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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, vs. 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, vs. STATE OF IDAHO, Respondent-Appellant.	DOCKET NO. 49531-2022 Idaho County District Court No. CV25-22-0004

REPLY BRIEF OF PLAINTIFF-APPELLANT/RESPONDENT-APPELLANT

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

HONORABLE JAY P. GASKILL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

MARK A. KUBINSKI
Deputy Attorney General
Chief, Criminal Law Division

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4539

ATTORNEYS FOR
PLAINTIFF-APPELLANT/
RESPONDENT-APPELLANT

JONAH J. HORWITZ
DEBORAH A. CZUBA
Federal Defender Services of Idaho
702 W. Idaho Street, Ste. 900
Boise, ID 83702

ATTORNEYS FOR
DEFENDANT-RESPONDENT/
PETITIONER-RESPONDENT

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A. The Phrase, "Only as Provided by Statute," Unambiguously Divested The Power Of The Commission In All Aspects Of Commutations To The Legislature

The state and Pizzuto agree that "the most straightforward path for the Court is to steer clear of the legislative history" and focus upon the plain meaning of the phrase, "only as provided by statute." (Brief, p.6.)[2] Moreover, the parties agree that the district court erred by finding the phrase, "only as provided by statute," is ambiguous. (Id. at pp.6-7.) But that is the extent of the parties' agreement.

Pizzuto's argument is based upon a tortured reading of Article IV, Section 7 of the Idaho Constitution. Specifically, Pizzuto contends:

> [T]he 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.

(Brief, p.4.)

Pizzuto's argument is based upon the phrase, "shall have the power" in Article IV, Section 7 that was not changed when the Legislature amended the provision in 1986 by adding the phrase, "only as provided by statute." *See* 1986 Idaho Sess. Laws, S.J.R. No.107, p.867. However, Pizzuto's use of ellipsis when referring to the "power" granted to the Commission annihilates his argument. The entire sentence reads as follows:

> Said board, or a majority thereof, **shall have power to remit fines and forfeitures**, and, only as provided by statute, to grant commutations and

[1] The state agrees in total with the Brief of Amicus Curiae Governor Brad Little in Support of the State of Idaho.

[2] Unless otherwise noted, all internal quotations, citations, brackets, ellipses, footnotes, and emphasis are omitted.

> pardons after conviction of a 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.

Id. (emphasis added).

The plain language of the **entire sentence** clearly and unequivocally grants the Commission "power to remit fines and forfeitures," but any "power" to grant commutations and pardons is granted, "only as provided by statute." Pizzuto's use of ellipsis and his failure to acknowledge the phrase, "to remit fines and forfeitures" changes the entire meaning of the sentence and is designed to circumvent the plain meaning of the sentence. But the entire language of the sentence cannot be ignored, and demonstrates the Legislature's intent in passing Article IV, Section 7. Indeed, prior to the 1986 amendment the sentence read:

> Said board, or a majority thereof, shall have power to remit fines and forfeitures, and to grant commutations and pardons after conviction of a 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.

1986 Idaho Sess. Laws, S.J.R. No. 107, p.867.

Under the prior provision, the Commission had "power" to remit both "fines and forfeitures" and "to grant commutations and pardons" with no intervention from the Legislature. However, with the addition of the phrase, "only as provided by statute," the Legislature intended to divest the Commission of any "power" to "grant commutations and pardons" except "as provided by statute." Not only is Pizzuto's interpretation of the sentence contrary to the "plain, usual and ordinary meaning" of the words in the sentence, it is contrary to the rule cited by Pizzuto: "Provisions should not be read in isolation, but must be interpreted in the context of the entire document." (Brief, p.7.) Not only has

Pizzuto failed to consider the "context of the entire document," he has deliberately ignored the context of the sentence from which the clause, "only as provided by state" was added.

In In re Radcliffe, 563 F.3d 627, 633 (7th Cir. 2009), the court discussed the dangers associated with using ellipses to change the meaning of a precedent, explaining, "The Fund's underhanded use of ellipsis to hide what the court was talking about, at best, undermines its argument; the Fund is not entitled to the line-item veto." That same statement obviously applies in the context of interpreting statutes and constitutions; Pizzuto is not permitted to use a "line-item veto" to excise relevant portions of the amendment to fit his interpretation of the 1986 amendment. While this Court has not expressly addressed the use of ellipses, in State v. Pratt, 160 Idaho 248, 249-50 (2016), the Court chastised counsel for repeatedly misquoting the record, and even noted that the attorney was "no longer licensed to practice law in Idaho." While the state is unaware of Pizzuto misquoting the record, his repeated use of ellipses to change the meaning of the 1986 amendment constitutes the same thing and should not be countenanced by this Court.

Pizzuto also attempts to redefine the issue by repeatedly focusing upon the question of whether the 1986 amendment gave authority to grant commutations to the Governor. (Brief, p.7.) Clearly, the amendment did not grant anything to the Governor. Rather, the "power" to grant commutations and pardons was divested from the Commission and the Legislature was then authorized to decide, "only as provided by statute," what entity would have the power to grant commutations, be it the Commission, the Legislature, the Governor, or some other entity the Legislature may decide to create legislatively.

Pizzuto next relies upon the second paragraph of Section 7 that addresses the "power" the Governor has "to grant respites or reprieves in all cases of convictions for

offenses against the state, except treason or conviction on impeachment." (Brief, pp.7-8.) However, Pizzuto ignores the relevant portion of In re Doe, 168 Idaho 511, 516 (2021), upon which he relies, and that requires examination of the "intent of the legislative body that adopted the act" that "begins with the literal language of the statute," and "[w]hen the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction." Admittedly, Doe also addresses the requirement that "[p]rovisions should not be read in isolation, but must be interpreted in the context of the entire document" being "considered as whole." Id. However, while the "document" "should be considered as a whole," "words should be given their plain, usual and ordinary meanings." Id. And Pizzuto's failure to even address the plain and ordinary meaning of the clause that was added in 1986 – "only as provided by statute" – and omit the phrase – "power to remit fines and forfeitures" – prevents him from embarking on rules of statutory construction where those words clearly and unambiguously establish the power to grant commutations and pardons is permitted "only as provided by statute." Paragraph 2 of Article 7, Section 2 provides no information on the plain and ordinary meaning of the added phrase – "only as provided by statute."

Even if paragraph 2 is considered it provides no solace to Pizzuto, who correctly explains that the amendment did not alter the Governor's power to grant respites and reprieves. (Brief, p.7.) The Governor retains that power even if a death-sentenced murderer files a commutation petition and the Commission grants a hearing on the petition, but schedules the hearing after the execution is scheduled. Obviously, the Governor may want to grant a respite or reprieve until the Commission conducts its hearing and renders a decision. There may also be other situations where the Governor may desire to grant a

respite or reprieve based upon other pending litigation, including an appeal where there is no stay of execution, especially during the time immediately preceding an execution. A respite or reprieve is the Governor's constitutional mechanism to grant a temporary stay of execution, and that power is not affected by anything in the first paragraph. Moreover, the second paragraph applies to all criminal cases, "except treason or conviction on impeachment," not just death penalty and fixed life sentences. There is no need to "harmonize" the first and second paragraphs, which involves another rule of statutory construction, because of the plain meaning of the relevant clause – "only as provided by statute." Irrespective, they are in complete "harmony" because one deals with commutations and pardons while the other deals with respites and reprieves.

Pizzuto also embarks upon a series of alternatives that the Legislature could have used when it passed the 1986 amendment, contending, "[s]uch language would have made plain the legislature's ability to deprive the Commission of its power." (Brief, p.9.) Even if the language Pizzuto proposes is clearer than what the Legislature used in 1986, that does not mean the language that was used means anything more than what Pizzuto suggests – "[c]ommutations may be granted by whatever body is deemed fit by the legislature" or "[t]he commutation power will be exercised only by the individuals or entities designated by statute." (Id.) In short, they all mean the same thing – the power to grant commutations is authorized "only as provided by statute" and it is the Legislature that enacts statutes. *Cf.* Pizzuto v. Idaho Dep't of Corr., 2022 WL 775584, *4 (2022) ("[W]e do not assess the meanings of words by plucking synonyms from a thesaurus."). Irrespective, Pizzuto has cited no authority for the proposition that, merely because the Legislature could have used

better or clearer language in 1986, the language used is not clear and unambiguous, and requires the Legislature to decide all the parameters of commutations and pardons.

