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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, **Plaintiff-Appellant,** **v.** **GERALD ROSS PIZZUTO, JR.,** **Defendant-Respondent.**	**DOCKET NO. 49489-2022** **Idaho County District Court No. CR-1985-22075** **CAPITAL CASE**
GERALD ROSS PIZZUTO, JR., **Petitioner-Respondent,** **v.** **STATE OF IDAHO,** **Respondent-Appellant.**	**DOCKET NO. 49531-2022** **Idaho County District Court No. CV25-22-0004** **CAPITAL CASE**

DEFENDANT-RESPONDENT'S/PETITIONER-RESPONDENT'S ANSWERING BRIEF

Appeal from the District Court of the Second Judicial District for Idaho County,
Honorable Jay P. Gaskill, District Judge Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Rules

Constitutional Provisions

Secondary Sources

I. STATEMENT OF THE CASE

Appellee Gerald Ross Pizzuto, Jr. does not disagree with the statement of the case in opposing counsel's opening brief, at least to the extent it relates to the issues relevant here. *See* Applt. Opening Br., filed Apr. 8, 2022 (hereinafter "Opening Brief" or "AOB"), at 1–5. Therefore, Mr. Pizzuto will not provide his own statement of the case. *See* I.A.R. 35(b)(3). However, Mr. Pizzuto will elaborate below in his argument section on certain facts not explored by opposing counsel's statement of the case where they are germane.

II. ISSUE PRESENTED ON APPEAL

Mr. Pizzuto submits that opposing counsel's characterization of the issue presented on appeal is insufficient insofar as it implies that Article IV, Section 7 of the Idaho Constitution (hereinafter "Section 7") must be deemed ambiguous in order for the district court's judgment to be affirmed. *See* AOB at 5. In fact, the district court can be affirmed on the ground that Section 7 unambiguously favors Mr. Pizzuto's interpretation, as he argues later that it should. *See infra* at Part III.A. To avoid the State's incorrect implication, Mr. Pizzuto proposes that the issue on appeal be more simply formulated as whether Idaho Code § 20-1016 is unconstitutional because Section 7 confers the commutation power on the Idaho Commission of Pardons and Parole ("the Commission") alone,[1] or whether it was permissible for the legislature to give the Governor the final decision-making authority. *See* I.A.R. 35(b)(4).

[1] As noted below, the Commission was previously referred to as the "Board of Pardons." *See infra* at Part III.B.1.a. Mr. Pizzuto will use the word "Commission" for consistency and clarity regardless of what time period he is discussing except when he describes the historical change in the name. *See infra* at Part III.B.1.a.

III. ARGUMENT

For more than seventy-five years, the Idaho Constitution has stated unequivocally that the *Commission* "shall have [the] power . . . to grant commutations."[2] The Constitution continues to so state today, as it has done since 1945. For those many decades, the Constitution has not referred to any other person or office as having the power to make final decisions with respect to commutations. *See infra* at Part III.B.1.a. Instead, the Constitution clearly gives the legislature and the Governor two quite distinct roles to play in the clemency[3] process: the legislature regulates the way in which the Commission exercises its commutation powers, and the Governor handles respites or reprieves, i.e., the temporary postponement of executions.[4] *See infra* at Part III.A. In this case, the Commission discharged its constitutional duty, considered Mr. Pizzuto's clemency petition, held a full hearing, and after careful deliberation decided by a majority vote to commute his death sentence to life in prison without the possibility of parole. *See* 49489 R., p.

[2] "A commutation" in this context is an executive act that "diminishes the severity of a sentence." *Standlee v. State*, 538 P.2d 778, 781 (Idaho 1975).

[3] Mr. Pizzuto uses the term "clemency" here to refer to any request by a prisoner for action from the executive branch with respect to a conviction or sentence, which includes, inter alia, both commutations and pardons.

[4] "Respites" and "reprieves" are synonymous, and both are defined essentially as temporary suspensions of death sentences. Black's Law Dictionary (11th ed. 2019).

540.[5] Because the Constitution places commutations in the hands of the Commission alone, its decision was final, and Mr. Pizzuto's death sentence was reduced as a matter of law.

Nevertheless, the Governor—who is not named once in the Constitution's discussion of commutations—intervened. The Governor purported to deny Mr. Pizzuto's commutation petition on the very day the Commission issued its reasoned decision granting it. *See* 49489 R., p. 543. He relied on a single authority: Idaho Code § 20-1016. *See* 49489 R., p. 543. Although § 20-1016 claims to give the Governor the ultimate commutation power, it is unconstitutional. The Constitution confers the commutation power exclusively on the Commission, rendering § 20-1016 unlawful and the Governor's interference with Mr. Pizzuto's case invalid.

In a thorough and thoughtful opinion, the district court below agreed: it held that the Commission's favorable decision was binding, as it alone held the commutation power, and the Governor was not permitted by the Constitution to usurp it. *See* 49489 R., pp. 736–55. The

[5] Like the State, Mr. Pizzuto cites to the two records in this consolidated appeal by reference to their individual case numbers. The district court granted relief to Mr. Pizzuto first in the Rule 35 proceeding before resolving the post-conviction matter. *Compare* 49489 R., p. 778, *with* 49531 R., p. 198. As a result, the district court included with its Rule 35 order a more detailed analysis, and incorporated the same reasoning into its post-conviction opinion. *Compare* 49489 R., pp. 765–78, *with* 49531 R., pp. 195–96. Consequently, Mr. Pizzuto will cite to the Rule 35 record when he is discussing the district court's rationale, and when he is referring to materials that are in both cases. In the same vein, Mr. Pizzuto notes that he is asking the Court in the present appeal to affirm the district judge's judgment in either the Rule 35 case, the post-conviction proceeding, or both. *See infra* at Part IV. To the extent the Court decides sua sponte that neither Rule 35 nor the post-conviction scheme provides the appropriate vehicle for Mr. Pizzuto's claim, other potential avenues may exist. For instance, a currently pending habeas proceeding in Ada County District Court raises the same issue. If the Court rejects the two proceedings currently at issue as vehicles, it may wish to stay the instant appeals until the habeas matter can be decided here as well, or to take some other approach that allows for a full and fair consideration of the merits of this important claim without prejudicing Mr. Pizzuto in the meantime.

district court therefore granted Mr. Pizzuto relief on his claim in two separate proceedings: a motion to reduce his sentence under Idaho Criminal Rule 35 and a post-conviction petition. *See* 49489 R., p. 754; 49531 R., p. 198. Persisting, the Attorney General appealed both orders, intent on putting Mr. Pizzuto to death even though a majority of the Commission—the people entrusted by the Constitution with commutations—decided in their considered judgment that mercy was appropriate, and that Mr. Pizzuto should be allowed to pass away in prison from natural causes.

On appeal, the State takes two tacks in its campaign against the plain language of the Constitution. First, the State contends that the plain language authorized the legislature to enact § 20-1016 because Section 7 indicates that the Commission is to exercise its commutation power "as provided by statute," which was added to the clause in a 1986 amendment. *See* AOB at 8–13. But contrary to the State's view, the plain language of Section 7 continues to provide that it is the *Commission* that "shall have [the] power . . . to grant commutations." The 1986 amendment means only that the legislature is allowed to establish parameters for the Commission in how it carries out its responsibilities, such as by setting standards that petitioners must satisfy, as many states have done by statute. *See infra* at Part III.A. There is nothing in the plain language to support the State's belief that "as provided by statute" somehow nullifies the grant of power unambiguously articulated in the very same constitutional sentence.

Second, based mostly on a smattering of vague newspaper articles, the State submits that, if Section 7 is ambiguous, the legislative history settles the question in its favor. *See* AOB at 13–23. Even taken on its own terms, the State's historical analysis is tenuous. It mostly succeeds in showing only that the 1986 amendment was designed to reduce the Commission's power. But

that goal would also have been accomplished by legislation *regulating* the Commission's handling of commutations, which would have been permissible, rather than taking the authority entirely away from the only entity that possesses it under the Constitution. *See infra* at Part III.B.1.d. At best, the State locates a single line in a single newspaper article paraphrasing a single individual that is even arguably consistent with its extreme interpretation of the 1986 amendment, and that is hardly enough to show that the voters intended to abrogate years of practice and precedent through the adoption of the generic phrase, "as provided by statute," when the public was told nothing of the sort in any official document. *See infra* at Part III.B.1.a.

Below, Mr. Pizzuto will defeat the State's argument in three steps. First, Mr. Pizzuto will demonstrate that the State's plain-language theory is mistaken, and that the unambiguous text of the Constitution grants the Commission alone the commutation power. *See infra* at Part III.A. Second, Mr. Pizzuto will prove that the legislative history definitively supports Mr. Pizzuto's—and the district court's—conclusion. *See infra* at Part III.B. And third, Mr. Pizzuto will establish that the caselaw pressed into service by the State is either inapposite or cuts in Mr. Pizzuto's favor. *See infra* at Part III.C. A fair inquiry into all three areas leads to the same result: the State's effort to avoid the plain import of Section 7 should be rebuffed, and the district court's comprehensive and well-considered orders granting relief to Mr. Pizzuto should be

affirmed.[6] Because there is so much overlap between the separate sections of the brief, every part is incorporated into every other part.

A. The Unambiguous Language of Section 7 Compels Affirmance.

The district court granted relief to Mr. Pizzuto on the ground that Section 7 was ambiguous and that the history behind the clause supported the conclusion that the Governor lacks the constitutional power to intercede in commutations. 49489, R., pp. 743–52. Nevertheless, this Court is entitled to affirm on any basis supported by the record. *See Hoffer v. City of Boise*, 257 P.3d 1226, 1229 (Idaho 2011) ("Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory.").[7] Here, the most straightforward path for the Court is to steer clear of the legislative history and rule, as Mr. Pizzuto argued below, *see* 49489 R., pp. 678–80, that Section 7 unambiguously confers the commutation power exclusively on the Commission, *see Pentico v. Idaho Comm. for*

[6] The State asks this Court to reverse and instruct the district judge to "immediately issue a new death warrant." AOB at 23. No authority or explanation is provided for this request and it is inappropriate. When the State wishes to schedule an execution, it "shall apply for a warrant from the *district court*." Idaho Code § 19-2715(2). The State did not make an argument about the death warrant in its Opening Brief and it is too late now. *See Shepherd v. Shepherd*, 383 P.3d 693, 699 (Idaho 2016) ("We will not consider arguments raised for the first time in an appellant's reply brief."). Based on the Opening Brief, the only issue before this Court is whether Mr. Pizzuto's death sentence was correctly reduced to life. If this Court reverses, it has no occasion to do anything other than set aside the judgments below without addressing the propriety of a death warrant, a matter for the district judge below in the first instance.

[7] In this brief, unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

Reapportionment, 504 P.3d 376, 379–80 (Idaho 2022) ("Where a statute or constitutional provision is clear we must follow the law as written.").

And that is the case—Section 7 is unambiguous. It gives the *Commission* the "power . . . to grant commutations," not the Governor. Section 7 endows the Governor with a *different* power: "to grant respites or reprieves."[8] There are no blurry lines in the division of authority established by Section 7. Ambiguity exists in a constitutional provision when "reasonable minds could interpret it in at least two different ways." *State v. Winkler*, 473 P.3d 796, 800 (Idaho 2020). Reasonable minds cannot differ on Section 7: it empowers the Commission alone to grant commutations, full stop. *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 Section 7).

The same outcome is dictated by the second paragraph of Section 7, which is fair game for the plain-language analysis, as it is part of the primary constitutional clause at issue here. *See 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."); *Rudeen v. Cenarrusa*, 38 P.3d 598, 605 (Idaho 2001) ("The general rules of statutory construction apply to constitutional provisions as well as statutes."). Although the State does not even attempt to deal with the second paragraph in its discussion of the plain language, *see* AOB at 8–13, the passage is critical.

[8] When using his own language rather than quoting other sources, Mr. Pizzuto will henceforth refer to both respites and reprieves as "reprieves" for simplicity's sake.

The second paragraph provides that "[t]he governor shall have power to grant respites or reprieves" subject to limited exceptions, "but such respites or reprieves shall not extend beyond the next session of the" Commission. After the Governor grants a reprieve, the Commission eventually decides whether to continue forestalling an execution or whether to "commute . . . the offense." As the second paragraph of Section 7 makes clear, the Governor takes care of temporary pauses in executions and the Commission takes care of permanent commutations.

The State has no answer to the question of why the second paragraph of Section 7 would provide the reprieve power to the Governor and refer only to the Commission with respect to the commutation power, if in fact it were permissible to place both powers in the Governor's hands. Mr. Pizzuto does have an answer: both the first and the second paragraphs adopt the simple, clean method of giving commutations to the Commission and reprieves to the Governor. All inmates are treated alike and no violence is done to the constitutional text. *See Sweitzer v. Dean*, 798 P.2d 27, 31 (Idaho 1990) ("It is the duty of the courts in construing statutes to harmonize and reconcile laws whenever possible and to adopt that construction of statutory provision which harmonizes and reconciles it with other statutory provisions.").

To escape the universal canons of construction, the State's plain-language theory is premised entirely on the 1986 amendment to Section 7, which added the italicized words in the following excerpt: the Commission "shall have power . . . , *only as provided by statute*, to grant commutations." *See* AOB at 8–13. According to the State, the 1986 amendment gave the legislature the constitutional authority to take the commutation power away from the Commission and give it to the Governor in the form of Idaho Code § 20-1016. *See* AOB at 8–

13. What the State overlooks is the crucial phrase left untouched by the 1986 amendment. It is still, after 1986, the *Commission*, that "shall have [the] power . . . to grant commutations." Indeed, even after the amendment, it remains the Commission's members alone who are empowered to grant such commutations "either *absolutely* or upon such conditions as *they* may impose . . . ." There is no other actor given that authority by Section 7. In the wake of the 1986 amendment, the plain language continues to unambiguously delegate the commutation power to the Commission and the Commission alone.

The State finds it "difficult to imagine a clause that more clearly establishes" the power it claims here for the legislature than Section 7. AOB at 12. Mr. Pizzuto has no such difficulty. Consider the following candidate: "Commutations may be granted by whatever body is deemed fit by the legislature." Or this one: "The commutation power will be exercised only by the individuals or entities designated by statute." Such language would have made plain the legislature's ability to deprive the Commission of its power, by contrast with what the 1986 amendment actually did, which *qualified* the power. In short, there are any number of ways in which a constitutional clause might, as the State puts it, empower the legislature to delineate "the entity or person that makes the final decision regarding a commutation." *Id.* The 1986 amendment took none of those easily available paths. Instead, it retained the language declaring that it was the *Commission* that "shall have" the commutation "power." There is no ambiguity to a clause that describes a particular type of power and names the organ with the constitutional authority to exercise it.

