Supp. 958, (D. Idaho 1990), a man convicted of first degree murder and sentenced to death in Idaho (Beam) filed a petition for habeas corpus in federal district court. Among Beam's claims was the allegation that his federal rights were violated because the guidelines set forth in Idaho Code § 19-2827(c)(3) failed to "minimize the risk of arbitrary or capricious decisions in cases having similar factual circumstances." *Id.* at 960. This claim was based upon his co-defendant's sentence of life imprisonment.

The court reviewed Idaho's capital sentencing scheme and found it to be constitutional because it adequately channels the sentencer's discretion. Noting that Pulley held that the existence of other safeguards rendered comparative proportionality review "superfluous," the court found that the mere fact that Beam's co-defendant did not receive the death penalty did not establish that Idaho's capital scheme operated in an unconstitutional manner. *Id.* at 960.

From these authorities, it is clear that comparative proportionality as mandated by Idaho Code § 19-2827 is not required by the United States Constitution. Idaho's capital scheme without comparative proportionality would still adequately channel a judge's discretion at sentencing because the court would still have to find at least one of several aggravating factors to exist beyond a reasonable doubt. Idaho Code § 19-2515(g). In addition, the court would have to find that all of the mitigating circumstances presented by the defendant taken together did not outweigh each of the aggravating factors considered separately. Idaho Code § 19-2515(c). State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989). Further, the Idaho Supreme Court would still be mandated to determine whether: 1) the sentence was the result of passion, prejudice or any other arbitrary factor; 2) whether the evidence supports the finding of an aggravating factor; and 3) whether the sentence is excessive. Idaho Code § 19-2827.

IV. Comparative Proportionality and the Idaho Constitution

The language of art. 1, § 6, of the Idaho Constitution pertaining to cruel and unusual punishment is identical to the Eighth Amendment. However, this does not mean that the two constitutional provisions will be identically interpreted. The Idaho courts have in the past departed from federal constitutional doctrine in order to enhance a defendant's rights under the Idaho Constitution, primarily in the area of search and seizure. State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992); State v. Thompson, 114 Idaho 746, 760 P.2d 1162 (1988).

On the other hand, Idaho's guarantee against cruel and unusual punishment, in particular, has never been interpreted by any Idaho appellate court to differ significantly from the federal guarantee. As a result, Idaho has only engaged in comparative proportionality analysis when it appeared that the federal courts required it under the

Eighth Amendment. For example, in State v. Broadhead, 120 Idaho 141, 814 P.2d 401 (1991), a second degree murder case, the court engaged in a comparative proportionality discussion because of the apparent requirement of Solem v. Helm, 463 U.S. 277 (1983), to so analyze the case.

Since Broadhead, the United States Supreme Court has refined the law regarding the Eighth Amendment to make it clear that comparative proportionality is not required when determining if a case is cruel and unusual. Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). As a result, the Idaho Supreme Court specifically overruled Broadhead "to the extent it relies on *Solem.*" State v. Brown, 121 Idaho 385, 394, 825 P.2d 482 (1992). The court went on to say:

> We limit our proportionality analysis to death penalty cases and, under the Idaho Constitution as contemplated in *State v. Evans*, to those cases which are "out of proportion to the gravity of the offense committed" in the cruel and unusual punishment setting similar to the "grossly disproportionate" analysis of the eighth amendment. . . . The lack of objective standards for evaluating differing terms of imprisonment . . . gives proportionality review outside these two limited areas the potential of essentially allowing, if not requiring, this Court to second guess the trial court's discretionary determination of the criminal sentence that best fits the criminal defendant and the crime.

121 Idaho at 394. In other words, the court found no independent state constitutional basis for engaging in comparative proportionality in reviewing sentences.

As noted previously, the reason the court engages in proportionality analysis in the death penalty setting is because of the statutory mandate. There appears to be no independent constitutional ground for a system that would "allow, if not require" the court to second guess a district court's death penalty sentence other than the statute. If the statute were to be amended to delete comparative proportionality, it would be unlikely in the extreme that a principled basis for proportionality could be found under the state constitution.

V. Conclusion

In summary, it is the opinion of this office that the proposed amendment to Idaho Code § 19-2827 deleting reference to comparative proportionality would not render Idaho's death penalty scheme unconstitutional, under either the federal or state constitutions.

AUTHORITIES CONSIDERED

1. U.S. Constitution:

Eighth Amendment.

2. Idaho Constitution:

Art. 1, § 6.

3. Idaho Code:

§ 19-2515.

§ 19-2827.

4. Idaho Cases:

State v. Broadhead, 120 Idaho 141, 814 P.2d 401 (1991).

State v. Brown, 121 Idaho 385, 825 P.2d 482 (1992).

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989).

State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952).

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

State v. Thompson, 114 Idaho 746, 760 P.2d 1162 (1988).

5. Other Cases:

Beam v. Paskett, 744 F. Supp. 958 (D. Idaho 1990).

Coker v. Georgia, 433 U.S. 584 (1977).

Enmund v. Florida, 458 U.S. 782 (1982).

Gregg v. Georgia, 428 U.S. 153 (1976).

Harmelin v. Michigan, ___ U.S. ___, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

Jurek v. Texas, 428 U.S. 262 (1976).

McCleskey v. Kemp, 481 U.S. 279 (1987).

Pulley v. Harris, 465 U.S. 37 (1984).

Solem v. Helm, 463 U.S. 277 (1983).

Walton v. Arizona, 497 U.S. 639 (1990).

DATED this 29th day of November, 1993.

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Analysis by:

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