Pizzuto next contends the amendment merely provided the Legislature the authority to "regulate the way in which the Commission would exercise its commutation power." (Brief, p.10). However, a plain reading of the phrase contains no such limitation, which means the out-of-state cases Pizzuto cites (Brief, pp.10-11) are inapposite because each is based upon a statute that governs procedure. *See* Idaho Falls Consolidated Hospitals, Inc. v. Bingham County Bd. of County Comm's, 102 Idaho 838, 840 (1982) ("To get the rule applicable to the construction of our Constitution it is not necessary to go into other jurisdictions."). Pizzuto's rebuttal to the state's assertion that the Legislature's omission of the word "process" is fatal to his argument (Brief, pp.11-12) also fails because the 1986 amendment involved both process and substance. The Legislature not only divested the Commission of any substantive power to grant commutations or pardons beyond what is provided by statute, but any authority regarding the process is omitted by the amendment. Pizzuto tries to parse the relevant sentence by focusing on the word, "shall." (Brief, p.13.) However, he omits important language from the sentence – "have the power to remit fines and forfeitures." The state has ignored nothing, but focuses upon the entire sentence, which states the Commission "**shall** have power to remit fines and forfeitures, and, **only as provided by statute**, to grant commutations and pardons."

Pizzuto's argument that the state's interpretation of the amendment would "lead to absurd results" is itself absurd and nonsensical because, under the separation of powers doctrine contained in Article 2, Section 1 of the Idaho Constitution, the Legislature is not permitted to pass laws that govern procedure in Idaho's courts, but only those that involve

substantive law. State v. Samuel, 165 Idaho 746, 756 (2019). Pizzuto's hypothetical would result in an obvious conflict with the separation of powers doctrine. Irrespective, "[w]here a statute or constitutional provision is clear" this Court "must follow the law as written," Pentico v. Idaho Comm. For Reapportionment, --- Idaho ---, 504 P.3d 376, 379 (2022), "whether or not the legislature anticipated the statute's result," Rim View Trout Co. v. Higginson, 121 Idaho 819, 824 (1992). The 1986 amendment is "clear" – it divests the Commission of any power or authority to grant commutations or pardons, except "as provided by statute," but retains the Commission's "power to remit fines and forfeitures."

Finally, Pizzuto relies upon a single case from Hawaii, United Pub. Workers v. Yogi, 62 P.3d 189 (Haw. 2002), as "persuasive authority" to support his position. (Brief, p.14.) Not only does Yogi fail to support his argument, but it actually supports the state's position. First, the Hawaii Supreme Court utilized rules of statutory construction to ascertain whether the amendment was constitutional. Id. More importantly, the court concluded that the phrase, "as provided by law," was a dependent clause that qualified the "preceding independent clause." Id. at 193. Here the phrase, "only as provided by statute," is a clause that qualifies the clause that follows, "to grant commutations and pardons," which means the Commission has authority or power to grant commutations and pardons only as provided by statute. The Commission has no other "power" beyond what the Legislature provides by statute. More importantly, in State v. Beason, 119 Idaho 103, 105 (Ct. App. 1991) (emphasis added), the Court of Appeals implicitly recognized the 1986 amendment divested the Commission of any power when it noted the authority to commute a sentence was "vested in the Commission" "because the Idaho Constitutional provision **which existed at the time** of the Commission's action in this case did not place a limitation

upon the Commission's commutation power through reference to statutory mandates." However, the Court recognized that Article IV, Section 7 had been amended in 1986 by adding the clause, "only as provided by statute." Id. at 105 n.2. There would have been no reason for the phrase, "which existed at the time of the Commission's action in this case," if the Court of Appeals believed the 1986 amendment did not divest the Commission of its prior power regarding commutations and pardons.

The language from the 1986 amendment is clear and unambiguous – it divested the Commission of any power associated with commutations and pardons except that which is provided by statutes enacted by the Legislature. Pizzuto's interpretation not only ignores the word, "only" as explained in the state's opening brief, but it requires the Court to ignore a key clause that was not changed by the amendment – "remit fines and forfeitures" – which is the only "power" the Commission retained after the 1986 amendment was enacted. Because the amendment unambiguously limits the power of the Commission to those statutes enacted by the Legislature, the district court's decisions must be reversed because the statute enacted by the Legislature – I.C. § 20-1016 – mandates that the Governor has the ultimate authority to deny or grant commutations recommended by the Commission in cases involving the death penalty and fixed life sentences.

B. The District Court's Decision is Contrary To Legislative History

After discussing the history of Article IV, Section 7, Pizzuto contends the 1986 amendment "does not refer to any other governmental actor when it describes who commutes sentences in Idaho" and that the state fails to "identify a single data point to suggest that the clause was ever amended to rescind that fundamental grant of power." (Brief, p.16.) Pizzuto is wrong. First, the question is not whether the 1986 amendment

refers to "any other governmental actor" "who commutes sentences in Idaho," but whether it refers to any governmental actor at all when discussing "who commutes sentences in Idaho." Simply stated, it does not. Rather, every aspect of commutations in Idaho, including "who," is governed by the clause, "only as provided by statute." Second, the "data point" the state utilizes is the 1986 amendment that divested the Commission of any authority relating to commutations. And Pizzuto's continued use of ellipses in an attempt to establish the Commission has "power … to grant commutations" (Brief, p.16) ignores the plain language of the entire sentence that only gives the Commission "power to remit fines and forfeitures," and requires legislative enactment "as provided by statute" before it has any power regarding commutations and pardons.

Pizzuto continues his attempt to misdirect the Court by focusing on the Governor's authority when the provision was first enacted in 1889. (Brief, p.17.) Importantly, when the 1986 amendment was enacted, it did not insert the Governor into the commutation process nor grant the Governor authority regarding commutations. Because the 1986 amendment divested the Commission of any authority, the Legislature was required to enact legislation enabling some entity with authority. That legislation was I.C. § 20-1016, which permits the Commission to deny commutations in fixed life and death penalty cases, but can recommend the Governor grant a commutation, which can then be accepted or denied by the Governor. It was I.C. § 20-1016 that injected the Governor into the commutation process, not the 1986 amendment.

Pizzuto next focuses upon "the people of Idaho in 1986" and whether they "abrogated well-settled precedent through the adoption of a few innocuous-sounding words." (Brief, p.17.) First, the "few innocuous-sounding words" are the entirety of the

1986 amendment. As such, they are more than "innocuous-sounding," but are the entire basis for amending Article IV, Section 7, which was to divest the Commission of any power associated with commutations, except "as provided by statute." The plain language of the amendment establishes that the Commission's pre-1986 power – "to remit fines and forfeitures, and to grant commutations and pardons" – would no longer exist as to commutations and pardons if the amendment was passed because the power to grant commutations and pardons would be "only as provided by statute."

Second, to the extent the voters in 1986 are presumed to be "aware of the state of the law when they cast their ballots" (Brief, p.17) (citing Idaho Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 159 (1944)), based upon the plain language of the 1986 amendment, the people would have recognized the amendment would no longer grant the Commission the "power … to grant commutations and pardons" because that power was being limited to "remit fines and forfeitures," while the power to grant commutations and pardons was permitted "only as provided by statute." Based upon the prior law that the voters are presumed to have been mindful of at the time of the proposed amendment, *see* Westerberg v. Andrus, 114 Idaho 401, 403 (1988), the amendment's inclusion of the phrase, "only as provided by statute," constituted a drastic change from the law as it existed prior to the amendment's proposal. The 1986 amendment did not "radically transform" the law by granting the Governor the power to grant commutations, it transformed the law by divesting the Commission of any authority associated with commutations unless it was "provided by statute." Not only does the language of the amendment "clearly indicate[ ]"

such a change, *see* Callies v. O'Neal, 147 Idaho 841, 847 (2009),[3] but as explained in the state's opening brief (AOB, p.20) and will be discussed further, the intent and understanding of the voters can be ascertained from the information provided to them, which establishes they recognized the change being proposed by the Legislature would divest the Commission of authority associated with commutations, except "as provided by statute." The state is not relying upon a "presumption" or an "inference" that the "amendment was intended to overrule years of precent." (Brief, p.18.) The state is expressly stating that the plain language of the amendment, which is also supported by the information provided to the voters in 1986, establishes the state's position, and only by removing portions of the relevant sentence, as done through Pizzuto's use of ellipses, or adding words that do not exist in the amendment, as done by Pizzuto by adding the word "process," can there be any other objectively reasonable interpretation.