Contrary to the State's distortions of the 1986 amendment, the new language had a clear utility, and it was not to tacitly strip from the Commission the commutation power in the same sentence that gave it the power in the first place. The 1986 amendment allowed the legislature to regulate the *way* in which the Commission would exercise its commutation power. That is the commonsense meaning of the amendment: the Commission would continue to "have [the commutation] power," but the power would now have to be wielded "as provided by statute," i.e., according to the guidelines set by the legislature.

Many states have passed legislation in precisely that category. In one common category, there are statutes that prescribe the standards that inmates are required to meet in order to obtain a favorable clemency decision. *See, e.g.*, *Wigglesworth v. Mauldin*, 990 P.2d 26, 32 (Ariz. Ct. App. 1999) (considering a statutory scheme that required "adherence to defined criteria" by a clemency board when it considered requests for commutation). For instance, the legislature might provide that commutations by a clemency board are merited "for good conduct, industry and obedience," and prohibited when a "charge of misconduct has been sustained." *Woodring v. Whyte*, 242 S.E.2d 238, 242 (W. Va. 1978). Or the legislature might stipulate that a board of pardons must ask "whether the petition presents a substantial issue which has not been reviewed in the judicial process." Utah Code Ann. § 77-27-5.5(5). When one moves outside the commutation context and takes into consideration other more routine decisions by similar agencies about parole and the like, countless additional examples materialize. *See, e.g.*, *Bd. of Pardons v. Allen*, 482 U.S. 369, 372 (1987) (discussing a statute "mandating release" on parole by a state board "under certain circumstances"); *Greenholtz v. Inmates of Neb. Penal and Corr.*

Complex, 442 U.S. 1, 16–17 (1979) (quoting a statute that listed factors a state board was "required to take into account in deciding whether or not to grant parole"); *Dace v. Mickelson*, 797 F.2d 574, 577 (8th Cir. 1986) (similar); *Huggins v. Isenbarger*, 798 F.2d 203, 204 (7th Cir. 1986) (similar); *Berard v. State of Vt. Parole Bd.*, 730 F.2d 71, 73 & n.1 (2d Cir. 1984) (similar); *Candelaria v. Griffin*, 641 F.2d 868, 869 (10th Cir. 1981) (per curiam) (similar).

Had it issued a statute in that popular vein, giving the Commission guidance on *when* it could grant commutations, the Idaho legislature would have been acting in accordance with the 1986 amendment. And, importantly, it is not clear that the legislature would have been able to promulgate such a statute before the 1986 amendment. In Tennessee, for example, the state constitution provides that the Governor "shall have the power to grant reprieves and pardons" and includes no qualifier comparable to Section 7's "as provided by statute." *Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997). As a consequence, in Tennessee, no other branch "has the authority to regulate" the Governor's "power to commute a sentence." *Id.* at 660. That is not the case in Idaho after the 1986 amendment. The legislature here does have the authority to *regulate* the Commission's commutation power. It could give the Commission parameters on when to exercise the power, as numerous other statutes elsewhere do. That option gives meaning to the amendment without suggesting, as the State does, that after 1986 the legislature was permitted to displace a power explicitly granted in the constitutional text and direct it elsewhere.

Resisting the foregoing logic, the State suggests that Mr. Pizzuto's approach to the 1986 amendment "requires the insertion of the word 'process'" into Section 7. AOB at 12. It doesn't. To exercise a power as provided by statute is by definition to exercise it according to the

processes established by the legislature. It is the State's interpretation that warps the plain language, by insisting that when "as provided by statute" was added to Section 7 it somehow silently deleted from the text the words declaring that the Commission would "have power . . . to grant commutations."[9]

The State likewise errs in accusing Mr. Pizzuto of ignoring the word "only" in Section 7. *Id.* at 13. "Only" is given a meaningful role to play in Mr. Pizzuto's construction. By clarifying that the Commission could "only" exercise its commutation power "as provided by statute," the 1986 amendment guaranteed that the Commission would have to follow each and every guideline created by the legislature for the process (presuming the guidelines were otherwise valid). That is to say, the process would be entirely up to the legislature, but the plain language of Section 7 still retained the Commission as the only entity constitutionally empowered to grant commutations. It is the State that ignores language in Section 7, not Mr. Pizzuto.

It is ironic that the State's principal authority on this point is *State v. Thiel*, 343 P.3d 1110 (Idaho 2015), *see* AOB at 12–13, because the Attorney General here is committing the same mistake he was rebuked for there. In *Thiel*, the question was whether Idaho Code § 20-621 gave courts discretion to reject recommendations by sheriffs for early release. *See* 343 P.3d at 1114. The statute stated that county inmates "shall upon the recommendation of the sheriff be allowed" time off of their sentences. *Id.* On appeal, the State contended that the words "recommendation"

[9] Below, in the legislative-history section of the brief, Mr. Pizzuto also points out that the State's position on the word "process" cannot be squared with the materials formally circulated to the voters about the 1986 amendment, which explicitly characterized the change as allowing the legislature "to set *policies and procedures* for commutations." *Infra* at Part III.B.1.c.

and "allowed" reflected permissibility, "rather than a mandatory directive." *Id.* This Court disagreed, holding that "'shall' signals clear legislative intent" and "acts as a qualifier to all other terms within the phrase," demonstrating that the "determination rests entirely within the province of the sheriff and leaves no room" for other actors, such as the courts. *Id.* at 1115. Seven years later, the Attorney General is again neglecting the importance of the word "shall." Under Section 7, the Commission "*shall* have power . . . to grant commutations." Just as in *Thiel*, the word "shall" qualifies everything that follows and underscores how the commutation "determination rests entirely within the province of the" Commission. *Id.*

The State's parsing of the plain language would also lead to absurd results and should be rejected for that reason as well. *See State v. Yager*, 85 P.3d 656, 666 (Idaho 2004) ("Constructions of a statute that would lead to absurd or unreasonably harsh results are disfavored.").[10] What if the Idaho Constitution provided that the state supreme court would discharge its judicial powers "only as provided by statute?" Surely the legislature would not then be allowed to enact a statute anointing an administrative board with the power to hear the final appeal in all state cases, which would effectively abolish this Court altogether. Yet that is the logical end-point of the State's analysis. It simply cannot be the case that such a mild phrase ("as provided by statute") carries such extreme implications.

[10] Mr. Pizzuto acknowledges that the Court will not strike down "an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written." *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 265 P.3d 502, 509 (Idaho 2011). Here, Section 7 unambiguously favors *Mr. Pizzuto*'s reading, and the absurdity of the results stemming from the State's contrary interpretation is therefore a fair consideration.

Mr. Pizzuto's reading of "as provided by statute" is in accord with persuasive precedent. In *United Pub. Workers v. Yogi*, 62 P.3d 189, 190 n.5 (Haw. 2002), a statute was challenged under a state constitutional clause providing that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." The statute purported to forbid "public employers and public employees' unions from collectively bargaining over cost items for the biennium 1999 to 2001." *Id.* at 191. Beginning with the plain language of the constitutional provision, the court defined "provided" as a "word used in introducing a proviso" which typically "signifies or expresses a condition," or alternatively may signify "a limitation or qualification, or a restraint, modification, or exception to something which precedes." *Id.* at 193 (quoting Black's Law Dictionary 1028 (1968)). The court applied that definition to the constitutional clause, explaining that "the dependent clause 'as provided by law' qualifies the preceding independent clause describing the right to organize for collective bargaining." *Id.* After discussing Hawaii precedent and the legislative history, none of which are relevant here, the court concluded that to uphold the statute would give "lawmakers absolute discretion to define the scope of collective bargaining," which would "produce the absurd result of nullifying the" very entitlement "to organize for the purposes of collective bargaining" recognized by the constitutional provision. *Id.* at 196. Just as in *Yogi*, the phrase "as provided by statute" in Section 7 "*qualifies*" the power given to the Commission to grant commutations. *Id.* at 193. And just as in *Yogi*, a contrary construction would "nullify[]" the grant of commutation power extended in the same sentence of Section 7.

In summary, the plain language of Section 7 situates the commutation power with the Commission, and nowhere else. Because § 20-1016 purports to transfer the power to the Governor, it is unconstitutional. *See 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 enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*"). The Commission's majority vote in favor of Mr. Pizzuto's clemency petition was final, and the district court's judgments so finding were correct and should be affirmed.

B. If Section 7 Is Ambiguous, Affirmance Is Still Appropriate.

If the Court disagrees with the above and deems Section 7 ambiguous, the analysis even more strongly favors the district judge's conclusion that the Governor has no constitutional power to meddle with commutations.

1. Legislative History Favors Affirmance.

Ambiguity would make legislative[11] history relevant, *see, e.g.*, *Gonzalez v. Thacker*, 231 P.3d 524, 526 (Idaho 2009); *Winkler*, 473 P.3d at 800, and the evolution of Section 7 confirms beyond any doubt that the Commission is the sole organ with commutation power.

[11] Mr. Pizzuto uses the term "*legislative* history" for convenience. He does not thereby imply that the legislature's intent ought to be on center stage in the analysis. To the contrary, as explained below, it is the people who made the 1986 amendment effective, and it is their intent that should control. *See infra* at Part III.B.1.c.

a) The Pre-1986 History Of Section 7 Supports Affirmance.

The trajectory of Section 7 before the 1986 amendment underscores how the commutation power was placed solely on the Commission by the Constitution, how easily it could have been deposited elsewhere—and how it was not. *See Idaho Water Res. Bd. v. Kramer*, 548 P.2d 35, 58 (Idaho 1976) (discussing the history of a constitutional amendment in interpreting its meaning).

While the commutation power in Idaho was initially enjoyed by a three-person committee comprised of the Governor, Attorney General, and Secretary of State, it was moved by constitutional amendment in 1945 and "vested" in the Board of Pardons. *See* 49489 R. p. 644. The Board of Pardons later became the Commission, *see Bates v. Murphy*, 796 P.2d 116, 120 n.3 (Idaho 1990), which assumed the commutation power from its predecessor. Between 1945 and 1986, this Court repeatedly recognized the obvious: that the Commission enjoyed the commutation power. *See State v. Rawson*, 597 P.2d 31, 33 (Idaho 1979) (referring to the "commutation powers granted to the" Commission); *State v. Iverson*, 310 P.2d 803, 804 (Idaho 1957) (remarking that the Commission "has power . . . to grant commutations"). Today, the commutation power under Section 7 remains vested with the Commission. Section 7 does not refer to any other governmental actor when it describes *who* commutes sentences in Idaho. It remains the Commission that "shall have power . . . to grant commutations." In its lengthy account of the history behind Section 7 over the last 133 years, *see* AOB at 13–20, the State does not identify a single data point to suggest that the clause was ever amended to rescind that fundamental grant of power.

It is especially noteworthy that the original Constitution made the Governor part of the entity responsible for rendering commutation decisions, and that he was then expressly removed from it by amendment in 1945. That removal displays a very particular constitutional intent. *See St. Alphonsus Reg'l Med. Ctr. v. Gooding Cnty.*, 356 P.3d 377, 382 (Idaho 2015) (declining to interpret a statute in a way that would re-incorporate language that was removed through amendment). Any attempt to reinsert the Governor into the process would need to bear equally strong hallmarks of intent, which are entirely absent here.

In addition to the history of Section 7 itself, its codification of the Commission's power was also memorialized in precedent. The State's position relies upon the improbable assumption that the people of Idaho in 1986 implicitly abrogated well-settled precedent through the adoption of a few innocuous-sounding words. For this Court in 1957 stated unequivocally what the plain terms of Section 7 meant: "The [Commission], created by the Constitution, has power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, and the Governor has the power to grant respites and reprieves." *Iverson*, 310 P.2d at 804. It must be presumed that the people of Idaho were aware of the state of the law when they cast their ballots. *See Idaho Mut. Ben. Ass'n v. Robison*, 154 P.2d 156, 159 (Idaho 1944). As the State would have it, the voters in 1986 radically transformed the straightforward law in place at the time, and effectively rewrote it to say the opposite, i.e., that the *Governor* has the power to grant commutations, as well as the power to grant reprieves. To read "as provided by statute" as silently overruling precedent and the plain language of the relevant constitutional provision, as the State invites the Court to do, would be to turn the canons of construction on their head.

Applying those canons, the 1986 amendment should only be regarded as abrogating the settled proposition that the Commission had the commutation power if its language "clearly indicate[d]" as much—which it does not. *Callies v. O'Neal*, 216 P.3d 130, 136 (Idaho 2009).

It is impermissible to presume, as the State does, that the 1986 amendment was intended to overrule years of precedent when the voters "did not expressly indicate an intention to do so." *Id.* at 139; *see Westerberg v. Andrus*, 757 P.2d 664, 668–69 (Idaho 1988) (declining to attribute to the voters "an intent to make a major change in the public policy of this state" when there was nothing to substantiate the inference). "Such a presumption would contravene . . . well-established principles of . . . interpretation." *Callies,* 216 P.3d at 139.; *see State v. Clarke*, 446 P.3d 451, 455 (Idaho 2019) (reminding that "the common law" in existence at the time of the framing "may be used to help inform our interpretation of the Idaho Constitution").

Lastly, the State forgets that "preexisting statutes" can also be edifying on the meaning of text in the state constitution. *Clarke*, 446 P.3d at 455. When the 1986 amendment to Section 7 was ratified, the Governor had no statutory role in commutations. *See* 49489 R., pp. 648–59. Instead, consistent with Section 7, the Idaho Code afforded the commutation power to the Commission alone. *See* 49489 R., pp. 648–59. Again, there was nothing in the 1986 amendment to suggest a change to the existing scheme, in which the Commission had the final say on commutations.

b) Other State Constitutions Support Affirmance.

Over the last 133 years, Section 7 could well have been amended to bring the Governor back into the commutation process, if the people of Idaho so wished. Templates are plentiful.

Several other state constitutions expressly endow governors with clemency power. Even more to the point, several of them create a structure whereby an agency makes a recommendation, and the Governor then rules on it. *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 punishment[s]"); 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(a) ("[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"); Cal. Const., art. V, § 8(b) (declaring that "[n]o decision of the parole authority . . . with respect to the granting . . . of parole . . . shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute" and "affirm, modify, or reverse the decision of the parole authority").

Another especially instructive example is Washington. There, the state constitution provides that "[t]he pardoning power shall be vested in the governor under such regulations and restrictions as may be prescribed by law." Wash. Const., art. III, § 9. Acting pursuant to the constitutional text, the Washington legislature passed a statute indicating that "[t]he clemency and pardons board shall receive petitions . . . for . . . commutation of sentences and pardoning of offenders . . . and shall make recommendations thereon to the governor." Wash. Rev. Code § 9.94A.885(1). Washington's statutory scheme shows what the Idaho legislature could properly

have done under Section 7. Because Section 7 vests the commutation power in the Commission under whatever terms are set by statute, the legislature would have been entitled to give the *Governor* a recommendation, just as Washington did for its clemency board. Conversely, the Washington example illustrates yet another way in which Idaho could have authorized a statute like § 20-1016 if it wished: namely, by amending Section 7 so that it vested the commutation power "in the governor under such regulations and restrictions as may be prescribed by law." Washington's constitutional provision was adopted in 1889 and had been on the books for nearly 100 years when Idaho passed its 1986 amendment—there was no reason not to model the change after the clear language in place in a neighboring state if a reconfiguration of the commutation power was the goal.