Pizzuto next returns to his contention that the Legislature could have used clearer language when it passed the 1986 amendment by using language from other states. (Brief, pp.18-22.) However, as with his argument regarding the use of language he contends could have been clearer, merely because other states have used language that may or may not be clearer than the 1986 amendment is of no consequence because the language of the 1986 amendment is clear and unambiguous on its face, establishing the Legislature's intent to divest any entity, including the Commission, of power regarding commutations and pardons, except "as provided by statute." And to the extent the district court and Pizzuto

[3] The state notes that Callies, 147 Idaho at 847, discusses that this Court presumes "the Legislature did not intend to change the common law unless the language of the statute clearly indicates otherwise." Obviously, the issue here is not the common law, but an amendment to the Idaho Constitution.

are correct, "that 'the Idaho Constitution has never directed that one individual has the power to decide matters of commutation in any criminal matter, let alone a case with the ultimate penalty of death'" (Brief, p.21) (quoting #49489, R., pp.751-52), that conclusion is irrelevant for at least two reasons. First, whether Idaho's Constitution previously granted the power to decide matters of commutation in any criminal matter to a single individual has no relevance to the question of whether the 1986 amendment made such a change. More importantly, the 1986 amendment did not give one individual the power to decide matters of commutation in any criminal matter. Rather, the amendment gave the Legislature the power to decide what entity or entities would have the power and the processes by which that power would be wielded. It was I.C. § 20-1016 that gave power to the Commission to deny commutations and pardons, make recommendations to the Governor to grant commutations and pardons, and give the Governor veto power over the Commission's recommendation to grant commutations and pardons in cases involving the death penalty and fixed life sentences.

Pizzuto also returns to his argument regarding the 1986 voters who ratified the amendment, contending they "are the most important actors to consider when analyzing the legislative history." (Brief, p.22.) First, the state acknowledges that in its opening brief and before the district court it asserted there was no case law in Idaho that discusses whether the voters' intent has any impact on this Court's interpretation of a constitutional amendment. However, the state's omission was hardly "surprising" because neither Pizzuto nor the district court cited any Idaho authority. Irrespective, to the extent that Robison remains good law, as explained above, because of the plain language of the 1986 amendment, Robison actually supports the state's position. Contrary to Pizzuto's

contention, this amendment involved much more than "modest language" (Brief, p.24), but transferred everything involving commutations and pardons to the Legislature.

In the Public Notice provided to voters regarding the 1986 amendment, the Legislative Council explained the "meaning and purpose" of the amendment, stating:

> The purpose of this proposed amendment to Section 7, Article IV of the Constitution of the State of Idaho is to **remove** from constitutional status the **powers** of commutation and pardons, which are held by the Board of Pardons, and to make the **powers** and pardon **subject to amendment** by statute by the **Legislature**.

(AOB, Appendix H) (emphasis added). Clearly, the voters were advised that the 1986 amendment would remove the constitutional powers associated with commutations and pardons that were held by the Commission and make those powers subject to legislative enactments. This is a clear and unambiguous statement regarding how the "power" to grant commutations and pardons would be subject to Legislative fiat. The Notice continues to explain the effect the amendment would have if adopted:

> **Presently, the Board** of Pardons has the constitutional **powers** of commutation and pardon. Because these powers are constitutional, they cannot be amended or changed by statutory enactment and are not subject to review. If SJR 107 is adopted, the **commutation** and pardon **power** will no longer have constitutional status; they **will be subject to amendment** by statutory enactment. The **Legislature** would have authority to set **policies and procedures** for commutation and pardons and could also review Board commutation and pardon decision."

(Id.) (emphasis added).

While Pizzuto focuses upon the word "procedures" (Brief, pp.25-26), he virtually ignores the words "power" and "policies," which mean the people were aware the amendment would involve more than the Legislature dictating "procedures" associated with commutations and pardons. *See Policy*, MERIAM-WEBSTER'S DICTIONARY, https://www.merriam.com/dictionary/only (last visited May 7, 2022) ("[A] definite course

or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions."). As explained in BLACK'S LAW DICTIONARY, 1157 (6th 3d. 1990) (emphasis added), policy "as applied to a law, ordinance or rule of law, denotes its **general purpose** or tendency considered as directed to the welfare or prosperity of the state or community." While there is no question the voters were not informed how the Legislature would wield its new authority, that is of no consequence because not even the Legislature must anticipate the eventual results from amendments to statutes or the constitution. *See* Rim View Trout Co., 121 Idaho at 824 ("This Court has stated that when the language of a statute is definite, courts must give effect to that meaning whether or not the legislature anticipated the statute's result."). Unsurprisingly, Pizzuto ignores the language of the question that was submitted to the voters, which states the intent of the amendment: the power of the Commission to grant commutation shall be "only as provided by statute." 1986 Idaho Sess. Laws, S.J.R. No. 107, p.868.

Pizzuto also criticizes the state for its use of newspaper articles to support its assertion regarding the legislature history of the 1986 amendment, contending the state relied upon only one document citing Jim Jones who was the Attorney General. (Brief, p.27.) Again, Pizzuto is wrong. The state cited and appended several articles and documents that explained the frustration Idaho citizens, judges, and legislators were feeling regarding the manner in which the Commission was using its power to commute and pardon inmates who had committed heinous crimes. (AOB, pp.15-17.) There is no reason to believe that either the voters or the Legislature would pass a constitutional amendment that continued to frustrate everyone by maintaining the status quo by providing all the

power of commutations and pardons to the Commission. And while Pizzuto contends that "[w]hen courts have relied upon newspaper articles to decipher voter intent it has been with reference to far more robust showings" (Brief, p.27), he fails to cite any article that is contrary to the state's position. Pizzuto's contention that the state's reliance upon such articles is "improper" (id., n.13) is also without merit because the state is not barred from providing this Court additional persuasive authority to support its position. While this Court has "long held that appellate court review is limited to the evidence, theories, and arguments that were presented below," State v. Garcia-Rodriguez, 162 Idaho 271, 275 (2017), "a party may polish up its support for an argument by citing statutes originally overlooked, so long as the party's legal position does not change," State v. Weigle, 165 Idaho 482, 486 (2019). The same principle applies to other persuasive authority.

Pizzuto next embarks upon the notion that the amendment was designed to merely "dilute the Commission's power." (Brief, p.29.) However, as repeatedly discussed, such an interpretation not only ignores the plain language of the amendment, but the historical attributes of Article IV, Section 7 and the information available to ascertain both the Legislature's and voters' intent when the amendment was passed in 1986. And Pizzuto's rebuttal to the state's assertion that the Legislature already enjoyed the power to regulate the process by which the Commission exercises its powers (Brief, pp.29-30) is based upon a very narrow interpretation of the power the Legislature possessed prior to enactment of the amendment, which allowed it to "prescribe the sessions of said board and the manner in which application shall be made, and regulate[ ] proceedings thereon." Contrary to Pizzuto's contention, this is much more than just "superficial matters," but includes virtually everything associated with the proceedings involving commutations and pardons.

Moreover, merely because the concerns of the voters, the Legislature, and the courts could have been "ameliorated … by supplying the Commissioners with more guidance on how to operate" (Brief, p.31) means nothing. Rather, it bolsters the state's argument because the Legislature not only failed to enact statutes prior to the 1986 amendment to provide the Commission more guidance, but, as explained next, rejected that very proposal, and elected to remove the Commission from involvement with commutations and pardons, except "as provided by statute."

Pizzuto next takes up the work that was done by the Interim Criminal Sentencing Committee ("Committee") and respective sub-committees (Brief, pp.32-39), contending the state is not permitted to address his arguments because the state did not address the minutes from the Committee's hearings but merely referred to a "newspaper article which in turn discusses the committee" (Brief, pp.32-34). Pizzuto is again wrong because there is nothing barring the state from addressing the Committee's hearings through a newspaper article and then discussing them in fuller detail in its reply brief. This is nothing more than polishing an argument that has already been made. *See* Weigle, 165 Idaho at 486. Moreover, the state is permitted to address arguments that are made in Pizzuto's response brief. *See* State v. Haws, 167 Idaho 471, 476 (2020) (permitting the appellant to address a waiver argument raised for the first time in the state's answering brief).

Pizzuto correctly notes that legislative "committees do not exercise legislative authority under Idaho law." (Brief, p.33.) That does not mean this Court cannot examine what was done by a legislative committee to ascertain information that was provided to the Legislature and informs the Legislature's intent. What is most significant involving the

meetings of the Committee is the dissatisfaction expressed with the Commission's granting of parole, commutations, and pardons.