The existence of these constitutional clauses in Washington and elsewhere is powerful evidence that Idaho chose a different route in 1986. *See Commonwealth v. Markman*, 916 A.2d 586, 606 (Pa. 2007) (relying on the fact that the legislature "could have placed an express exception for murder into the statutory text, as some other states have done" but that it "chose not to"); *Alfieri v. Martelli*, 647 A.2d 52, 55 (Del. 1994) (interpreting a law in light of the principle that the legislature "could have drafted the statute to effectuate such an intent as has been done in other states"); *Baker v. State*, 164 So. 3d 151, 155 (Fla. Dist. Ct. App. 2015) ("Had the Legislature wanted to draft a statute that only made it illegal to obscure the license tag's alphanumeric designation by matter that was 'on' the tag, it could have easily done so, as other states have provided.").

The district court below stated with some reason that Section 7 could have been written along the lines of the constitutional provisions listed above, had the Idaho drafters wished to follow such an approach. *See* 49489 R., p. 752. Quarreling with this part of the order, the State faults the district court for resorting to the principle that "death is different," i.e., that the irreversible nature of capital punishment was animating its decision. AOB at 22. Actually, the district court was making the opposite point. The district court drew meaning from the fact—which the State does not deny—that "[t]he 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." 49489 R., pp. 751–52. As the district court then elaborated, "the Constitution never extracted commutation powers from a board of decision makers based upon the ultimate penalty of death." 49489 R., p. 752. The district court's well-founded conclusion was therefore that all commutation powers, in capital and non-capital cases alike, are enjoyed only by the Commission. As a result, the State's fear of "an entirely different interpretation of the clause for non-capital cases," AOB at 22, is untethered from the district court's analysis, which would create no such discrepancy.

Throughout the lifespan of this case, the State has never pointed to another jurisdiction in which the clause "as provided by statute" in the clemency context has been interpreted in the expansive way that opposing counsel reads the 1986 amendment. So far as Mr. Pizzuto is aware, the only state in which similar language appears in a clemency provision is Utah, and it provides yet more support for the position taken by the district court below and Mr. Pizzuto. In Utah, the state constitution provides that "[t]he Board of Pardons and Parole, by majority vote and *upon*

other conditions as provided by statute, may . . . commute punishments . . . in all cases except treason and impeachments., subject to regulations *as provided by statute*." Utah Const., art. 7, § 12(2)(a). The Utah legislature has never regarded these four words as somehow negating the plain grant of commutation power to the Board in the constitutional text, as Idaho's has. Instead, acting consistently with the constitutional language, the Utah legislature has confirmed through statute that it is the *Board* that "may consider the commutation of a death sentence." Utah Code Ann. § 77-27-5.5(1). What is more, as stated above, the Utah legislature has understood the "as provided" language as simply giving lawmakers the power to impose standards on who can obtain commutations and how their petitions should be processed. *See supra* at Part III.A; *see also* Utah Code Ann. § 77-27-5.5. The State has not supplied an explanation as to why the language would mean something different in Idaho, or why these words above all others would be chosen to carry out such a far-reaching change in settled law.

c) The Voters Never Moved The Commutation Power.

Although they are entirely ignored by the State, the voters are the most important actors to consider when analyzing the legislative history, and they were never given a single reason to suppose that they were upsetting a well-established constitutional distribution of power by adding four simple words ("as provided by statute") to Section 7.

It is the people of Idaho who made the 1986 amendment law. It is therefore the people of Idaho whose perspective matters most when it comes to legislative history. *See Robison*, 154 P.2d at 159 (focusing on the intent of the public in construing a constitutional amendment because "[t]he people, not the legislature, amend the constitution" and because "the amendment

becomes effective when ratified by the people and not otherwise"); *see also Flavorland Foods v. Wash. Cty. Assessor*, 54 P.3d 582, 585 (Or. 2002) (en banc) ("When we interpret either initiated or referred constitutional provisions, we attempt to discern the intent of *the voters*. That is so because, with respect to such provisions, it is the people's understanding and intended meaning of the provision in question that are critical to this court's analysis." (cleaned up)); *Davis v. City of Berkeley*, 794 P.2d 897, 900 (Cal. 1990) ("When construing a constitutional provision enacted by initiative, the intent of *the voters* is the paramount consideration."); *Keenan v. Price*, 195 P.2d 662, 667 (Idaho 1948) (cautioning courts that "the will of the people expressed at the proper time and in the proper manner in ratifying [a constitutional] amendment ought not to be lightly disregarded"); *cf.* Cathy R. Silak, *The People Act, The Courts React: A Proposed Model For Interpreting Initiatives in Idaho*, 33 Idaho L. Rev. 1, 37, 39–43 (1996) (explaining how Idaho courts should consider voter intent when construing measures passed by the public). The voters are properly the focal point of the analysis even when, as here, the amendment at issue began with the legislature but was then ratified by the public. *See Flavorland*, 54 P.3d at 585; *Keenan*, 195 P.2d at 664.

Below, the State made the surprising assertion that there "is no case in Idaho, none whatsoever, that talks about the voters having any say whatsoever in determining the intent of a constitutional amendment." 49489 Tr., p. 19, ll. 7–9. Aside from being incorrect, *see Robison*, 154 P.2d at 159; *Keenan*, 195 P.2d at 667, the State's casual dismissal of the voters is illogical and anti-democratic, since the 1986 amendment would have no legal effect without the people of Idaho having passed it. There were nearly a million Idaho citizens in 1986. *See* Census Bureau,

Intercensal Estimates of the Total Resident Population of States: 1980 to 1990, available at https://www2.census.gov/programs-surveys/popest/tables/1980-1990/state/asrh/st8090ts.txt. It would be strange if they were all discounted entirely in favor of a few dozen legislators who could not have made the 1986 amendment law on their own. The district court therefore properly considered the intent of the public. *See* 49489 R., p. 749 (deciding that there was "no indication that . . . 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"). Like the district judge, this Court should not adopt the State's indifference to the people who enacted the 1986 amendment: the voters.

An Idaho voter in 1986 would have been looking at a constitutional passage providing that the Commission "shall have power . . . to grant commutations." The question presented to the voter at the ballot box was whether the passage was to be amended "to provide that the power of the" Commission "to grant commutations . . . shall be only as provided by statute." 49489 R., p. 646. It is far-fetched to suppose that a voter reviewing that modest language would ever anticipate that it somehow invited the legislature to rework the clear constitutional distinction drawn between the Commission, which had the power to commute, and the Governor, who merely had the power to reprieve. *See Iverson*, 310 P.2d at 804 ("The [Commission], created by the Constitution, has power to remit fines and forfeitures, and to grant commutations . . . after conviction and judgment, and the Governor has the power to grant respites and reprieves."). There are, of course, many ways in which the legislature might regulate commutations through statute, some of which are discussed above. *See supra* at Part III.A. But the one thing a voter

would surely not comprehend was that a vote for an amendment that said absolutely nothing about the Governor was a vote to withdraw from the Commission and transfer to the Governor the ultimate power to grant commutations. The State's proposed interpretation is starkly inconsistent with the constitutional text, both before and after amendment. Nothing in the ballot that was placed before the voters even suggested the possibility of such a radical transfer of power, one that is utterly inconsistent with the text and structure of Section 7 itself. *See Standlee,* 538 P.2d at 781 ("The state constitution is not a grant but a limitation on legislative power so that the legislature may enact any law not expressly or *inferentially prohibited* by the state or federal constitutions.").

The public notice circulated in connection with the 1986 amendment is a significant piece of evidence about the voters' intent. It is required by the Constitution, *see* Idaho Const., art. XX, § 1, the nature of its contents are spelled out in statute, *see* Idaho Code § 67-453, and it is the only formal document describing the amendment to the voters apart from the ballot itself. And the public notice militates decisively in favor of Mr. Pizzuto's interpretation of the amendment. The public notice told the citizenry that the 1986 amendment would give the legislature "the authority to set policies and procedures for commutations." AOB, App. H.[12] Further, it described the amendment as providing the legislature the ability to "set standards for commutations." *Id.* As the voters were correctly informed, the amendment would allow the legislature to regulate the commutation process in the sense that it could now establish standards

[12] This same language also appeared on the ballot as part of the description of the "effect of adoption" of SJR 107, 49489 R., p. 646, reinforcing its importance to the historical inquiry.

that petitioners would have to satisfy in order to obtain a reduction in their sentences—something outside the reach of lawmakers under the pre-existing constitutional language. Of equal significance is that the public notice referred from the post-amendment perspective to Commission "decisions" regarding commutations. *Id.*. Why would commutation decisions still be made by the Commission if the whole objective of the amendment was to deprive the Commission of its commutation power? The State's silence is deafening.

It is true that the public notice regarding the 1986 amendment expressed the aim of "remov[ing] from constitutional status the powers of commutation." AOB, App. H. Nonetheless, the very next clause of the same sentence clarifies what "remove" means here, namely, "to make the powers of commutation . . . subject to amendment by statute by the Legislature." *Id.* In other words, the commutation power is only being "remove[d]" from its constitutional standing in the sense that the Commission can no longer exercise it without statutory boundaries. Henceforth, the power will be wielded in a way that is cabined by the legislature. The decisive thing is that it is still the *Commission* with the power, though. It is not the Governor, who is absent entirely from the Council's statement.

The only document cited by the State that does support its interpretation and would potentially have been considered by the voters is a newspaper article from October 23, 1986,[13] in which then-Attorney General Jim Jones is paraphrased as promising, if the amendment passed, to "prepare legislation giving the governor final authority whether commutation will be granted." AOB, App. G. When courts have relied upon newspaper articles to decipher voter intent it has been with reference to far more robust showings. *See State v. Allison*, 923 P.2d 1224, 1231 (Or. Ct. App. 1996) (interpreting a referendum in light of the fact that "nearly every one of over two dozen newspaper articles concerning" the initiative described the issue consistently). Here, all of the other materials available to the voters—including the far more significant statements on the ballot and in the public notice—outweigh this single newspaper article paraphrasing a single individual's plan of action.

The juxtaposition of the newspaper article with the language of the ballot is particularly telling. As described above, the ballot characterized the amendment in a way that is harmonious with Mr. Pizzuto's interpretation, i.e., the change would let the legislature "set *policies and*

[13] The State attached six newspaper articles to its Opening Brief: Appendices A, B, C, D, F, G. Below, the State did not make the articles part of the record, ask that judicial notice be taken of them, or even cite them. It is therefore improper for the State, as the appellant, to rely on the materials now. *See Zehm v. Associated Logging Contractors, Inc.*, 775 P.2d 1191, 1193 (Idaho 1988) (deciding that an appellant's "assertions" would "not be heard for the first time on appeal" where "[n]o facts supporting such argument were presented to the district court"). However, because the articles support Mr. Pizzuto's position, the result remains the same if they are considered.

procedures for commutations" and "set standards for commutations." 49489 R., p. 646.[14] A lone newspaper article representing one person's thoughts and read by an unknown number of Idahoans cannot possibly outweigh statements that represented the formal characterization of the amendment to the voters and was presented to all of them. *See Hull v. Rossi*, 17 Cal. Rptr. 2d 457, 460 (Ct. App. 1993) ("Since this pamphlet accompanies the ballot, it appears to give an imprimatur of official approval to its contents and is likely to carry greater weight in the minds of the voters than normal campaign literature.").

d) The State's Historical Arguments Are Off-Point.

The most pervasive confusion that runs through the historical discussion in the State's Opening Brief is the notion that any reference to a *qualification* of the Commission's commutation power justifies the legislature's wholesale *displacement* of its power in § 20-1016. Variations on that theme crop up throughout the Opening Brief. For instance, the State comments on the legislature's intent "to remove the *unbridled* power of the Commission to grant commutations." AOB at 15. Elsewhere, it quotes an editorial supporting the amendment because it "would make the power of the Commission *subject* to laws passed by the Legislature." *Id.* at 16. And then again, the State emphasizes how the title of the relevant joint resolution

[14] The ballot also notified the voters that the 1986 amendment would allow the legislature to "review [Commission] commutation . . . decisions." 49489 R., p. 646. Read in context, this language seems to refer to the same sort of statutory regulation of the commutation process that Mr. Pizzuto has described elsewhere. Thus, the legislature would be able to gather information about how commutations were being handled and propose statutory fixes for any problems it saw, as—by example—by promulgating standards for petitioners to meet when asking the Commission for clemency. In the quoted phrase, it was still the *Commission* that was making the "commutation . . . decisions." 49489 R., p. 646.

"expressly stated the Legislature wanted to provide that the [Commission] shall have the power to grant commutations . . . only as provided by statute." *Id.* at 19.

The problem for the State is that the references it draws attention to about restricting the Commission's powers by no means line up with the wholesale *eradication* of commutation power that was ultimately attempted in § 20-1016. For the type of legislation contemplated by Mr. Pizzuto as falling within the ambit of the 1986 amendment would *also* dilute the Commission's power. From the vantage point of 1986, any legislative restriction on commutations would affect the Commission's power, since it was the body entrusted with commutations. The language about "power" seized upon by the State would have been fully harmonious with the type of statutes detailed above, which provide standards to govern agencies in the clemency process. *See supra* at Part III.A. To return to those examples, a statute proscribing commutation when a "charge of misconduct has been sustained" against the prisoner, *Woodring*, 242 S.E.2d at 242, restricts the Commission's power because it might otherwise grant a commutation to an inmate with a disciplinary record. Likewise, a statute limiting commutations to grounds that have "not been reviewed in the judicial process," Utah Code Ann. § 77-27-5.5(5), restrains the Commission's power because it might otherwise be inclined to grant a commutation regardless of whether the issue was considered by the courts or not.

The State maintains that the legislature already enjoyed the power, prior to the 1986 amendment, to impose the sort of restrictions on the commutation process projected by Mr. Pizzuto. *See* AOB at 19. Its view centers on Section 7's longstanding invitation to the legislature to "prescribe the sessions of [the Commission] and the manner in which application

shall be made, and regulate proceedings thereon." AOB at 19. Unfortunately for the State, there is nothing in this pre-1986 language about creating *standards* for the granting of commutations. The pre-1986 clause would seem to only license the legislature to direct the Commission on superficial matters such as how long the application could be, how a hearing might be conducted, and so forth—and not on who actually received commutations based on more substantive eligibility criteria, for example.

At best, the State's focus on materials discussing the need to reduce the Commission's power is not helpful in answering the question presented. At worst, the State's approach actively cuts against its conclusion. Although the State appears to be under the impression that its view is bolstered by the editorial quote about making "the power of the Commission *subject* to laws passed by the Legislature," AOB at 16, it is not. To say that the Commission's powers are becoming subject to laws is to almost explicitly say that the powers will be exercised pursuant to guidelines crafted by the legislature, which is precisely Mr. Pizzuto's view. It is by no means to say that that the powers are being erased or extinguished or obliterated. There are many synonyms for that concept and the editorial notably uses none of them.

Other extracts by the State from the historical materials suffer the same defect. Referring to the minutes from a legislative hearing, the State stresses how certain stakeholders "were concerned with the way the Commission was granting . . . commutations" and that particular legislators had "no confidence" in its work. AOB at 15, 16 (citing App. E). Where the State goes astray is in drawing from those cobbled-together opinions the inference that "the Legislature intended to *remove any power* previously held by the Commission regarding

commutations." *Id.* at 16. Such concerns about the Commission's decisions would have been ameliorated, and confidence in the agency would have been boosted, by supplying the Commissioners with more guidance on how to operate, as legislatures around the country have done, and as the 1986 amendment is most naturally read as providing.

The State also seems to intimate that the purpose of the amendment can be discerned by the passage of § 20-1016 itself. *See* AOB at 20. To start, the argument is anachronistic—§ 20-1016 did not exist at the time the 1986 amendment was ratified. The statute was enacted in 1988. Language adopted in 1988 can hardly tell us what language adopted in 1986 meant. The argument is also circular. To say that the statute is constitutional because it reflects the motivation animating the constitutional amendment is to avoid any meaningful constitutional scrutiny of the statute. It is to basically say that the statute must be constitutional because the legislature passed it. Such an approach suffers from the additional flaw of focusing on the legislators to the detriment of the *voters*. It was the voters who passed the 1986 amendment and made it law, not the legislature. And as just shown, the voters would have had absolutely no notice that they were approving a change that would make the Commission subservient to the Governor on commutations, whatever legislators may or may not have thought. There is no purchase in law or in logic for the State's poison-pill theory, whereby the public can somehow silently invite the legislature to reconfigure plain constitutional language through legislation that has not even been born yet.

e) The Interim Committee's Work Supports Affirmance.

In order to provide the Court with the fullest possible account of the history surrounding Section 7, Mr. Pizzuto will next delve into the Interim Criminal Sentencing Committee, the body which initially recommended SJR 107 to the legislature. As set forth below, the committee's work is not controlling here because it is not proper legislative history, as the group had no lawmaking authority under this Court's precedent. However, because the committee's role might otherwise create confusion in the Court's historical inquiry, Mr. Pizzuto examines the subject. If the Committee is considered, it does not change the bottom line both because it rejected proposals that would have transferred the commutation power to the Governor and because any intent to make such a transfer was not in any event communicated to the voters.

The State does not analyze the interim committee by name in its Opening Brief. However, the State does refer to a newspaper article which in turn discusses the committee. In the document in question, the Idaho Statesman notes an interim committee of the Legislative Council co-chaired by Senator Roger Fairchild and Representative Larry Harris. As the Statesman reports, the committee was "working on several proposals," including one that would "[g]iv[e] the governor the final say over . . . commutations." AOB, App. C. The referenced committee was the Interim Criminal Sentencing Committee, which the State does not describe whatsoever in its Opening Brief.

As a preliminary matter, the interim committee's paper trail is not true legislative history. The committee was created by the legislature, but it had no lawmaking power. *See* Ex. 1. Rather, the committee's remit was solely to "complete a study" of sentencing" and "to present

. . . a final report, together with recommended" reforms to the legislature. *Id.* at 1–2. It has for many years been settled that such committees do not exercise legislative authority under Idaho law. *See Kramer*, 548 P.2d at 65–66 (concluding that a similar committee also made up of lawmakers and tasked with making recommendations to the legislature had "no law making authority" and was not exercising "legislative power" but was simply performing "incidental and ancillary tasks" on behalf of the legislature); *Jewett v. Williams*, 369 P.2d 590, 594 (Idaho 1962) (noting that a commission made up of legislators assigned with proposing recommendations was "[c]learly . . . a fact-finding and fact evaluating body" and was "not exercising legislative functions"). Because the committee was not properly acting in a legislative capacity, its file is not legislative history.[15]

Still, Mr. Pizzuto examines the committee's records here for two reasons: 1) so that the Court can have the benefit of the information, to the extent it is deemed relevant; and 2) because even though the documents are not legislative history, they can still be considered as yet another demonstration of how the 1986 amendment could have made the change claimed by the State, and did not. Be that as it may, Mr. Pizzuto respectfully submits that the Court should disregard any new arguments for reversal made by the State and based on the committee's records. Although the Court can affirm for any reason supported by the record, *Hoffer*, 257 P.3d at 1229, it refuses to "consider arguments raised for the first time in an appellant's reply brief," *Shepherd*,

[15] When it comes to the actual legislative history behind SJR 107, the State has only a single page to cite: the minutes from a March 1986 meeting of a House Committee. *See* AOB, App. E. As set forth above, the minutes do not support the State's interpretation of the 1986 amendment. *See supra* at Part III.B.1.d.

383 P.3d at 699, or facts not presented by an appellant below, *see Zehm*, 775 P.2d at 1193. The State had an opportunity to submit and analyze the committee's history to the Court in its Opening Brief and did not take it and any late-blooming theories on the subject are improper on appeal.

Turning to the substance of the history, the committee met in the fall of 1985 and took up two separate proposed constitutional amendments that would have both explicitly given the Governor the commutation power. *See* Ex. 2 at 2. One of the proposed amendments would have authorized the Governor to approve or disapprove of decisions made by the Commission (RS 11689C2), *see* Ex. 3, and the other one would have made the Governor alone the say-so on commutations (RS 11882), *see* Ex. 4. The committee deliberated on those two proposals and elected *not* to recommend them to the legislature. *See* Ex. 2 at 2. Instead, the committee's final report advocated for the adoption of SJR 107, *see* Ex. 5 at 5, the bill that later became the 1986 amendment, which did not incorporate the Governor into commutations, left the decisions in the hands of the Commission, and simply made them subject to the rules and regulations laid down by the legislature, i.e., required the power to be exercised "as provided by statute." The fact that the committee specifically mulled over proposals that would have expressly made the precise change now claimed by the State—the conferral on the Governor of the commutation power—is yet another illustration of how easily the change could have been presented to the people of Idaho for their vote, and how undeniable it is that they were given no such option.

It is therefore true, as the district court found, that the 1986 amendment "could have been drafted with th[e] specific language" necessary to make the change asserted by the State. 49489

R., p. 752. The point can actually be made even more strongly. We know for a historical fact that members of the legislature were aware of how to move the commutation power from the Commission to the Governor through a constitutional amendment—lawmakers reviewed proposals that would have done just that. Their decision not to go down that road speaks far louder on the issue presented than anything else in the committee's materials. Thus, *if* the committee's efforts are viewed as legislative history (over Mr. Pizzuto's objection), the specific rejection of proposals that would have expressly made the precise change now claimed by the State would be substantial evidence in Mr. Pizzuto's favor. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 579–80 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation."); *Wood v. Farmers Ins. Co. of Idaho*, 454 P.3d 1126, 1128–29 (Idaho 2019) (similar).

Mr. Pizzuto acknowledges that there are pieces of the interim committee's work product that do seem to endorse a desire to give the legislature the power purportedly exercised in § 20-1016, but they do not alter the calculus.

The first place that comments in that vein appear is at a November 20, 1985 meeting of the interim committee. At that meeting, two people spoke up in favor of a "third alternative," i.e., an approach other than the express transfer of commutation power to the Governor. Ex. 2 at 2. One of those people, a court administrator, described the third alternative as the "eliminat[ion of the Commission as] a constitutional body." *Id.* The administrator promoted the third alternative as a means of providing "the legislature more flexibility in adding powers or limiting powers of" the Commission, "determining who approves commutations, etc." *Id.* A senator

appeared to also embrace the third alternative, suggesting that staff "prepare legislation to eliminate the section of the Constitution that establishes the [Commission] as a constitutional board and replace it with something established by law without saying it will be in the hands of the governor." *Id.*

It is far too unclear what became of these thoughts for the Court to rely on them in deciphering the 1986 amendment. For although the materials could be read to suggest a desire to turn the third alternative into SJR 107, it is not at all apparent that the legislature in fact did so. After all, SJR 107 did *not* "eliminate" the Commission as "a constitutional body." *Id.* Nor did it "eliminate" the Commission "and replace it with something established by law." *Id.* As discussed elsewhere, the Commission remained in Section 7 after the passage of the 1986 amendment, and it continued to explicitly exercise the commutation power. Whatever might have happened between the November 1985 meeting and the drafting of the text for the amendment, the latter self-evidently did not reflect the characterization of the third alternative at the committee's session. As before, the legislature could undeniably have proposed to the voters the complete removal from Section 7 of the Commission. Yet the amendment did not even touch the first sentence of Section 7, which establishes the Commission as a constitutional organ. Instead, the legislature presented to the voters an amendment that left intact Section 7's basic description of the Commission as the only entity empowered to commute sentences, merely altered the conditions under which it would exercise certain of its powers by adding the "as provided by statute" language, and then advised the public that they would be giving the

legislature "the authority to set policies and procedures for commutations" and "to set standards for commutations" that the *Commission* would grant. AOB, App. H.

And to the unclear extent that the senator's comment about not "saying it will be in the hands of the governor" should be taken as evidence of a legislative desire to make the transfer of power that was later attempted in § 20-1016, there was never a whisper to the voters about that desire. In the event the voters were misled into authorizing a rebalancing of power, the authorization would be invalid. It cannot be the case that legislative actors are permitted to acquire power from the people through ballot measures by deceiving the public. *See Penrod v. Crowley*, 356 P.2d 73, 82–83 (Idaho 1960) (implying that a constitutional amendment that "mislead[s] the voters" results in the measure being "void"); *see also Blackwell v. City Council for City of Seat Pleasant*, 617 A.2d 1110, 1112–1116 (Md. Ct. Spec. App. 1993) (invalidating an amendment passed by the public when "the electorate was clearly misled" by the materials associated with the vote). Indeed, if the senator's statement illustrates anything, it is the incontrovertible fact that legislators knew exactly how to convey the power to the Governor and made a willful decision not to.

The second place in which an intent to authorize something like § 20-1016 is arguably hinted at is in the committee's final report. There, the co-chairmen of the committee wrote that SJR 107 would "remov[] from the Commission . . . its constitutional powers of commutation and pardon" and would be "followed with enabling legislation that would restrict the powers of the Commission." Ex. 5 at 5. Continuing, they described such legislation as "restrict[ing] the sentence reduction powers of the commission to those powers specifically granted by statute,"

which "would place all functions of the commission directly under the control and supervision of the legislature." *Id.* Mr. Pizzuto acknowledges that this understanding of SJR 107 is in tension with his own. However, the passage does not control now for numerous reasons. Some have already been surveyed, including—most importantly—that such an interpretation was never offered to the voters who actually passed the 1986 amendment, and who were given every basis to suppose from the language of the measure itself and its formal accompanying materials that they were not removing the Commission's power and were instead allowing the legislature to guide that power with standards for commutation.

Moreover, to rely on these two co-chairmen as the secret key to Section 7 would be to ignore not only the voters, but the many other legislators who later approved of the resolution *in their capacity as legislators* rather than while serving on a non-legislative body. Such a cherry-picking method would not be sound. *See Edwards v. Aguillard*, 482 U.S. 578, 637–38 (1987) (Scalia, J., dissenting) (discussing how it is "almost always an impossible task" to "discern[] the subjective motivation of those enacting [a] statute" because of how many different potential explanations there are, because "'what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it,'" and because "[l]egislative histories can be contrived and sanitized" (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

Another chapter of the committee's undertaking conceivably merits some discussion as well. Earlier in the process, Attorney General Jones had lobbied the interim committee to transfer the commutation power to the Governor. *See* Ex. 6 at 1. But, as explained, the

committee did not do so, nor did the legislature. And just as Attorney General opinions do not constitute binding precedent, *see, e.g.*, *Holly Care Ctr. v. Dep't of Emp't*, 714 P.2d 45, 51 (Idaho 1986), the proposed course of action by Attorney General Jones yields to the fact that the voters never endorsed it. The history only accentuates how the committee ultimately elected *not* to recommend a transfer of the commutation power in the amendment that was eventually presented to the public. In sum, Attorney General Jones's efforts cannot overcome the fact that all of the pivotal documents regarding the voters' intent favor Mr. Pizzuto's—and the district court's—reading of the 1986 amendment.

f) Conclusion To Legislative History Section

To recapitulate, the history of the 1986 amendment establishes beyond peradventure that the voters were never given any reason to imagine that they were permitting the legislature to invert a clear allocation of power established in the Constitution and affirmed by years of precedent. It would have been a simple matter to give the voters that option. Other states have in their own constitutions. If a clear constitutional grant of power is to be reconsidered by a popular vote, then the people of Idaho deserve to be given a full and honest account of the decision before them, with all of its ramifications. Until they are given that account, the commutation power remains with the Commission, where the Constitution places it. The legislature is more than capable of placing the question before the public in a clear and comprehensible fashion. In the meantime, however, the currently empowered Commission granted Mr. Pizzuto's commutation petition, and its decision should be enforced.

2. The Rule Of Lenity Supports Affirmance.

Another factor that counsels in Mr. Pizzuto's favor is the rule of lenity. If, contrary to Mr. Pizzuto's argument, the meaning of Section 7 is not settled in his favor by the legislative history, there is a "grievous ambiguity or uncertainty" in the clause and the rule of lenity is implicated. *State v. Bradshaw*, 313 P.3d 765, 768–69 (Idaho Ct. App. 2013). Under the rule of lenity, language is construed "strictly in favor of defendants in death penalty cases." *State v. Sivak*, 806 P.2d 413, 418 (Idaho 1990). It is true that the rule of lenity is most often employed in the interpretation of traditionally criminal statutes that spell out prohibited conduct or punishments. *See, e.g.*, *Doan v. State*, 979 P.2d 1154, 1159 (Idaho 1999). That said, the rule has also been taken into account when statutes are not necessarily in the classic categories but still have "criminal applications." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992).