At the May 17, 1985 Committee meeting, Carl Bianchi, Administrative Director of the Courts, discussed the exceptionally broad power that had been granted the Commission and that it could not "be limited by the legislature" because "commutation **power** is constitutional." (Appendix A, p.2) (emphasis added).[4] Al Murphy, Director of Corrections, was also queried about the Commission's power to grant commutations and pardons, with Senator Darrington asking, "what effect the power of commutation has on the judges in their sentences," and noting that the legislature and judges "have tried to impose harsh sentences," but "they are both playing games with the Parole Commission who are commuting the sentences and letting those same people out of prison." (Id., p.3.) Bianchi responded that Senator Darrington "may be right, it has become a game," but the Commission "feels they are doing their responsibility under the Constitution and are following the guidelines of the legislature." (Id.) It was agreed the Committee needed to address commutation and pardons. (Id., p.12.)

At the June 20, 1985 meeting, Judge Haman agreed there should be "some form of commutation available but he feels the commutation powers that are now there are being abused. He agree[d] with Judge Kramer that the commutation **power** needs to be tightened up." (Appendix B, p.3) (emphasis added). Olivia Craven, Executive Secretary of the

[4] In the interest of providing as much information as possible, the state has attempted to locate all the minutes of the meetings held by the Committee and respective sub-committees and append them to this reply brief, and not just a few as provided by Pizzuto. It is unclear whether that task was successful. Additionally, while large portions of the minutes are not particularly relevant on the issue of commutations and pardons, they demonstrate an overall dissatisfaction with the system that was in place.

Commission, discussed the "**powers** [that] are given to the Parole Commission by the state Constitution" and "the process involved in an application and subsequent hearing for a pardon." (Id., p.6) (emphasis added). Representative Sorensen expressed his opinion that "the weak link in the system is the Parole Commission" (id.), which was reaffirmed at the June 20, 1985 Work Session on Pardons and Parole (id., p.9). Importantly, Representatives Sorenson, Keeton, and Senator Darrington all believed "the commutation **power** should be removed from the Pardons and Parole Commission." (Id.) (emphasis added). And when Tony Scoro, Parole Commissioner, stated "he felt the Pardons and Parole Commission has entirely too much **power**," Craven stated the Commission "would not be unhappy if they lost commutation **powers**," and that in "those states that puts commutation **powers** in the executive branch, the parole commission investigates and makes recommendations to the governor before he makes the final decision." (Id.) (emphasis added). Such strong statements from legislators, a Commission member, and the Commission's Executive Secretary establish the problems that existed at the time, and early consideration of the very resolution that ultimately occurred, both as a result of the 1986 amendment that divested the Commission of any power, and subsequently by I.C. § 20-1016.

July 25, 1985 minutes reflect the "[w]orking group members felt that the **power** of commutations should be held by the governor of the state and not the Commission for Pardons and Parole." (Appendix F, p.1) (emphasis added). RS 11697 was discussed, but there was concern it expanded the power of the Commission. (Id., pp.1-2.) There was significant discussion regarding RS 11689, which stated, "a commutation granted by the Board of Pardons shall not be effective until approved by the governor in a manner to be

provided by law" (id., p.2); a motion to recommend RS 11689 to the full committee was approved (id., p.3).

On October 22, 1985, an amended RS – 11689C – was presented to the Committee, which stated, in relevant part, "no commutation or pardon, reduction, alteration, discharge, or any other mitigation of the sentence granted by the board shall be effective until approved by the governor in a manner to be provided by law." (Appendix I, p.2.) When there were questions regarding the phrase, "in a manner to be provided by law," Bianchi explained, "this language is commonly used in constitutional provisions so that constitutional language is not cluttered with wordiness. It this language were not in the constitutional provision, the powers of the governor would be unanswerable to the legislature." (Id.) Because of concerns involving the language, further action on RS 11689C was deferred pending additional research. (Id.).

RS 11689C was again addressed on November 20, 1985, as was RS 11882. (Appendix J, p.2; Appendix J, Exhibits C and D.) Bianchi explained there was a third alternative that included eliminating having the Commission as a "constitutional body," which "would give the legislature more flexibility in adding **powers** or limiting **powers** of the [Commission], determining who approves commutations etc." (Appendix J, p.2) (emphasis added). The Committee agreed that staff should "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.) The resulting "legislation" was S.J.R. 107, which, as explained by the Committee:

> [R]epresents 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 [be] **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**.

(Brief, Exhibit 5, p.5) (emphasis added). Pizzuto concedes that the Committee's final report is contrary to his position. (Brief, p.35.)

Nevertheless, Pizzuto contends that the Committee's consideration of other proposals that directly involved the Governor in the commutation process "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." (Brief, p.34.) Pizzuto's contention ignores the deliberations the Committee had regarding the respective proposals and its ultimate decision that it wanted the Commission removed as a constitutional body with respect to commutations, "give the legislature more flexibility in adding **powers** or limiting powers of the [Commission], determining who approves commutations," and that the new language should not say it would "be in the hands of the governor," but "something established by law." (Appendix J, p.2) (emphasis added). S.J.R. 107 did what the Committee proposed. It was not until passage of I.C. § 20-1016 that the commutation powers of the Commission and Governor were actually delineated.

Pizzuto contends the statements in the minutes and reports are "far too unclear" "for the Court to rely on them in deciphering the 1986 amendment" because "S.J.R. 107 did not 'eliminate' the Commission as a 'constitutional body'" or "replace it with something established by law." (Brief, p.36.) Admittedly, the 1986 amendment did not "eliminate" the Commission as a "constitutional body." But what remained was relevant

only to the Commission's "power to remit fines and forfeitures." And contrary to Pizzuto's contention, the Commission was "replaced with something established by law" with respect to commutations and pardons – I.C. § 20-1016. Obviously, the issue with the Commission was not its power to "remit fines and forfeitures," but its power "to grant commutations and pardons," which both the Legislature and voters could ascertain from the plain reading of the amendment and the information that was provided regarding the amendment. Likewise, Pizzuto's contention that there was not "a whisper to the voters about" I.C. § 20-1016 (Brief, p.37) is unavailing because the amendment clearly required that the Commission's power and authority to grant commutations and pardons was premised on the preceding clause – "only as provided by statute." It was only passage of I.C. § 20-1016 that granted any entity the authority and power to even consider commutations or parole. The voters clearly knew that "only as provided by statute," required either existing legislation or passage of new legislation.

Finally, the state is doing much more than "cherry-picking." (Brief, p.38.) Rather, when everything associated with S.J.R. 107 is considered, whether it be the underlying problems in 1986 the Legislature was trying to resolve, the statements of legislators, the statements of other individuals, including the Attorney General, the statements to the voters, or the plain language of the amendment itself, there can be only one reasonable conclusion: the legislature and the voters intended to divest the Commission of any power and authority to grant commutations or pardons, except as provided by statute. When the proffered interpretations are "consider[ed] in the context in which the language is used," coupled with the "evils to be remedied and the objects in view," there is only one reasonable interpretation of the 1986 amendment – that the Legislature divested the

Commission of any power associated with commutations and pardons and conveyed that power to the Legislature, which, "as provided by statute," gave the Commission limited power to deny commutations and pardons, but gave the Governor veto power over the Commission's recommendation to grant a commutation in fixed life and death penalty cases. *See* Callies, 147 Idaho at 847.

C. The Rule Of Lenity

For the first time on appeal, Pizzuto invokes the rule of lenity. (Brief, pp.40-41.) "The rule of lenity states that criminal statutes must be strictly construed in favor of defendants." State v. Anderson, 145 Idaho 99, 103 (2008). However, if a statute is unambiguous, "the rule of lenity does not apply." State v. Anderson, 154 Idaho 54, 56 (2013). Moreover, "where a review of the legislative history makes the meaning of the statute clear, the rule of lenity will not be applied." State v. Bradshaw, 155 Idaho 437, 440 (Ct. App. 2013). "The rule of lenity does not require courts to disregard legislative history, public policy, or the context of the statutory language when determining the intent of the legislature." Id. Rather, "[t]here must be a **grievous ambiguity** or uncertainty in the statute that is not resolved by looking at the text, context, history or policy of the statute, thereby allowing for multiple reasonable constructions." Id. (emphasis added).

Pizzuto's argument fails on several fronts. First, he did not raise this argument before the district court. This Court has "long held that appellate court review is limited to the evidence, theories, and arguments that were presented below." Garcia-Rodriguez, 162 Idaho at 275. While "a party may polish up its support for an argument by citing statutes originally overlooked, so long as the party's legal position does not change," Weigle, 165 Idaho at 486, Pizzuto's argument is much more than "polish." His new argument is no

different than the state trying to carry its burden of establishing a search fell within an exception to the warrant requirement that was not raised before the district court. *See* State v. Hoskins, 165 Idaho 217, 235 (2019) (rejecting the state's argument on appeal that a search fell within the plain view doctrine when the search was justified before the district court by the consent doctrine); State v. Gonzalez, 165 Idaho 95, 97-99 (2019) (discussing several cases where this Court declined to address argument for the first time on appeal).

Second, Idaho has never applied the rule of lenity to a non-criminal constitutional provision. Indeed, Pizzuto has resorted to cases from outside Idaho to contend "the rule has also been taken into account when statutes are not necessarily in the classic categories but still have criminal applications." (Brief, p.40.) However, in Bradshaw, 155 Idaho at 441, the defendant sought an interpretation of the rule of lenity much different than what was used in Idaho. The Court of Appeals rejected the argument, explaining that Bradshaw failed to identify any Idaho case adopting his interpretation. Id. Moreover, Pizzuto has failed to cite any jurisdiction that has applied the rule of lenity to a constitutional provision involving the power of parole commissions or any other entity to grant commutations and parole. That failure is fatal to his argument. *See* State v. Abdullah, 158 Idaho 386, 414 n.12 (2015) ("As we have consistently held numerous times, issues raised on appeal without argument or authority are deemed waived by this Court…").

Third, Pizzuto implies that the rule of lenity should be interpreted differently because "death is different." (Brief, p.41.) Of course, he fails to cite any authority for such a bold proposition associated with a constitutional amendment that not only applies to the death penalty, but to fixed life sentences, which would mean a different "rule of lenity" for death penalty cases versus fixed life cases, which is absurd on its face. Irrespective, as

detailed in the state's opening brief and throughout this reply brief, Pizzuto has failed to establish "grievous ambiguity or uncertainty" associated with the 1986 amendment.

D. Public Policy

Contrary to Pizzuto's argument (Brief, pp.41-44), public policy does not favor his position, and he failed to present any evidence supporting the vast majority of his argument. Pizzuto's argument is based upon the notion that the Commissioners have "extensive expertise in dealing with the many complex factors that influence decisions about reducing criminal sentences." (Brief, p.42.) However, Pizzuto provided no evidence regarding the Commissioners' background, let alone "extensive expertise" in any of the areas discussed by Pizzuto. Neither is there any evidence in the record detailing how long each Commissioner has been on the Commission. And there certainly is no evidence establishing "extensive expertise" in the area of death sentenced murderers who are seeking a commutation or pardon, especially since Idaho has not executed a death sentenced murderer for over two decades. Indeed, I.C. § 20-1002, relied upon by Pizzuto, indicates some of the worst fears of the Committee that were discussed above because members of the Commission "serve at the pleasure of the Governor and not more than four (4) members shall be from any one (1) political party," which indicates the political nature of the Commission and one of the reasons the Legislature divested the Commission of the power to commute and pardon death sentenced murderers and those inmates sentenced to fixed life. If the Legislature was truly interested in Commissioners with "extensive expertise," it would enact legislation stating such or have judges involved in commutations and pardons who obviously have "extensive expertise" in the areas discussed by Pizzuto, but was rejected by the Committee. (Appendix F, p.3.)

Pizzuto implicitly contends that, because the Commission had the opportunity to consider all the evidence presented during the commutation hearing and, "taking a voluminous amount of information under advisement," the Commission was in a better position to make the decision regarding Pizzuto's commutation because "the Governor denied commutation on the same day that he received the Commission's letter" and he failed to "even acknowledge the abundant evidence favoring commutation." (Brief, pp.43-44.) Once again, Pizzuto misstates the record. The letter signed by Governor Little expressly stated he was rejecting the Commission's decisions "[a]fter a **thorough review** of the **voluminous records** submitted during the November 30 public hearing." (#49489, R., p.566) (emphasis added). Governor Little also detailed a few of the facts associated with Pizzuto's trail of terror that began with his conviction for a brutal rape in Michigan in 1975, two murders in Washington within a year of his release from prison for the rape conviction, and ending with the Herndons' murders in 1985. (Id.) The Governor, who sees the same commutations and pardons that are recommended by the Commission, had the ability to show "mercy due to [ ] Pizzuto's current medical condition and evidence of his decreased intellectual functioning." (Brief, p.43.) Governor Little simply chose, based upon his own "extensive expertise" from reviewing those prior recommendations from the Commission, to reject the recommendation, which was permitted because the Commission had no power to grant commutations or pardons, except "as provided by statute."

E. Precedent Supports The State's Position

In the final section of his brief, Pizzuto attempts to minimize the importance of four cases cited in the state's opening brief. (Brief, pp.44-49.) First, Pizzuto contends this Court should ignore State v. Winkler, 167 Idaho 527 (2020), because it would "authorize an

execution based on dicta from a DUI case in an opinion that did not engage with the many compelling arguments that [he] has presented." (Brief, pp.44-45.) Pizzuto is wrong when he states the Court's discussion of Article IV, Section 7 was merely dicta. This Court clearly addressed the 1986 amendment and reasoned, "where the offense is one for which the maximum punishment allowed by law is death or life imprisonment, the Commission's pardon power is limited to that of providing a recommendation that must be approved by the Governor." Id. at 530 n.1. It was that language that allowed the Court to conclude the Commission has "'full and final authority' to grant a pardon for driving under the influence because the offense does not fall within the exceptions to either statute." Id. Of course, the relevant statute was I.C. § 20-240A, which was redesignated as I.C.§ 20-1016, the very statute in question in this case. The only difference is that Winkler dealt with a pardon, which is the same as a commutation for purposes of Article IV, Section 7 and I.C. § 20-1016. That difference, coupled with the fact that the charge in Winkler involved a DUI, does not make this Court's analysis mere dicta. However, even if Pizzuto is correct, the Court's reasoning is exceptionally persuasive authority that supports the state's position.

State v. Hall, 163 Idaho 744, 805 (2018), and Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985), work hand-in-hand, and support the state's position that even the Commission believed its power associated with a commutation was merely to recommend such to the Governor. Pizzuto attempts to minimize the state's assertion that this Court would not have affirmed a jury instruction in Hall if it violated the 1986 amendment by expressly stating only the Governor may commute a death sentence if it is recommended by the Commission. However, his argument defies common sense; certainly, this Court

would not have affirmed an instruction that, according to Pizzuto, would have been so blatantly unconstitutional under the 1986 amendment.

Pizzuto's argument regarding Standlee v. State, 96 Idaho 849 (1975), is also misplaced because it involved the Commission's authority associated with parole decisions, which was not changed as a result of the 1986 amendment that dealt with commutations and pardons. Idaho Code § 20-1016 does not "take the power away from the Commission" (Brief, p.49); that was done by the 1986 amendment. Rather, I.C. § 20-1016 gives power to the Commission to grant commutations in cases not involving fixed life sentences or the death penalty. and to deny commutations and make recommendations to the Governor to grant commutations in cases involving fixed life and the death penalty.

F. Summary

Pizzuto's case provides **the classic example** of why the Commission was divested of its power to grant commutations and pardons. As recognized by Governor Little in his letter rejecting the Commission's recommendation and by this Court in its first opinion in Pizzuto's long traverse through the legal system, Pizzuto's murders of Berta and Del were exceptionally brutal. They were two strangers unknown to Pizzuto. He told Berta and Del that he was "a highwayman," stuck the gun up to Del's face, and then said, "does this look like a cannon from where you are standing." State v. Pizzuto, 119 Idaho 742, 749 (1991). When they did not believe Pizzuto was going to rob them, Pizzuto forced Del to "drop his pants and crawl to the cabin." Id. When Pizzuto used a hammer to bludgeon their skulls, it sounded like "'bashing hollow sounds' like that of 'thumping a watermelon.'" Id. However, Del did not die easily because when Pizzuto's co-defendant, James Rice, went to the cabin he heard a "deep snort and some shuffling" sounds, went inside the cabin and

saw Del lying on the floor with his "feet [ ] shaking in rapid succession." Rice shot Del "in the head because he 'didn't want him to suffer.'" Id.