Thus, the Ninth Circuit considers the rule of lenity when a technically civil statute affects the sentence imposed upon an inmate. *See United States v. Turner*, 689 F.3d 1117, 1125 (9th Cir. 2012) ("The intertwining of the Act with the criminal provisions at issue is sufficient to invoke the rule of lenity."). Such an approach is consistent with this Court's utilization of the rule of lenity in the sentencing-enhancement context. *See Thompson*, 614 P.2d at 978. And it makes sense here. Section 7 is at a minimum "intertwin[ed]" with criminal law, *Turner*, 689 F.3d at 1125, for it exerts a powerful influence on how sentences are carried out—as demonstrated by Mr. Pizzuto's case. The rule of lenity is motivated by a concern that the government should not be able to bring to bear its coercive power on an individual when there is

any doubt about its authority to do so. *See, e.g.*, *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (describing how the rule of lenity is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should"). There is no more awesome governmental power than the power to execute a prisoner. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."). It is therefore especially appropriate to resort to the rule of lenity in the present case. And, of course, the I.C.R. 35 order granting relief below was entered in the criminal case number, making the rule of lenity even more apropos. Applying the rule, any "doubt" would "be resolved in" Mr. Pizzuto's "favor," *United States v. Ehle*, 640 F.3d 689, 698 (6th Cir. 2011), and Section 7 would be interpreted to uphold the Commission's vote to commute.[16]

3. Public Policy Favors Affirmance.

If legislative history is on the table, so too is public policy. *See Hayden Lake Fire Prot. Dist. v. Alcorn*, 111 P.3d 73, 83–84 (Idaho 2005), *overruled on other grounds by Farber v. Idaho State Ins. Fund*, 272 P.3d 467, 469 (Idaho 2012) (clarifying that when a statute is ambiguous the

[16] Below, the State invoked the principle that statutes are presumed constitutional. *See* 49489 R., p. 587 (citing, inter alia, *State v. Delling*, 267 P.3d 709 (Idaho 2011)). On appeal, the State abandons the argument, thereby forfeiting it. *See Shepherd*, 383 P.3d at 699 ("We will not consider arguments raised for the first time in an appellant's reply brief."). The State was right to do so, for the U.S. Supreme Court has recently explained as a matter of federal constitutional law that the presumption cannot be applied to the detriment of a criminal defendant under due process principles. *See United States v. Davis*, 139 S. Ct. 2319, 2332–33 (2019). *Delling* and cases like it have therefore been abrogated. To the extent the Court disagrees, Mr. Pizzuto submits in the alternative that he has satisfied his burden and overcome the presumption of constitutionality for the reasons outlined in this brief and by the district judge below.

courts must look at "the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history").

The State steers clear of public policy, perhaps because it is so favorable to Mr. Pizzuto. Simply put, it makes good sense to leave commutation decisions in the hands of the Commission. Commissioners are appointed by the Governor himself and confirmed by the Senate, and they develop extensive expertise in dealing with the many complex factors that influence decisions about reducing criminal sentences. *See generally* Idaho Code § 20-1002. The Commission regularly confronts not only questions about commutation, but related issues in the parole, probation, and pardon contexts. *See id.* All of those areas force the Commission to develop specialized skill and knowledge in protecting the public and enhancing the goals of rehabilitation, retribution, and deterrence. *See State v. Smith*, 909 P.2d 236, 244 (Utah 1995) (explaining that a parole board was "in a far better position than a court to monitor a defendant's subsequent behavior and possible progress toward rehabilitation while in prison and to adjust the maximum sentence accordingly"); *Asitonia v. State*, 508 P.2d 1023, 1027 (Alaska 1973) (upholding a sentence where the trial judge properly "left it to the expertise of the parole board to determine after careful supervision and examination when the defendant has been successfully rehabilitated and can be released to society at large"); *In re Shigemura*, 148 Cal. Rptr. 3d 230, 237 n.4 (Ct. App. 2012) (describing "the importance of the [Board of Parole Hearings'] role in protecting public safety and the extreme deference courts must accord board decisions"). And there is political accountability in the process by virtue of the fact that the Commissioners are appointed by the Governor, who is answerable to the voters. *See United States v. Arthrex, Inc.*,

141 S. Ct. 1970, 1979 (2021) ("Assigning the nomination power to the President guarantees accountability for the appointees' actions because the blame of a bad nomination would fall upon the president singly and absolutely.").

The case at bar perfectly encapsulates the privileged position occupied by the Commission, and the public-policy benefit in deferring to its insight. Mr. Pizzuto's clemency petition set forth extensive facts militating in favor of mercy, including that that he experienced a childhood filled with horrific abuse and that he has always suffered from severe cognitive limitations, in addition to his myriad health issues. 49489 R., pp. 661–71. Exercising the discretion afforded to it by the Idaho Constitution, the Commission deemed the petition worthy of a hearing. 49531 R., p. 30. After conducting the hearing and taking a voluminous amount of information under advisement, the Commission released its considered judgment a month later: that commutation was warranted out of "mercy due to Mr. Pizzuto's current medical condition and evidence of his decreased intellectual functioning." 49489 R., p. 540. Concluding its explanation, the Commission wrote: "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." 49489 R., p. 540.

In short, the Commission did the job it was created to do. The Commissioners reviewed a wealth of evidence, listened to the perspectives of the interested parties, and rendered a thoughtful decision based on the material before them and their own judgment, expertise, and experience in dealing with inmates requesting clemency.

After the Commissioners discharged their duties to the best of their ability, the Governor denied commutation on the same day that he received the Commission's determination. He did so in a letter that did not even acknowledge the abundant evidence favoring commutation that was relied upon by the Commission. 49489 R., p. 543. In so doing, the Governor demonstrated the wisdom of the framers in placing the commutation power with a specialized group of professionals who are not directly animated by electoral considerations and can instead take seriously their responsibility to balance the needs of justice with those of mercy.

C. Precedent Supports Affirmance.

Dealing finally with precedent, three of the State's four principal cases are irrelevant, and the fourth illustrates perfectly why § 20-1016 is unconstitutional.

The State's first precedent is *Winkler*. To the unclear extent that *Winkler*'s passing aside about the 1986 amendment could be read as a statement about the meaning of the "as provided by statute" language, *see* 473 P.3d at 799, it is dicta. No challenge in *Winkler* was made to the constitutionality of the gubernatorial role in the clemency process because the Governor played no role in the pardon at issue in the case. In *Winkler*, the question presented was whether the Commission's pardoning of a DUI conviction prevented the prosecution from using the offense to enhance a sentence for a later crime. *See* 473 P.3d at 797. The Governor did not purport to intervene in Mr. Winkler's clemency process. *See id.* As a consequence, any text in *Winkler* about the 1986 amendment is, with respect to the present case, dicta. *See, e.g.*, *Petersen v. State*, 393 P.2d 585, 587 (Idaho 1964) (explaining that a discussion in a previous appellate opinion was dicta with respect to authorities that did not "play[] a role in the ultimate decision of the court").

The Court is not bound by dicta from its previous opinions. *See Weippe ex rel. Les Schwab Tire Ctrs. v. Yarno*, 528 P.2d 201, 205 (Idaho 1974). And here it would be particularly ill-advised to authorize an execution based on dicta from a DUI case in an opinion that did not engage with the many compelling arguments that Mr. Pizzuto has presented, and which were sufficient to persuade the district court to grant relief.

State v. Hall, 419 P.3d 1042 (Idaho 2018), is even farther afield. It does no more than recite the contents of § 20-1016 (in the form of its previous iteration, Idaho Code § 20-240). *See* 419 P.3d at 1104. The fact that this Court has acknowledged the existence of a statute hardly demonstrates that it is constitutional. And though the State finds it "exceptionally doubtful [that] this Court would have" summarized the provisions in § 20-1016 had it been unconstitutional, AOB at 21, what is in reality exceptionally doubtful is that this Court would have given any thought to the constitutionality of the statute in an appeal where no one questioned it.

The State's next authority—*Caldwell v. Mississippi*, 472 U.S. 320 (1985)—is the most inapposite of all. True, *Caldwell* found it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." AOB at 22. But that was because such an occurrence violates the Eighth Amendment's command that capital punishment must "facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell*, 472 U.S. at 329. In the pertinent clause, the Eighth Amendment forbids "cruel and unusual punishments." U.S. Const., am. VIII. The State does not endeavor to explain how a finding in Mr. Pizzuto's favor, which reduces his death sentence to life, would somehow create a

cruel and unusual punishment. Such an explanation is hard to picture. At the risk of stating the obvious, the Eighth Amendment does not give *the State* any rights. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) (referring to the Bill of Rights as containing "restrictions on government power"). The Eighth Amendment protects *defendants* from excessive punishments. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 469 (2012) ("The Eighth Amendment's prohibition of cruel and unusual punishment guarantees *individuals* the right not to be subjected to excessive sanctions."). It turns the Eighth Amendment on its head in multiple respects for the State to claim that its own rights were violated by the lessening of a punishment. And while the State baldly asserts that "the same principle" from *Caldwell* "applies" here, AOB at 22, it has no authority or argument for why.

Furthermore, to agree, with the State, that *Caldwell* undermines the legitimacy of the Commission's vote would be to improperly presume a lack of sincerity on the part of the government officials tasked with commutation decisions. As described earlier, the Commission considered Mr. Pizzuto's petition, held a hearing, reviewed a large body of evidence, deliberated, and issued a reasoned statement explaining why mercy was called for. Contrary to the State's insinuation, there is no basis to accuse the Commissioners of speaking disingenuously when they voted to reduce Mr. Pizzuto's sentence to life. *See Williams v. State*, 501 P.2d 203, 207 (Idaho 1972) (reiterating "the presumption that government officials are presumed to have properly carried out or performed their official duties"). To the same end, it is inconsistent with this Court's venerable precedent for the State to imply that the Commission's decision would not be final *even if* the Constitution gave it sole decision-making authority. As the district court

properly found, precedent establishes that "executive clemency is a gift," and "after the delivery" the executive "cannot recover the thing given." 49489 R., p. 745 (quoting *Ex parte Prout*, 86 P. 275, 277 (Idaho 1906)).

The State's appeal to *Caldwell* fails in another way that only succeeds in highlighting the strength of Mr. Pizzuto's claim. Specifically, the State maintains that under *Caldwell*, the Commission "unconstitutionally abrogated its responsibility when it believed it was making only a recommendation" regarding commutation. AOB at 22. Preliminarily, a "belief" does not violate the constitution—only an action does.[17] There are no thought police to enforce Article 7. The action here was a majority vote in favor of commutation by the Commission. Because Article 7 gives the commutation power to the Commission, its majority vote was final, and Mr. Pizzuto's sentence was reduced to life without the possibility of parole by operation of law. That is why the district court properly recognized the reduction, which directly redresses the constitutional violation.

[17] Insofar as the State is insinuating that the Court should defer to the Commission's understanding of Section 7, the insinuation is misplaced. Although courts sometimes give deference to agency's interpretations of their own *regulations* or statutes enacted in their fields, deference "is not appropriate where the issue being reviewed is the agency's interpretation of *the Constitution*" because "[c]onstitutional interpretation is uniquely the province of the . . . courts." *Sirmans v. Caldera*, 27 F. Supp. 2d 248, 251 n.3 (D.D.C. 1998); *see In re Vermont Ry.*, 769 A.2d 648, 653 (Vt. 2000) (rebuffing the idea "that an agency's interpretation of a statutory provision implicating constitutional questions merits deference, for agencies are in no better position to resolve constitutional questions than the courts"). The Commission is not entitled to decline a power afforded exclusively to it by the Constitution, and in any event the Commission clearly understood the significance and weight of its decision in addressing Mr. Pizzuto's application for clemency.

The State's final citation is to *Standlee*, a case that directly supports Mr. Pizzuto's position. *Standlee* involved a challenge to a statute requiring a prisoner to serve one third of his sentence before becoming eligible for parole. 538 P.2d at 779–80. Significantly, the statute also reaffirmed the Board of Correction's ("Board's") power to oversee parole decisions in many respects, i.e., it could decide to return inmates to custody at its discretion, it could decide when after the one third was served to grant parole, and so forth. *See id.* at 779 n.1.

In the pertinent section of the opinion, this Court considered whether the statute was in conflict with Article X, Section 5 of the Idaho Constitution ("Section 5"). *See id.* at 781–82. The Court recited how Section 5 "originally provided that the control, direction and management of state prisons would be by a board." *Id.* at 781. In 1941, the section was amended and the revised clause announced that the board would still have such "control, direction, and management," but also that it would enjoy "such compensation, powers, and duties as may be prescribed by law." *Id.* Most importantly, the amended version of Section 5 gave the Board control over "probation and parole." *Id.* The legislature then "implemented" the amendment by enacting a series of statutes, including the challenged provision, that "prescribe[d] the powers and duties of the Board of Correction." *Id.* Assessing the validity of the statute, the Court began with the axiom that "[t]he state constitution is not a grant but a limitation on legislative power so that the legislature may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* The Court then upheld the statute because it was "within the power of the Legislature in prescribing the powers and duties of the State Board of Correction as mandated" by Section 5. *Id.* at 782.

For today's question, the central feature of *Standlee* is that the Board retained the core parole powers under the statute, which it was given by Section 5. As mentioned, the Board still decided who got paroled and who did not, but exercised that power within the confines set by statute, i.e., the one-third rule. That is why the statute survived constitutional scrutiny. And that captures neatly what the legislature did *not* do here in the form of § 20-1016. Section 20-1016 does not set ground rules for the Commission to follow in exercising the power it was granted by the Constitution, as the statute in *Standlee* did, and as many other legislatures have done. *See supra* at Part III.A. Quite to the contrary, § 20-1016 takes the power away from the Commission entirely and gives it to someone else. If the legislature had done in *Standlee* what it did here in § 20-1016, the parole statute at issue would not have created a one-third rule. Instead, it would have done something more like give the Governor the final say on *all* requests by *all* prisoners for parole, even though Section 5 endowed the Board with the parole power. There is no reason to imagine that this Court would have sanctioned such a blatant violation of Section 5 in *Standlee*, and thus no reason to regard it as legitimizing the blatant violation of Section 7 here.

In overview, *Standlee* perfectly illustrates why § 20-1016 *was* "inferentially prohibited by the state . . . constitution[]," 538 P.2d at 781, and thus why the district court properly struck it down.

IV. CONCLUSION

Mr. Pizzuto recognizes that capital punishment arouses strong political feelings on all sides, including from those who wish to see executions carried out. The intensity of those feelings, though, is all the more reason for the courts to apply the law on the subject impartially

and dispassionately. In this case, the simple reality is that when the people of Idaho were given a choice on whether to amend Section 7 in 1986, they were not offered one scintilla of reason to believe that they were authorizing the legislature to take the commutation power away from the Commission, where it resided before and where the constitutional language continued to place it afterwards. Had the promoters of the amendment wished to give the voters that option, they could easily have done so. They still can. But because that question was not put to the people in any comprehensible fashion, all of the commutation power today continues to repose with the Commission under the current Constitution. The Commission's majority vote in Mr. Pizzuto's favor therefore reduced his death sentence to life as a matter of constitutional law. Despite the unconstitutional directive in § 20-1016, the Governor had no lawful authority to intervene in Mr. Pizzuto's commutation. The district court's well-reasoned orders were consequently correct and its judgment granting relief should be affirmed in the Rule 35 proceeding and/or in the post-conviction matter.