These facts involving the Herndons' murders, coupled with Pizzuto's criminal history that involves raping a woman in Michigan and, within one year of his release from prison, murdering two individuals in Washington, hardly warrants the "mercy" shown by the Commission's recommendation. And the fact that Pizzuto now suffers from various ailments hardly warrants mercy considering he has embarked on a tactical decision to delay, in any fashion possible, his execution as demonstrated by his litigious history described in the state's opening brief. (AOB, pp.1-2.) Even now, he suggests that this Court stay this appeal because he has another challenge to the Governor's decision pending in a state habeas case. (Brief, p.3 n.5.)

In 1985, the Legislature, the people, and the courts recognized that, just like this case, the Commission was improperly granting (or recommending in this case) commutations and pardons in egregious cases where it was not warranted. As a result of the Commission's decision, the Idaho Constitution was amended to remove that power from the Commission and give it to the Legislature, which was permitted, "as provided by statute," to determine the entity that would have the power to deny and grant commutations and pardons. In short, the problem was recognized and resolved by adding the clause, "only as provided by statute," which gave the Legislature all decision-making authority associated with commutations and pardons, and resulted in the enactment of I.C. § 20-1016.

CONCLUSION

The state respectfully requests that this Court reverse the decisions of the district court and order the district court to immediately issue a new death warrant scheduling Pizzuto's execution as provided by law.[5]

DATED this 11th day of May, 2022.

/s/ *L. LaMont Anderson*
L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

[5] Pizzuto takes exception to the state's request in its Opening Brief to "order the district court to immediately issue a new death warrant scheduling [his] execution as provided by law. (Brief, p.6 n.6) (*see* AOB, p.23). Not only has this language been previously used by the Court in the Remittitur in death penalty appeals, but the state is merely asking the Court to order the district court to comply with the law once this appeal is resolved. And because there are no stays of execution in place, I.C. § 19-2715(3) mandates that the district court "set a new execution date not more than thirty (30) days thereafter."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 11th day of May, 2022, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Jonah Horwitz	_____ U.S. Mail
Deborah A. Czuba	_____ Hand Delivery
Federal Defender Services of Idaho	_____ Overnight Mail
Capital Habeas Unit	_____ Facsimile
702 W. Idaho Street, Suite 900	X Electronic Court Filing
Boise, ID 83702	
Jonah_Horwitz@fd.org	

/s/ *L. LaMont Anderson*
L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

APPENDIX A

Legislative Council
Criminal Sentencing Committee
House Caucus Room
Statehouse
Boise, Idaho
May 17, 1985

MINUTES

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

Others present were Representatives Fields, Bengson, Loveland, Forrey, and Fry; Carl Bianchi, Judiciary; Al Murphy, Ron R. Martin, and Eugene Larson, Department of Corrections; Sharon Harrigfeld Hixon, Commission for Children/Youth, and Jeff Shinn, Governor's Office; and Pat Kole, Deputy Attorney General.

Senator Fairchild gave a brief analysis of the assignment of the committee. He indicated there was a perception that the criminal sentencing laws were in need of change - more simplicity so that the citizenry could understand it; more certainty so that our criminal element will know the consequences of their actions.

Co-Chairman Representative Harris added the committee will look at problems as they affect Idaho and take steps to solve these problems and bring appropriate solutions.

Ron Hodge reviewed the results of the 1984 special study on criminal sentencing, giving a history of the events of that study committee, the persons testifying before the committee, etc. He said issues raised during this study dealt with sentencing disparities, truth in sentencing, inconsistencies in Idaho's current statutes, and the roles of the three branches of government in the sentencing process. Also the issue of the changing emphasis of criminal sentencing from rehabilitation to retribution was addressed.

The committee heard testimony from a superior court judge from Spokane who discussed the underlying philosophy of the Washington presumptive sentencing system, including judicial sentencing discretion. The committee discussed at length the removal of parole from the criminal sentencing system in Washington, plea bargaining, and effects of presumptive sentencing on prison population.

Carl Bianchi, Administrative Director of the Courts. Mr. Bianchi explained the misconceptions that people have regarding sentencing and actual length of time served. The interplay of statutes, good time, and parole makes a guessing game out of figuring out how long the person will be in prison and for the judges and prosecutors to figure out what kind of a sentence to give someone to make sure he is actually in prison for as long as they want him to be.

He explained there were a lot of people involved in sentencing, not just judges. Prosecutors sentence through the mechanism of plea bargaining. About 95% of our criminal cases are sentenced through plea bargaining, and plea bargaining is actually two things; i.e., it's either sentence bargaining (the prosecutor makes a recommendation on a sentence in exchange for the defendant's plea of guilty, which is not binding on the judge) or charge bargaining (the prosecutor amends or reduces the charge against the defendant, which is binding on the judge).

The Corrections Department also sentences. They sentence through the indeterminate sentence mechanism and the interplay of the Commission on Pardons and Parole where a defendant is sentenced to the penitentiary for an indeterminate term and let out by the Parole Commission.

Third, the legislature sentences through the mechanism of mandatory sentences and through its limits on the parole power. The parole function is a delegated function of the legislature which determines in many cases how long a person will be in prison before they are considered for parole.

Fourth, judges sentence. And judges have a fairly narrow range of control in the sentencing process.

Next, Mr. Bianchi gave a history of Idaho's sentencing statutes. He stated that prior to 1909 sentencing laws were of two varieties: Some crimes had a fixed minimum sentence; and some crimes had no provisions for sentences. It was left entirely to the discretion of the judges. And at this time there was no parole function.

After 1909 the first indeterminate sentencing law was adopted (I.C. 19-2513), and this state was our basic sentencing law until 1977. This statute abolishes all previous minimum sentences and explains what an indeterminate sentence is.

In 1947 the current constitutional section concerning the Board of Pardons was enacted, which gave the board the constitutional authority to grant commutations and pardons.

The legislature provided by statute that the Department of Corrections shall appoint a State Commission for Pardons and Parole, each member of which is subject to confirmation by the Senate. Then the legislature set up (I.C. 20-223) rules and regulations governing parole. The legislature delegates parole authority and responsibility to the Commission on Pardons and Parole.

In response to a question from Senator Bray, Mr. Bianchi defined commutation of a sentence as the changing of the sentence. The Commission on Pardons and Parole not only can shorten a sentence but they can, for example, change it from a fixed term to an indeterminate term. He defined parole power as shortening that part of a sentence relating to incarceration, but not actually changing the type of sentence. The important distinction is that commutation power is constitutional and cannot be limited by the legislature; parole power is statutory, and can be changed by the Legislature.

The legislature gave the state Board of Correction the power to establish rules and regulations under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole. However, the legislature set standards on this parole power. For example, no person serving a life sentence shall be eligible for release on parole until he has served at least ten years.

In 1923 a persistent violator statute was adopted. This was the first attempt by the legislature to set a mandatory minimum sentence. Mr. Bianchi then explained this didn't really work because of the wording in the statute. Different judges interpreted the meaning of the word "shall" in different ways and judges were free to suspend the sentence or alter the sentence in some way.

In 1970 the legislature passed legislation setting up mandatory minimum jail terms for drunken driving. However, one judge imposed the mandatory jail term, then

suspended that sentence. When this was appealed to the Idaho Supreme Court the Court ruled that the separation of powers prohibited the legislature from telling the courts how to sentence people.

From 1970 to 1977 the legislature did nothing more to change the sentencing statutes. However, in 1977 the legislature adopted the alternative fixed term sentence (I.C. 19-2513A). This is probably one of the most important statutes in terms of its impact that's been passed in recent years. This statute allows the judge to select an alternative fixed term sentence and set sentences for a fixed period of time not less than two years and not more than the maximum provided by law for said felony. This technically limits the parole power and delegates authority over the parole powers to the judge instead of the Commission on Pardons and Parole. This delegation of power was later upheld by the Supreme Court.

Representative Stoker inquired if there is a probation or parole period for someone that has their sentence commuted. Al Murphy, Director of Corrections, replied that if there was a person that had served two years of a fixed sentence, and the Commission on Pardons and Parole wanted to release him, they could commute him to an indeterminate sentence of two years and release him that day and he would have no parole supervision. However, if they commuted him to an indeterminate ten-year sentence, and he had served two years, he would be under parole supervision for eight more years. But parole doesn't always mean he has to be supervised. This is also left to the discretion of the Parole Commission.

Representative Speck asked Mr. Murphy if the Parole Commission could commute a sentence with conditions. Mr. Murphy replied yes, they could parole off the commutated sentence.

Senator Darrington asked what effect the power of commutation has on the judges in their sentencing? Does it have a negative effect or does it tend to make them give harsher sentences? Mr. Bianchi responded that commutation and parole powers makes a second-guessing game out of sentencing to try and figure out when the person will be released, whether he'll be paroled or commuted, and then the judge trying to structure the sentence to make sure that person actually serves the sentence he wants him to serve.

Senator Darrington continued that the legislature has tried to put some harshness into sentencing, the judges have tried to impose harsh sentences, and he feels they are both playing games with the Parole Commission who are commuting the sentences and letting those same people out of prison.

Mr. Bianchi replied that to a large extent Senator Darrington may be right, it has become a game. But on the other hand the Commission on Pardons and Parole feels they are doing their responsibility under the Constitution and are following the guidelines of the legislature.

Senator Rakozy inquired if juries were informed on what happens to a person under the particular kind of sentence they come up with. Representative Stoker replied that the jury has nothing to do with the sentencing aspect; this is left to the discretion of judges.

Senator Rakozy then asked if one judge was more lenient than another, if the sentences would be different, with the judges taking possible commutation and parole into consideration. Mr. Bianchi replied in the affirmative and added that that situation

adds other elements into the sentencing process. It's not just the number of years of a sentence, it's whether the sentence is fixed or indeterminate. An indeterminate 30-year sentence could actually turn out to be shorter than a fixed 20-year sentence.

In reply to a question by Senator Fairchild, Mr. Bianchi indicated that one thing the judges would like to see is the simplification of sentencing laws. They think we have a hodge podge of laws now, they don't understand the interplay of all statutes such as good time provisions, and it becomes a guessing game.

Also in 1977 the first enhancement statutes were adopted. They weren't called enhancements at the time but the legislature set additional sentences for the use of a firearm or a deadly weapon (I.C. 19-2520). This provides that for certain defined defenses the defendant shall receive an additional sentence of not less than three years nor more than fifteen. However, this was not a mandatory minimum on the courts because the Supreme Court had ruled that the legislature couldn't tell the courts how to sentence; and secondly, it wasn't a limit on the Parole Commission's powers because there was nothing in the statute about whether the person could be paroled. So even if the judge did add an additional ten or fifteen years, it didn't mean the Parole Commission couldn't parole that person at the same time anyway.

This led to a lot of public dissatisfaction, not only in Idaho, but all over the country. The result of this was a constitutional amendment which, for the first time, gave the legislature the authority to set mandatory minimum sentences. However, Mr. Bianchi pointed out that's all it did.

He indicated there had been discussion about the legislature setting prescriptive sentences and setting sentencing guidelines. He felt the legislature may not have the constitutional authority to set prescriptive guidelines or sentencing guidelines by statute without further amending the constitution. This will need further research if the committee decides to go in this direction.

To clarify this, Mr. Bianchi explained that the legislature has the authority to set a mandatory minimum sentence, but in terms of setting up a whole system, a matrix of factors (if the defendant is a first-time offender he gets so many years, and if it's a certain crime, he gets so many years, etc.), he's not so sure the legislature can do that without further amending the constitution.

Mandatory minimum sentences were adopted in Idaho in 1979 (I.C. 19-2520A). This statute states that for certain felonies where firearms are used, and those persons have a previous felony conviction within the last ten years, they would receive an additional mandatory minimum sentence of not less than three years and up to a maximum of fifteen years. The statute also stated this would be without eligibility for parole. Mandatory minimum statutes were enacted by about 40 other states around the country during the late 70s and early 80s.

Then in 1981 the legislature passed the next mandatory minimum penalty (I.C. 37-2739A). This statute deals with drug distribution and only applies if the defendant has been previously convicted of drug distribution within the past ten years. However, there is no mention in the statute about parole. It sets a mandatory minimum on the judge in sentencing, but does nothing about releasing the person on parole.

Also in 1981 the first enhancements that were called enhancements were enacted (I.C. 19-2520B and 19-2520C). These deal with offenses where there is either great bodily injury or repeated sex offenses, extortion, and kidnapping. Under those

circumstances the legislature said the defendant shall receive an additional sentence of five to twenty years, without eligibility for parole. However, it was not made mandatory upon the judge. Judges around the state generally treat this statute as mandatory, but technically they concede it is not mandatory. Judges have also indicated to Mr. Bianchi that this statute hasn't been used much in the last couple of years. The prosecutors feel the sentences are long enough anyway and to charge and prove an enhancement just creates additional proof problems and therefore isn't used much.

Representative McDermott pointed out that of the five crimes that are listed in the statute, four of them carry a maximum penalty of life in prison, so if a judge gives someone a fixed term of life, it doesn't make much sense to add enhancements. Mr. Bianchi agreed and said that illustrates the need for simplifying the statutes and the enhancement statute. Idaho Code 19-2520C could probably be eliminated and it would not have an impact at all on the state.

Mr. Bianchi stated that enhancements created a lot of confusion for the judiciary in several respects. First, it created problems pertaining to the burden of proof; second, the state of California had a number of court decisions that held that a person couldn't be sentenced five different ways for the same crime.

Therefore, in 1983 we adopted amendments to existing statutes that said (1) the defendant must receive notice that the prosecutor is seeking an enhanced penalty; (2) the enhancements must be charged in the original information; (3) the defendant can't be subject in more than one enhancement for the same charge. This has cleared up technical problems with the application of the enhancements.

Also in 1983 a new law was enacted to provide that it was a felony for forcible sexual penetration by use of a foreign object, punishable by imprisonment for not more than life. However, by virtue of the language of the legislation, (1) this is not a mandatory minimum; and (2) parole powers are not limited.

One of the last mandatory laws that was passed was also passed in 1983. This pertains to theft of livestock. However, the language of the legislation states that grand theft of livestock shall be punishable by a fine of $1,000 to $5,000 and the minimum fine shall not be suspended or withheld, making it a mandatory fine. Imprisonment was also provided for, but this wasn't made mandatory. But, in another section of the statute - petit theft of livestock - there is a mandatory minimum fine and a mandatory minimum jail sentence.

In 1984 the last mandatory/minimum laws were passed, pertaining to driving while drinking and driving without privileges.

Mr. Bianchi then reviewed statistics pertaining to the actual number of persons being sentenced under mandatory, fixed, and enhanced sentences. These statistics are available in the Legislative Council office upon request.

Mr. Bianchi explained that a sentence of life in prison was legally defined as a 30-year term for parole purposes. Senator Darrington inquired if this was defined by statute or by Supreme Court decision. Mr. Bianchi responded that the Idaho Supreme Court had ruled that for purposes of parole, a life sentence would be treated the same as a 30-year sentence. The legislature then amended that statute to read that one can be considered for parole on an indeterminate life sentence after ten years.

Senator Bray inquired if the constitutional amendment which was passed in 1978 pertaining to mandatory minimum sentences affected the applicability of the 1977 firearm/deadly weapon statute. Mr. Bianchi responded that the constitutional amendment did not affect any of the previous laws.

Representative McDermott asked if the statutes pertaining to great bodily harm, repeated sex offenses, etc., had not been passed, if judges would be giving longer sentences for these crimes anyway. Mr. Bianchi said yes, he didn't really feel these statutes were critical in the sentencing process. There are others the judge can use for both longer sentences and fixed sentences.

Mr. Bianchi then reviewed the purposes of sentencing and gave the following definitions:

1. Retribution - Administering punishment to offenders as retribution to society for the crime they have committed. ("Just desserts")

2. Deterrence - Deterring crime by showing potential offenders the serious consequences for committing a criminal offense.

3. Incapacitation - Protecting the public by removing offenders from the community where they might commit additional crimes.

4. Rehabilitation - Rehabilitating offenders so that they might pursue non-criminal lives.

Mr. Bianchi explained that ten or fifteen years ago rehabilitation would have been the first priority. However, now it is last in terms of theory of importance. We have gone through a huge cycle in the last 50 or 60 years because in the 1920s people thought the main purpose of prison sentences was retribution. Then through the years of 1960-1970 we thought rehabilitation was the main purpose. This was all tied in with the indeterminate-sentencing system. The pendulum has now swung back and we are talking more about deterrence and incapacitation, and more and more retribution is one of the primary goals of sentencing.

The following definitions were given by Mr. Bianchi on various terms in the sentencing process:

1. Probation - a sentence by the judge. The judge sets the conditions and it is usually an alternataive to incarceration and it is statutory.

2. Parole - occurs after the sentence. Happens after a person has been in prison for a time. The Commission on Pardons and Parole sets the conditions of release. Parole is statutory.