Respectfully submitted this 27th day of April 2022.

/*s*/ Jonah J. Horwitz
Jonah J. Horwitz
Attorney for Defendant-
Respondent/Petitioner-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April 2022, I caused to be served two true and correct copies of the foregoing document by the method indicated below, postage pre-paid where applicable, addressed to:

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State of Idaho v. Gerald Ross Pizzuto, Jr.
Supreme Court Docket Nos. 49489-2022, 49531-2022
Filed in Support of Answering Brief

Exhibit 1

(House Resolution RS 11220E1 (1985))

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE HOUSE OF REPRESENTATIVES

HOUSE CONCURRENT RESOLUTION NO. 20, AS AMENDED

BY JUDICIARY, RULES AND ADMINISTRATION COMMITTEE

A CONCURRENT RESOLUTION

STATING LEGISLATIVE CONCERNS AND FINDINGS AND DIRECTING THE LEGISLATIVE COUNCIL TO UNDERTAKE AND COMPLETE A STUDY OF THE IDAHO CRIMINAL SENTENCING SYSTEM AND THE ADVISABILITY OF IMPLEMENTING A PRESUMPTIVE SENTENCING SYSTEM.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, under Idaho's current sentencing laws the disparity of sentences given among judicial districts and among individual judges for the conviction of the same or a similar crime is perceived to be a problem by many Idaho judges and reduces the respect and confidence of the public in the criminal system, and results in unfair treatment of, and bitterness in, the person convicted; and

WHEREAS, under Idaho's current sentencing and parole laws, the sentences which are being handed down by the courts are seldom served to their full extent, creating a truth-in-sentencing problem and therefore reducing the respect and confidence of the public in the Idaho criminal system and reducing the deterrent effect of Idaho's criminal sanctions; and

WHEREAS, Idaho's criminal and sentencing laws were enacted at different times and therefore reflect different sentencing philosophies, which have resulted in a somewhat uncoordinated interaction among the sentencing, correction and parole systems, and in sentencing statutes which are sometimes inconsistent, confusing and pose difficult problems of construction to the courts; and

WHEREAS, nine other states have undertaken a review of their criminal justice systems and found many problems which are the same as or similar to Idaho's current problems, and have responded to these problems by enacting presumptive sentencing systems; and

WHEREAS, President Ronald Reagan has expressed his support for legislation adopting a presumptive sentencing system be enacted on the federal level; and

WHEREAS, a comprehensive review and reform, possibly through the implementation of a presumptive sentencing system, of Idaho's laws concerning criminal sentencing, corrections and pardons and paroles, could result in a greater philosophical coherency, remove inconsistencies, reduce sentencing disparity, increase truth-in-sentencing, and therefore result in greater citizen confidence and respect for Idaho's criminal justice system, greater deterrence to would-be criminals and justice for persons convicted.

NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Session of the Forty-eighth Idaho Legislature, the House of Representatives and the Senate concurring therein, that the Idaho Legislative Council is directed to establish a committee to undertake and complete a study of all matters relating to the criminal sentencing system of the State of Idaho and to evaluate and determine the advantages and disadvantages of the implementation of a presumptive sentencing system in the State of Idaho and to present to the Second

Regular Session of the Forty-eighth Idaho Legislature the Committee's final report, together with recommended legislation, if any. The Legislative Council is hereby authorized to create and appoint a Criminal Sentencing Alternatives Committee to be composed of not less than 10, and not more than 20, members from the Idaho House of Representatives and the Idaho Senate. The Chairman of the House Judiciary, Rules and Administration Committee and the Senate Judiciary and Rules Committee shall serve as Co-Chairmen of the Criminal Sentencing Alternatives Committee.

BE IT FURTHER RESOLVED that all costs incurred by the Criminal Sentencing Alternatives Committee shall be paid from the Legislative Account.

State of Idaho v. Gerald Ross Pizzuto, Jr.
Supreme Court Docket Nos. 49489-2022, 49531-2022
Filed in Support of Answering Brief

Exhibit 2

(Criminal Sentencing Committee Minutes, Nov. 20, 1985)

Legislative Council
Criminal Sentencing Committee
House Caucus Room
Statehouse
Boise, Idaho
November 20, 1985

MINUTES

The meeting was called to order at 9 a.m. by Co-Chairman Senator Fairchild. Other committee members present were Senators Bray, Darrington, Reed, Rakozy, and Rydalch; Co-Chairman Representative Harris, Representatives Bayer, Crane, Herndon, Stoicheff, Montgomery, Sorensen, and Stoker. Representatives Keeton and Speck were formally excused. Staff present were Hodge, Nugent, Clarkson, and Wood.

Others in attendance were Representative Fry; Patrick Kole and Myrna Stahman, Attorney General's Office; Ray Stark, Legislative Budget Office; Jeff Shinn, Division of Financial Management; Carl Bianchi, Administrative Director of the Courts; and Zalinda and Greg Dorcheus.

Senator Fairchild stated that Representative Stoicheff had been appointed to replace Representative McDermott on the committee.

Representative Harris made a motion, seconded by Senator Rydalch, that the minutes of the last meeting be approved as presented in Monthly Matters. The motion carried.

Pat Kole, Deputy Attorney General, gave the committee an update on sentence reclassifications and briefly noted the types of legislation they were proposing for the legislative session.

Representative Montgomery gave a brief review of the reasoning behind recommendations made by the working group on code revisions. These recommendations were included in the minutes of the meeting held October 22, 1985.

Myrna Stahman, Deputy Attorney General, presented a rough draft of proposed legislation to the committee regarding sentencing. This legislation deals with sentencing alternatives, judge-imposed mandatory minimum sentences, parole, restitution, etc. This draft legislation is attached as Exhibit A.

Representative Sorensen stated that evidence has shown that persons sentenced to prison on enhanced sentences usually spend less time in prison than those not imprisoned on an enhanced sentence. He said he would like to see the law changed so that these sentences do not run consecutively, but that the enhancement portion of a sentence is served before the principal portion of the sentence is served.

Representative Montgomery indicated he still favors the type of sentencing whereby the judge would sentence an individual for a crime and a certain percentage of that sentence, for instance one-third, would have to be served before that person is eligible for parole. However, he said he liked the concept in Ms. Stahman's proposed legislation and didn't think the two ideas were that far apart.

Representative Stoker stated he felt that the legislation that has been proposed is not really answering the problems we are trying to solve. He said it looks good on paper

but is not really solving the problems and is really a peacemeal approach to a major problem. He said it is just building onto a system that is already archaic and needs to be changed in its entirety.

Senator Fairchild said the main thrust of the committee has been in the area of violent crimes because evidence has shown that rapists, murderers, and kidnappers are being released from prison in an average of 16 months. He said regardless of which approach we finally decide on, he feels each gives credence to the public so they know exactly how much time a person must serve before he is eligible for parole.

Representative Montgomery made a motion that the draft legislation Ms. Stahman presented be put into RS form and also that the appropriate parties draft legislation pertaining to the concept that one third of a sentence must be served before being eligible for parole. Representative Harris seconded the motion and it carried.

Representative Stoker pointed out concerns regarding constitutional provisions that may affect Ms. Stahman's proposed legislation and the Attorney General's office was requested to consult with Carl Bianchi and review Constitutional provisions as they apply to the Parole Board to see if this type of legislation can be adopted without modifying the Constitution.

Mr. Nugent reviewed RS 11688C3 (attached as Exhibit B) which provides that the Commission of Pardons and Parole is to be appointed by the governor instead of the Board of Correction. Senator Darrington made a motion, seconded by Senator Rydalch, that this proposed legislation be included in the final report of this committee with a favorable recommendation. The motion carried.

Mr. Nugent reviewed RS 11689C2 (Exhibit C) and companion legislation RS 11882 (Exhibit D) which deal with pardoning powers of the Commission of Pardons and Parole.

Carl Bianchi, Administrative Director of the Courts, indicated a third alternative the committee should consider which would eliminate having the Board of Pardons a constitutional body. This would give the legislature more flexibility in adding powers or limiting powers of the Board of Pardons, determining who approves commutations, etc.

Senator Darrington made a motion, seconded by Senator Rydalch, that staff prepare legislation to eliminate the section of the constitution that establishes the Board of Pardons as a constitutional board and replace it with something established by law without saying it will be in the hands of the governor. This proposed legislation is to be submitted in the final report of the committee. The motion carried with Representatives Stoicheff and Herndon voting no.

Carl Bianchi stated the committee should make sure current statutes governing pardons and parole are in place so that if the constitutional amendment is adopted, there will be a system in place statutorily to replace it. Mr. Bianchi said the committee needs to determine if companion legislation needs to be introduced during the next legislative session to deal with changes that will happen should the constitutional amendment pass.

Mr. Nugent discussed RS 11722C2 (Exhibit E) which deals with meritorious reduction of a sentence. This would affect those persons sentenced for crimes committed on or after July 1, 1986. Representative Sorensen made a motion, seconded by Representative Bayer, that this legislation be included in the final report with a favorable recommendation. The motion carried.

Mr. Nugent reviewed RS 11748C2 (Exhibit F) dealing with extended terms of imprisonment for the use of a firearm during the commission of a crime. Representative Sorensen reiterated that he would like to see the subject of enhancements dealt with one way or another and his preference is that the enhancement portion of a sentence should be served prior to the commencement of the main part of a prison sentence, rather than have it served consecutively like it is now.

Representative Sorensen made a motion, seconded by Senator Darrington, that this proposed legislation be changed so that the enhancement portion of a sentence is served prior to, rather than consecutive to, the main part of a prison sentence. Carl Bianchi stated this type of legislation is really creating mandatory sentences but the present language in the proposed legislation does not make it mandatory on the judiciary. He said language would have to be drawn up to make the legislative intent binding on the judiciary and the Parole Commission. Representative Sorensen withdrew his motion with the consent of his second.

Representative Sorensen made a motion, seconded by Senator Darrington, that staff draft two pieces of legislation, one that would eliminate enhancements and dovetail enhancements for crimes into an extended cap on sentences; and one that would maintain enhancers in the Code and these enhanced sentences would run prior to, rather than consecutive to, the main part of a prison sentence. The motion carried.

The committee recessed for lunch at this time to reconvene at 1:30 p.m.

Zalinda Dorcheus reported to the committee her concerns regarding the possible parole of the person that murdered her son. Correspondence relating to her concerns are attached as Exhibit G.

Idaho Criminal Rule 35 allows a defendant to ask the sentencing court to reduce the sentence within 120 days of the sentencing date and within 120 days of an appeal. Representative Stoker suggested that perhaps this committee should consider drafting legislation to disallow the filing for a reduction of a sentence after an appeal. Myrna Stahman suggested that before legislation is drafted the committee should consult with the Criminal Rules Committee to determine if they would be willing to change Rule 35 so that a prisoner cannot file for a reduction of his sentence following an appeal.

Judge Challeen, Judge of County Court, Winona, Minnesota, spoke to the committee regarding unique sentencing guidelines that have been established in Minnesota. He spoke of sentencing alternatives other than prison sentences such as restitution, community service, inpatient alcohol treatment programs, group therapy and mental health sessions, infamily counseling for juvenile offenders, etc.

Ted Reubin, former judge and state legislator from Colorado, and current director of juvenile justice programs at the Institute for Court Management in Colorado, talked to the committee about juvenile justice programs and commended Idaho for developing legislation regarding restitution to victims, etc. He spoke of mediation as a new concept in the juvenile justice system.

Representative Harris stated that at the next committee meeting items that have been developed will be presented in three segments: 1. Transmittal letter from co-chairmen; 2. Attachment of all proposed legislation which have been approved for recommendation by this committee; and 3. Suggestions for legislation not finalized at this time.

On request by Representative Harris, granted by unanimous consent, Carl Bianchi will prepare proposed legislation for review by the committee relating to: 1. Alternative fixed term sentences to first degree murder penalties; 2. Creating a general discretionary fine classification for felony cases. Also to be presented for committee review is legislation proposing continuation of the interim Criminal Sentencing Committee, with the addition of members of the judiciary, prosecuting attorneys, etc.

Mr. Hodge presented proposed legislation, RS 11881, (Exhibit H) which would, in effect, separate the Commission of Pardons and Parole from the Board of Correction. This legislation also puts all sections of the Code dealing with the Commission of Pardons and Parole into a separate chapter.

Representative Sorensen explained that it was the feeling of some of the committee members that a full-time, three-member parole board should be established. He said there is a fiscal note attached to this type of legislation but feels the fiscal note would be offset by the savings of the mistakes that are currently being made within the system itself.

Representative Stoker pointed out that if legislation passes whereby the judge sets a minimum amount of time that a person has to serve before being eligible for parole, that it should make it easier for the present Commission on Pardons and Parole to make the parole decision.

Representative Montgomery made a motion, seconded by Representative Stoker, that staff prepare legislation establishing a full-time, three-member parole board to be presented at the next committee meeting. The new board is to be appointed by the goveror with staggered terms. The motion carried.

On request by Representative Harris, granted by unanimous consent, the next meeting of the committee will be held January 7, 1986, immediately upon adjournment of both houses of the Legislature.

There being no further business, the meeting adjourned at 3:40 p.m.

Exhibit 3

(Proposed Resolution RS 11689C2 (1985))

November - 98

EXHIBIT C

RS11689C2

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE SENATE

SENATE JOINT RESOLUTION NO. _____

BY _____

A JOINT RESOLUTION

PROPOSING AN AMENDMENT TO SECTION 7, ARTICLE IV, OF THE CONSTITUTION OF THE STATE OF IDAHO, RELATING TO THE GRANTING OF COMMUTATION, PARDONS OR OTHER MITIGATION OF SENTENCES, TO PROVIDE THAT A COMMUTATION OR PARDON GRANTED BY THE BOARD OF PARDONS SHALL NOT BE EFFECTIVE UNTIL APPROVED BY THE GOVERNOR; STATING THE QUESTION TO BE SUBMITTED TO THE ELECTORATE; DIRECTING THE LEGISLATIVE COUNCIL TO PREPARE THE STATEMENTS REQUIRED BY LAW; AND DIRECTING THE SECRETARY OF STATE TO PUBLISH THE AMENDMENT AND ARGUMENTS AS REQUIRED BY LAW.

Be It Resolved by the Legislature of the State of Idaho:

SECTION 1. That Section 7, Article IV, of the Constitution of the State of Idaho be amended to read as follows:

SECTION 7. THE PARDONING POWER. From and after July 1, 1947, 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, provided, however, no commutation or pardon granted by the board shall be effective until approved by the governor in a manner to be provided by law. 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.

SECTION 2. The question to be submitted to the electors of the State of Idaho at the next general election shall be as follows:

"Shall Section 7, Article IV, of the Constitution of the State of Idaho be amended to provide that no commutation or pardon granted by the Board of Pardons shall be effective until approved by the Governor?".

SECTION 3. The Legislative Council is directed to prepare the statements required by Section 67-453, Idaho Code, and file the same.

SECTION 4. The Secretary of State is hereby directed to publish this proposed constitutional amendment and arguments as required by law.

State of Idaho v. Gerald Ross Pizzuto, Jr.
Supreme Court Docket Nos. 49489-2022, 49531-2022
Filed in Support of Answering Brief

Exhibit 4

(Proposed Resolution RS 11882 (1985))

November - 100

EXHIBIT D

RS11882

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ JOINT RESOLUTION NO._____

BY_____

A JOINT RESOLUTION
(TITLE TO BE WRITTEN)

Be It Resolved by the Legislature of the State of Idaho:

SECTION 1. That Section 7, Article IV, of the Constitution of the State of Idaho be, and the same is hereby repealed.

SECTION 2. That Article IV, of the Constitution of the State of Idaho be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 7, Article IV, of the Constitution of the State of Idaho, and to read as follows:

> SECTION 7. THE PARDONING POWER. Subject to application procedures provided by law, the governor shall have power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, either absolutely or upon such condition as he may impose in all cases of offenses against the state except treason or conviction on impeachment. The governor shall in every case where he may exercise this power send to the senate and the house of representatives of the state legislature at the first regular session thereafter, a transcript of the petition, all proceedings, and the reasons for his action. There may be created, by law, a parole commission with power to grant paroles or conditional releases to persons under sentences for crime, to supervise persons on parole or conditional release, and to recommend to the governor candidates for commutations or pardons. The qualifications, method of selection and terms of members of the commission shall be prescribed by law.

SECTION 3. The question to be submitted to the electors of the State of Idaho at the next general election shall be as follows:

"Shall Section 7, Article IV, of the Constitution of the State of Idaho relating to the Board of Pardons and its ability to remit fines and forfeitures and to grant commutation and pardons after conviction and judgment be repealed, and shall Article IV of the Constitution of the State of Idaho be amended by the addition of a new Section 7, Article IV, to provide that

SECTION 4. The Legislative Council is directed to prepare the statements required by Section 67-453, Idaho Code, and file the same.

SECTION 5. The Secretary of State is hereby directed to publish this proposed constitutional amendment and arguments as required by law.

State of Idaho v. Gerald Ross Pizzuto, Jr.
Supreme Court Docket Nos. 49489-2022, 49531-2022
Filed in Support of Answering Brief

Exhibit 5

(Overview of Legislation Proposed by the Interim Criminal Sentencing Committee (1985))

From: Representative Harris and Senator Fairchild

Re: Overview of Legislation Proposed by the Interim Criminal Sentencing Committee and the Co-chairmen

This report has been prepared in order to give an overview of the legislative proposals which have been prepared pursuant to the Legislative Council Interim Study Committee on Criminal Sentencing and requests by the co-chairmen of that committee. There will be numerous legislative proposals in the criminal sentencing and pardons and parole area that will come before the Legislature this session. All the proposals are interrelated and some are mutually exclusive. The co-chairmen feel that a good working knowledge of the broader scope of the legislative approach being taken in this area is vital to making informed decisions regarding individual proposals which will be coming before the Legislature.

The Committee was established by House Concurrent Resolution No. 20, as amended, by the First Regular Session of the Forty eighth Idaho Legislature in 1985. The resolution directed the Legislative Council to appoint a committee to undertake and complete a study of all matters relating to Idaho's criminal sentencing system and, if needed, to recommend legislation. The committee was also directed to determine the advantages and disadvantages of the implementation of a presumptive sentencing system in Idaho. The charge of the committee was very broad and the material involved complex. For these reasons, the committee met six times, May 17, June 20, July 25, September 18, October 22, November 20, 1985. We acknowledge and commend the committee members and staff for such long hours and diligent work.

At the May meeting, the committee heard testimony indicating that disparity in criminal sentencing was often caused by statutory rather than judicial sen-

tencing discrepancies. For this reason, the committee chose not to pursue the implementation of a prescriptive sentencing system which is usually a response to judicial sentencing disparity. Therefore, throughout the meetings the committee was concerned primarily with modifying the present criminal code to achieve truth in sentencing, simplification, and removing statutory discrepancies and inconsistencies. This resulted in committee action in two main areas. First, the committee paid particular attention to the factors causing the confusion in what a criminal sentence actually meant in terms of the period of incarceration. The committee found that not only was the public confused, but even the sentencing judges were unsure of what a sentence to incarceration actually meant in terms of actual incarceration time. To remedy this confusion, the committee has made recommendations that call for major substantive changes in good time, parole, commutation and the powers of the Commission of Pardons and Parole. These changes will be discussed in more detail in the recommended legislation section of this report.

Second, review of the criminal code statutes has prompted the committee to recommend a reclassification of all crimes and a complete recodification of the criminal code. This will certainly be a large and complex task, possibly taking several years to complete, but it is the committee's firm belief that truth in sentencing, statutory simplification and removing discrepancies and inconsistencies from the criminal statutes is vital to the proper operation of the criminal justice system. The public has lost confidence in, and respect for, our criminal system because sentences are meaningless and confusing and determining actual incarceration time has become a guessing game. Further, because of this sentencing confusion, the current system does not provide effective deterrance to would be criminals. Also, such uncertainty is unjust to and

imposes an unnecessary hardship to the persons convicted.

It must be stressed that throughout the activity of the committee, one eye was kept on needed reforms in the criminal sentencing area while the other eye was on the impact of the reforms on the prison population, the possible need for additional facilities and the possible impact on the general fund. The committee received testimony on this subject on several occasions and appointed a special working group to determine the possible impact of recommended reforms.

The committee received testimony from numerous witnesses, including Attorney General Jim Jones, an appellate court judge, district court judges, magistrates, commissioners from the Commission of Pardons and Parole, prosecuting attorneys, deputy attorneys general, a county court judge from Minnesota and an expert on juvenile probation. The testimony received is too voluminous to include in this report in any detail. Please refer to the committee minutes in the appropriate Monthly Matters issue if more detailed information is required.

Because the appointed task was large and the area complex, the committee decided to divide into two working groups, one to study discrepancies in the criminal sentencing sections of the Idaho Code, and the other to study the area of pardons and parole. The June, July and September meetings were bifurcated with approximately one half day being spent in working groups developing proposals and one half day hearing testimony as the full committee. As a result of the meetings of the two working groups, numerous recommendations were made to the full committee for its consideration. Many of these recommendations were accepted by the full committee and are included with this report as legislation which is recommended to the Legislative Council. Generally speaking, these recommendations contain specific and substantive changes directed towards the

pardons and parole and criminal code areas. In addition, several proposals have been prepared at the request of the co-chairmen. These proposals are contained in a separate section.

RECOMMENDED LEGISLATION FROM THE INTERIM COMMITTEE

1. The committee recommends RS11633C3. This RS requires the members of the Commission of Pardons and Parole be appointed by the governor instead of by the Board of Corrections. This is one of several changes that were made to give the commission more autonomy from the Board of Corrections. It also removes the requirement that members have special knowledge in sociology, psychology, rehabilitative services and similar pertinent disciplines and adds language requiring members to be cognizant of the four objectives of criminal sentencing, protection of society, deterrance, punishment and rehabilitation.

2. The committee recommends RS11722C2. This RS contains one of the committee's main efforts at achieving greater truth in sentencing. Through the testimony received, the committee found that the automatic reduction of sentences by the application of good time pursuant to sections 20-101A through C, Idaho Code, was a process that even some judges did not understand let alone the general public. As a result, judges didn't know how to set their sentences to take good time into account and the general public and the convicted criminal never knew what a sentence actually meant. Additionally, it was an ineffective prisoner management tool for the Department of Corrections because it was applied automatically. This RS adds 20-101D, Idaho Code, which allows the awarding of good time only when an inmate performs an extraordinary act of heroism or for outstanding service to the state resulting in the saving of

lives, prevention of the destruction of property or the prevention of escape. This section would remove the automatic application of good time and make sentences far more predictable and therefore achieve greater truth in sentencing.

3. The committee recommends SJR 107. This represents another major change in the criminal system designed to further truth in sentencing. This is a joint resolution which removes from the Commission of Pardons and Parole its constitutional powers of commutation and pardon. This must followed with enabling legislation that would restrict the powers of the Commission of Pardons and Parole statutorily. That is, restrict the sentence reduction powers of the commission to those powers specifically granted by statute. This would place all functions of the commission directly under the control and supervision of the Legislature.

4. The committee recommends RS11743. This RS is included as an example of the numerous code discrepancies which the committee found in its review of the criminal code. This example was brought to the committee's attention by a district judge. Currently, perjury, whether committed in a felony proceeding or a misdemeanor proceeding is punishable by the same penalty. This RS would reduce the maximum penalty for perjury in misdemeanor proceedings to 5 years and leave the maximum penalty for perjury in felony cases at 14 years.

INTERIM STUDY COMMITTEE RECOMMENDATIONS

A. The code revision working group made a series of recommendations which were subsequently approved by the committee. These recommendations and the corresponding Legislative proposals are:

1. Representative Montgomery moved, seconded by Representative McDermott, that we recommend to the full committee that we attempt to put together a classification system classifying crimes by seriousness of the offense, for the purpose of achieving uniformity in penalties, and that we have our staff obtain any resource material that would be useful to us, specifically the Utah Statute and the 1971 Criminal Code in Idaho so that we, as a working group, can then review that as a starting point. I would also include in my motion that we at least make an inquiry of the College of Law as to whether there might be students who would be interested in participating with us in an effort to compile that kind of classification. Representative Montgomery made a last clarification on his motion to the effect that the working group is free to make its own classifications and he only suggested they inquire whether the College of Law would be interested in participating. Co-chairman Harris asked the question on the motion and the vote was unanimous. The motion carried, and he declared, "so ordered." Please refer to RS11717C3.

2. Representative McDermott moved, seconded by Representative Montgomery, that the working group recommend to the full committee that we seriously consider abolishing the enhancements that have been discussed today. Co-chairman Harris asked the question on the motion and the motion carried. Please refer to RS11987C2 and RS11988C1.

3. Representative McDermott moved, seconded by Senator Rydalch, to recommend to the full committee that every felony carry a potential fine in addition to penal incarceration. The motion carried. Please refer to H.B. 373.

4. Representative Montgomery moved, seconded by Representative McDermott, that they recommend to the full committee that we seriously consider

eliminating the current mandatory minimums as contained in the individual statutes and in lieu therefor adopt a general statute which would require that when a sentence is imposed, the person must serve a stated percentage of that sentence before he is eligible for parole. The percentage could vary depending on the classification in which it falls. The motion carried. An RS is being processed.

5. Senator Rydalch said one item has been brought up repeatedly. We need to make a motion about gearing towards and budgeting for a maximum security unit. Senator Rydalch moved, seconded by Representative Bayer, that they make a recommendation to start thinking along those lines and planning and budgeting toward a maximum security unit. The motion carried. Please refer to H.B. 423.

PROPOSALS REQUESTED BY THE CO-CHAIRMEN

In addition to the legislation requested by the interim committe, other RSs have been prepared and will be presented before both houses. In this section, each RS will be listed and discussed briefly in order to give some perspective on the overall approach taken in the area of criminal sentencing.

1. RS12299C1 introduces the Unified Sentencing Act in Idaho. This represents a fundamental change in the criminal sentencing area. Currently, the judges can impose an indeterminate sentence or fixed sentence. The two cannot currently be combined. Under the unified sentence, the judge imposes a minimum sentence term which must be served and cannot be reduced by commutation, parole or good time, plus, at the courts discretion, an indeterminate sentence to begin at the completion of the minimum term. Under this proposal, a court can impose a purely fixed sentence but cannot impose a purely indeterminate sentence. But

in no case can the aggregate of the two sentence terms exceed the statutory sentencing limit. The proposal contains language to allow the court to impose a minimum term consistent with the sentence enhancement sections, if applicable. The proposal removes all minimum parole requirements in section 20-223, Idaho Code. This is intended to render section 20-223 consistent with the policy being implemented by unified sentencing, namely placing the discretion of setting minimum sentences into the hands of the judge. The change to section 20-223 requires new language in 18-4004 to require persons serving a sentence for first degree murder serve a minimum of 10 years.

There are two major policy justifications for this proposal. First, by making the minimum period fixed and not subject to reduction, greater truth in sentencing is achieved. At the time of sentencing everyone knows the minimum period which must be served. Second, greater sentencing flexibility is achieved. The court can tailor the sentence to fit the person convicted by combining minimum and indeterminate periods. The court can impart the specific amount of punishment it feels to be just and still impose an indeterminate period to be used by the Commission of Pardons and Parole for rehabilitation and parole purposes.

The Unified Sentencing Act has an effective date of February 1, 1987. This is to allow judges, prosecutors and the public time to assimilate the change and the legislature an additional opportunity to correcting any problems which may develop.

2 & 3. RS11987C2 amends the enhancement statutes in the Idaho Code, Sections 19-2520, 19-2520A, 19-2520B and 19-2520C, to require the enhancement term created by these sections be served and completed before the main under-

lying sentence can commence. The amendments also require the enhancement sentence to not run concurrently with any other sentence.

RS11988C1 amends the enhancement statutes in the Idaho Code, Sections 19-2520, 19-2520A, 12-2520B and 19-2520C, to allow the court to impose an extended sentence instead of the present sentence enhancements. Rather than handing down two separate sentences, e.g. a main sentence for robbery and a sentence enhancement for use of a firearm, the court would simply extend the maximum sentence for the underlying crime by the amount of time indicated in the applicable sentence extension section. These are two different and mutually exclusive approaches to a problem faced by the Commission of Pardons and Parole when they wish to parole a prisoner. Under the current enhancement statutes, the Commission must either commute the main sentence and parole the prisoner for the period of the enhancement sentence or commute the enhancement sentence and parole the prisoner for the period of time remaining in the main sentence. Usually, the Commission has commuted the enhancement sentence so they can use the longer sentence period in the main sentence because it poses a greater threat and therefore, is a more effective management tool. This practice has resulted in the commutation of many sentence enhancements and has defeated the purpose of the Legislature in passing the enhancement statutes. Either RS would resolve this problem by either requiring the enhancement sentence to be served first, or by unifying the underlying and enhancement sentences.

4. H.B. 373 creates a general fine provision. Some criminal felony statutes in the Idaho Code do not authorize fines as a possible punishment which the court can impose. This legislation would give the courts the option to impose a fine of up to $5,000 dollars in any felony conviction for a crime where a fine was not otherwise specifically statutorily authorized.

5. H.B. 374 corrects a technical flaw in the Idaho Code. In a special concurring opinion in the case of State vs. Geier, the Idaho Court of Appeals discussed an inconsistency in the statutes regarding the maximum length of probation. Section 20-222, Idaho Code, limited the period of probation to five years while Section 19-2601(7), Idaho Code, allowed the probationary period to equal the length of the maximum sentence term. This amendment makes Section 20-222 consistant with Section 19-2601(7), by removing the five-year limitation.

6. RS12125C1 allows the court to sentence a felon to the county jail for a period of up to 2 years. It also requires the state to pay to a county $20 per day for each day a felon stays in a county jail over 1 year. This proposal is designed to relieve some of the overcrowding at the state penitentiary level and give the court greater flexibility in sentencing. This proposal would allow a judge to keep certain convicted felons away from the penitentiary environment which can be extremely harmful to certain types of individuals.

7. H.B. 423 creates a $10 head tax for funding a maximum security prison. Although this bill will not be considered by either judiciary and rules committee, it has a major impact on virtually all the proposals discussed in this report, for without the funding provided for in H.B. 423, many of the proposed changes to the criminal sentencing system would be fiscally impossible.

H.B. 423 creates a head tax of $10 per return for the years 1987 through 1991. The proceeds, estimated to be approximately $17.5 million will be placed in the prison construction account of which 80% is reserved for construction of a maximum security prison and 20% for the upgrading of county jails. The bill creates a prison siting committee which would meet during the 1987 interim. It also appropriates $350,000 to the Permanent Building Fund Advisory Council and

the Division of Public Works to design and site a maximum security prison. The Advisory Council would recommend five possible sites to the legislative interim committee who then submits its report to the legislature by February 1, 1987. No prison shall be sited without prior legislative approval.

FUTURE RECOMMENDED ACTIONS

Although the recommended legislation substantially improves the criminal sentencing system in Idaho, a great amount of work remains to be done. It is the belief of the committee that to rid the criminal code of discrepancies and anachronisms, make it philosophically consistent and increase public confidence in the criminal justice system, a complete recodification of the criminal statutes is required. Therefore, the committee recommends RS11883C2 which is a concurrent resolution creating an interim study committee to begin the process of recodification. The concurrent resolution also authorizes the Legislative Council to create a criminal code advisory board made up of a judge, a prosecuting attorney, a criminal defense attorney and a representative from the attorney general's office to assist with the recodification.

The committee recommends that RS11717C3 be used as a framework for a complete recodification of the criminal statutes. This RS creates a classification system for criminal sentences. The system includes four degrees of felonies plus capital felonies and 3 classes of misdemeanors. Fines for all classes of felonies and misdemeanors are provided and the existing sentence enhancements are replaced in the new system by extended term sentences. The committee believes that a classification system such as the one recommended is significantly more understandable and provides a useful framework for comparing one

crime to another when making the policy decisions as to what sentence should be assigned to a specific crime.

CONCLUSION

We would like to thank the committee for their diligence, hard work and excellent attendance throughout all six meetings. We would also like to thank all those persons who testified before the committee and who helped the committee in its study of this large and complex area. We further express special appreciation to committee staff of the Legislative Council, the Administrative Director of the Courts and representatives of the Attorney General, all of whom participated in the actual drafting of proposed legislation.

Sincerely,

Senator Roger Fairchild

Representative Larry Harris

State of Idaho v. Gerald Ross Pizzuto, Jr.
Supreme Court Docket Nos. 49489-2022, 49531-2022
Filed in Support of Answering Brief

Exhibit 6

(Criminal Sentencing Committee Minutes (1985))

Senator Fairchild welcomed Attorney General Jim Jones to the committee and he addressed the committee with the following comments:

Mr. Jones indicated he wanted to highlight some of the things he feels deserve a good deal of attention by this committee so that we can possibly improve the sentencing scheme to ensure that it serves not only the community well but protects the community from people who may not, under the present system, be serving the time away from society that they need to.

Mr. Jones stated that it was important to determine what the scope of the committee's charge might be. There have been some that advocate that we should throw out the old system and develop a completely new system. He's not sure that is the proper focus of this group. We must clarify proper procedures to follow to more clearly outline the responsibilities and authority of the various players - how the Commission on Pardons and Parole fits into the system; how their responsibilities should be dovetailed with that of the courts so that we can assure that there is some continuity between the responsibilities of both entities and that they're not working at cross purposes.

Mr. Jones feels what the courts are doing in some areas is being undone by the Commission on Pardons and Parole under its current procedures and the conditions they work under. But he feels these problems can be addressed without completely revamping the penal code, but by making targeted changes that will address some of the difficulties. He stated that a complete revision of the penal code would take approximately two years and would involve prosecutors, judges, and many others, to make sure we're not creating more havoc than good.

These are the three things that Mr. Jones feel are the most important for this committee to consider:

1. Restructuring and restricting the powers of the Commission of Pardons and Parole.

2. Clarification of sentencing statutes to make more definite the amount of time that a convicted person must serve.

3. A fiscal response which will carry the corrections system through the impact of the proposed changes.

Mr. Jones stated that one of the most unfortunate things that has happened in the criminal justice system was in 1948 when the portion of the Constitution dealing with the pardon, parole, and commutation system was amended. There had been abuses and those abuses were addressed. But the action taken went overboard. It was decided that the attorney general, the secretary of state, and the governor would not be the Commission on Pardons and Parole. They were attempting to take the system out of politics. However, the system was not only taken out of politics, it was almost completely taken out of accountability. Now there are no restrictions on the powers and abilities of the Commission on Pardons and Parole.

The Commission on Pardons and Parole is now appointed by the Board of Corrections and Mr. Jones feels the Commission should be appointed by the Governor. It should be required that all commutations and pardons be subject to final approval by the Governor. This would put more accountability in the system. And he doesn't feel it would bring politics into the scheme of things. The Commission would still have the responsibility for working up the cases, determining who would be an appropriate candidate for a commutation, and the Governor would either approve or disapprove.

At the very least Mr. Jones said the open meeting law should be applied to the Commission on Pardons and Parole. The Attorney General has advised the existing Commission the open meeting laws apply to it; but the Commission has thus far declined to follow this counsel.

Mr. Jones feels the qualifications of the persons comprising the Commission of Pardons and Parole should also be reexamined. Make sure these people have background in law enforcement, penology, criminology, etc.

Mr. Jones stated legislation needs to be drafted to spell out specifically that the Commission on Pardons and Parole cannot initiate a commutation proceeding for anybody under a death penalty, or any other kind of penalty. It has to be initiated by the inmate himself.

Mr. Jones said every person sentenced to prison should be required to serve a minimum part of that sentence before he becomes eligible for parole. He feels for nonviolent crimes they should be required to serve at least one-third of their sentence; and persons convicted of violent crimes should be required to serve at least two-thirds of their sentence before they are eligible for parole.

Mr. Jones indicated that good time should be eliminated almost entirely except for that type of good time that is within the discretion of the director of the Department of Corrections. It should not be automatically given.

Mr. Jones stated there should be more ability on the part of the judges to use a mix of sentencing alternatives. They should be able to use a mixture of determinate and indeterminate sentences. This allows a judge to know exactly how much time that person will serve before being eligible for parole, and still gives the Commission on Pardons and Parole some latitude in dealing with the prisoner.

Mr. Jones feels there should be more flexibility for judges in imposing fines for certain crimes.

Mr. Jones summarized that it is well and good to talk about the needed changes but we also need to be willing to accept the fact that more prison space will be needed if these changes take place. The federal courts have stated certain elements have to met at the prison and the state must meet these requirements.

Mr. Jones said if we are ever going to have any credibility in the system, if we're ever going to have these people being kept off the streets for the time that they need to be kept off the streets, if we're ever going to show them that the system means business and if you get a life sentence it's going to be pretty close to that, or if you get a ten-year sentence it's going to be pretty close to that, we'll have to provide the money to expand the present facilities.

Representative Bayer and Senator Rydalch asked Mr. Jones if there was any way that Idaho could get away from the federal court orders that have been enacted. Mr. Jones said there are numerous states that are under federal court orders with regard to their prison system and states like Oklahoma, the federal courts practically took complete control of the system. There's just not much that can be done to get away from these orders.

Representative Harris told Mr. Jones that it was not this committee's intent to go as far as complete code revision without drawing in many more people, spending more

time and money, and being more thorough, but we are trying to address some of the inconsistencies in the statutes and clarify them, starting with some basic classification of crimes and moving on from there.

Mr. Jones said this was an alternative and may be the answer to handling the problems and trying to harmonize the enhanced sentencing with the regular sentencing structure. One of the problems we run into is every time we change a statute we make it subject to renewed challenges in court and uncertainty as to whether the court is going to uphold it or not.

Mr. Jones stated that this interim committee should recommend to the legislature that there be a complete code revision in the criminal area.

Mr. Jones' written remarks are attached as Exhibit A.

Greg Bower, Ada County Prosecuting Attorney. Mr. Bower said the biggest problem Idaho has is prison bed space. If the state does not solve the problem, the federal courts will.

Mr. Bower addressed several areas of concern:

1. Truth in sentencing - The public has an unfortunate perception of our criminal justice system. We need to develop credibility with the public and make it so that a person serves the sentence he is given by the judge.

2. Good time, as it is now statutorily, has to go. However, the Department of Corrections needs a management tool through the rewarding for extraordinarily good behavior and the punishing of extraordinarily bad behavior.

3. Enhancements - The basic enhancements that are used most often are in the drug area, using a firearm, and the habitual offender. It is senseless to spend taxpayers' money to bring a person to trial and add additional sentences to that person when he is already serving several life sentences. The problem is with the Commission on Pardons and Parole commuting the longer sentences to get to the shorter enhancement sentence so that that person can be paroled and they feel they can have a certain amount of control over them while they are on parole.

Mr. Bower said he thought it was an outstanding idea that the committee has to make it so a person must serve two-thirds of each sentence he receives, and the remainder of each sentence being applied toward parole time.

Mr. Bower also said the idea of judges mixing determinate and indeterminate sentences appealed to him as a means of permitting the institution to manage persons during the fixed term.

4. Mandatory minimum sentences - feels they work well and are putting some backbone into some sentencing laws. One area that needs mandatory minimum sentences is the area of the sale of narcotics. Mr. Bower said we are losing the battle in this state on the sale of drugs. Drugs are becoming an important factor in crime.

Mr. Bower said there are many cases that a prison sentence is simply not appropriate. Other options that work well are community work centers, county jail time, and restitution. He is skeptical about mandatory fines in felonies unless he knows where that money is going to go. Fines are not used very much in felony cases because collecting them is such a problem.

Russell E. Webb, Idaho Trial Lawyers Association. Mr. Webb stated that he is an attorney in Idaho Falls in private practice, was at one time the Teton County prosecutor and early in his career worked for the American Bar Association on a prison reform commission and because of this served three days and nights in the Ohio State Penitentiary. He said the main concern he heard from the prisoners was parole - not so much do I get out tomorrow, but what do I have to do to show them that I'm ready to get out.

Mr. Webb stated that the public's conception is that the most important function of judges is to determine whether a person is guilty or not; people seem to focus on the trial process, the cross-examination, etc. And that's just not the way it is. Nationwide guilty plea rates are 80-95%; so the most important thing judges do is decide how long a person will be sentenced.

Mr. Webb said he is very much in favor of discretion in the hands of judges as far as length of sentences. But mandatory minimum sentences do put teeth into certain statutes, especially ones like the DUI statute.

Mr. Webb said one of the difficulties is that the Idaho Code, in terms of both definitions of crimes as well as the sentences laid down, have been built up over the years but there has not been much effort to unify it and make the Code an integrated thing that works in harmony with itself.

Mr. Webb stated that the grid system (like the Washington grid system) works best at the level of parole. Grids allow the system to make sure that all the facts and the problems pro and con on a person's release really are before a parole commission when they make their decision. He doesn't feel the grid system works as well in the sentencing process.

Mr. Webb said he feels what everyone is trying to figure out is "What is a just sentence? How much time should a person serve in prison, if he should go to prison?" He doesn't think a legislature could come in and define every possible circumstance and know with certainty that that would result in a just sentence. On the other hand, a wide-open system totally up to the judges wouldn't work either.

Senator Rakozy asked Mr. Webb his opinion on making a person serve two-thirds of his sentence before being eligible for parole. Mr. Webb said he's not sure if two-thirds means anything, sometimes too much is too much. One of the problems is that the longer a sentence is, the less the defendant has to lose. If a person faces a long sentence, he feels he might as well use every technicality available to him, go to trial; and plea bargaining doesn't mean as much to him. If a person is given a shorter sentence, such as one to five years, he can vision the end of the five years, and it means more to him.

One thing Mr. Webb wanted to stress is, what happens if someone appeals a sentence? Idaho is unusual; either side can appeal basically. A lot of states don't allow the prosecutors to appeal. An appeal is a checks and balance system so that judges don't abuse their discretion in sentencing.

The only value Mr. Webb sees in good time is as a management tool for prison authorities.

Mr. Webb said there needs to be truth in sentencing. To him truth in sentencing means (1) that the system is designed in an intellectually honest way; and (2) it functions reliably.

Mr. Webb questions a real need for enhancements because most judges take all the mitigating circumstances into consideration when sentencing persons. But it is a bargaining tool for prosecutors.

Mr. Webb said parole is an age old problem. Some people feel the sentencing judge should be the paroling judge. But he feels this might lead to abuse because in some instances a judge might be very harsh toward a particular defendant. Also it is questioned whether judges have enough knowledge about what is happening in prison. Mr. Webb continued, however, that there needs to be some way where a person can aim at getting out of prison and make the transition of getting back into society.

A copy of written statements by Mr. Webb is attached as Exhibit B. Also, written remarks submitted by Judge Donald L. Burnett, Jr., Idaho Court of Appeals, are attached as Exhibit C.

Representative Sorensen indicated he would like to have figures on the recidivism rate of persons on parole. He questions the value of parole and would like more information to see whether the parole system is working in Idaho or whether we're just going through the motions under a philosophy that it is a handle that we have, but one that really doesn't work at all.

Mryna Stahman said one thing the committee wanted to be sure and do is define by statute all terms being used such as fixed-term sentence, mixed-term sentence, indeterminate term, etc., because different people have different connotations and different states also have different connotations. Senator Fairchild asked Ms. Stahman to bring definitions to the next meeting for the committee to consider.

Senator Bray asked Ms. Stahman to research pros and cons of allowing judges to mix fixed sentences and indeterminate sentences so the judges and the public know how much time a person will serve versus the legislature deciding a percentage of time that must be served. Do they both give truth in sentencing?

The next meeting of the committee was scheduled for September 19, beginning with the entire committee meeting at 9 a.m.

The meeting adjourned at 3:55 p.m.