3. Commutation - constitutional power of Commission on Pardons and Parole. It reduces or changes the form or type of a sentence.

4. Pardons - In practice has not been applied to inmates, but is usually granted to persons who have been released from the custody of the Board of Corrections. Pardoning powers have not been used very often. It is constitutional.

5. Good Time - Applies automatically with the statutory formula depending on length of sentence (I.C. 20-101A). There is also discretionary good time which may be awarded up to five days per month. It may be taken away for misconduct. Good time is a major factor in the sentencing process.

Senator Darrington asked that good time be clarified. Al Murphy responded that on a ten-year fixed term, this is what happens when that person gets to prison:

A ten-year fixed term is 3650 days. The minute a person enters the penitentiary 1200 days are automatically deducted from that sentence. But, if the prisoner works while he is in prison, and does not refuse a job, there is an additional five days a month (600 days) deducted from his sentence.

A third part of the good time law states that inmates performing exceptionally meritorious or outstanding services under rules adopted by the state Board of Correction may be awarded a lump sum of good time. The number of days awarded may not exceed the regulatory maximum. The director of the Department of Correction may award discretionary good time up to 1200 days. So, in essence, a person coming into prison on a ten-year fixed sentence may possibly be released without parole in 912 days, or two and a half years.

6. Retained Jurisdiction - Gives the judge control over a defendant once he has been sentenced. The judge can sentence a defendant for a period of 120-180 days and retain jurisdiction for that period of time, can pull the defendant back from the Department of Corrections and put him on probation or give him some other sentence. This sentencing tool has worked out well over the years. It is statutory.

Mr. Bianchi then explained the different types of sentences. These are as follows:

1. Indeterminate - minimum and maximum incarceration set by legislature. The sentence is left to judges' discretion and the judge may suspend the entire sentence. The time limit when the defendant is eligible for parole is set by the legislature. The judges' sentence can be commuted by the Commission on Pardons and Parole.

2. Alternative Fixed Term - left to judge's discretion to select it. The maximum sentence the judge can set is the same as the indeterminate maximum set by statute. No parole is allowed. The Commission on Pardons and Parole may commute this type of sentence, and it may not be combined with an indeterminate sentence.

3. Mandatory Minimum - set by the legislature; judge sets sentence above that minimum. The judge is bound by the minimum sentence and it may not be suspended. Parole is usually not allowed but this depends on the language in the statute. The sentence can be commuted by the Commission on Pardons and Parole; no good time is allowed.

4. Enhancements - time added to base sentence. Sentences are served consecutively. The language of individual statutes determines whether they are mandatory on judges and whether they are eligible for parole. Enhancements can be commuted by Commission on Pardons and Parole.

Mr. Bianchi indicated to the committee that they should examine closely whether or not there is disparity in sentencing. He is of the opinion that if the committee gets some good reliable statistics on sentencing, it will find there really is not that much disparity in sentencing for the same crime from judge to judge and from region to region.

He indicated, however, that there are no statistics on the disparity on people whose sentences were suspended or withheld, or the disparity in prosecutors' offices on who is sentenced under amended charges. He also indicated there is disparity on who is paroled and who is not, or disparity in the way the legislature sets up the statutes. For example, the legislature has listed certain crimes (I.C. 20-223) as being eligible for parole not sooner than after they have served one-third of their sentence or five years, whichever is less. If the crime doesn't fall under one of those enumerated crimes, they are eligible for parole from the first day they enter prison. This has created disparity between one crime and another. One example of this is assault with intent to commit lewd and lascivious act upon a child. Because it's specifically listed, one would have to serve one-third of the sentence or five years; but battery with intent to commit a lewd and lascivious act upon a child, because it's not listed, carries no minimum term before a person is eligible for parole. This is disparity built into the statutes.

Two additional things Mr. Bianchi would like to have the committee discuss is the fact that disparity is not necessarily irrational. The judge will have all of the facts of the case before him, testimony of the witnesses, etc., and then he will make a decision. It is therefore rational to make a distinction between one defendant and another. Should everyone receive the same penalty regardless of their circumstances and the circumstances of the crime, or should people be treated differently? If people are treated differently, there is going to be disparity.

Second, Mr. Bianchi stated that the whole parole function should be examined. A number of states have abolished parole in recent years. Why do we have parole? Do we need parole? Do some of these people need supervision when they are released from prison? What are the statistics relating to recidivism when people are paroled? Is parole an escape valve on prison population?

Mr. Bianchi feels the committee needs to take a close look at good time. Is it a control on prison population? Is it too automatic? What happens when good time is taken away? If good time is taken away, can this be challenged in court? Should it be entirely discretionary? Should it be granted only at the end of a prison term?

Mr. Bianchi emphasized to the committee, however, that before any changes are made in the sentencing laws, a prison-impact analysis should be made. The committee needs to determine the impact the changes that are made will have on the Department of Corrections.

Mr. Bianchi indicated the judges wanted the committee to be aware of one thing: This is not a "quick fix." This committee is on a very difficult technical mission - to understand and figure out sentencing. The judges feel there is a need to simplify the sentencing statutes.

He continued that if we just take a consensus guideline - a guideline of what is already being done - we're not going to accomplish anything. If we're going to go through and make a prescriptive guideline on what sentences ought to be, it will require amending the entire criminal code. Guidelines might end up not simplifying, but making the whole sentencing system more complicated.

Senator Bray and Representative Speck concurred that we need to be more specific in what we expect from the Commission on Pardons and Parole, giving them clear signals regarding rehabilitation and retribution, but also making deterrence and incapacitation important as part of the entire system.

Senator Fairchild was of the opinion that deterrence is one of the most important aspects of the sentencing system, that people be aware of the consequences of their actions.

Al Murphy, Director, Department of Corrections. Mr. Murphy explained to the committee that he really didn't see a lot of variance in the sentences Idaho judges are giving, compared with judges nationally. And he doesn't see much disparity on sentences between Idaho judges. Statistics supporting this are available in the Legislative Council office upon request.

However, in comparing statistics for Idaho and the national average regarding the incarceration rate, Idaho is significantly lower than the national average and lower still when compared to the regional average.

He continued that where we really differ from other states is the average amount of time served on a sentence, not in the amount of sentence. These are sentences involving violent crimes. The national average of time served is 28 months; Idaho's average sentence is 81.6 months and average time served is 18.85 months.

Mr. Murphy placed emphasis on the confusion in the sentencing process. People that receive sentence enhancers are released sooner than if they didn't have the enhancers. He continued if he were being sentenced, he would rather have a ten-year fixed sentence than an eight or nine-year sentence because automatically he will do less time on the ten-year fixed sentence than on the eight or nine-year fixed sentence because of the good time formula.

On a ten-year sentence, there is a possibility of getting 25 days off for good time for every month served. On a nine-year sentence they can possibly get 21 days off per month.

Mr. Murphy is of the opinion that the legislature needs to recodify the criminal code into something that is understandable to the Department of Corrections. In other words, "Say what you mean and do what you say." He stated that because of the wording in the statutes it was possible that a person serving time for lewd and lascivious conduct stands a better chance of doing more time with less benefits than a person who uses violence in lewd and lascivious conduct.

He stated that good time creates problems for the Department of Corrections and the Commission on Pardons and Parole. He said the Commission and judges should never be concerned about space requirements at the prison. The Parole Commission should consider only if a person is safe to be released from prison. Parole should never be used as a safety valve.

The Parole Commission is also concerned with whether or not persons should be released from prison with or without parole supervision. For example, on a 10-year fixed sentence, they must decide if they should commute a persons's sentence and then parole them at 3 1/2 years which means they are under supervision for the remainder of their sentence, or if it is better to let that person serve the fixed term which means they will possibly be released on good time in 4 years, 8 months without parole supervision.

Representative Montgomery inquired if good time was an incentive for good behavior. Mr. Murphy responded that the only incentive for good behavior should be a parole by the Commission for Pardons and Parole. He continued there is absolutely no incentive to good time because it is given automatically. Anytime they try to take good time away from a person it ends up in a lawsuit.

Representative Montgomery then asked if good time were eliminated, would the current pardon and parole system be adequate? Mr. Murphy replied that if we eliminated good time and the Commission on Pardons and Parole adopted good solid parole guidelines, those guidelines not being based on the amount of time served but the risk assessment factor, then the Commission on Pardons and Parole would be a very viable program.

Senator Fairchild asked Mr. Murphy if it would be a workable approach if we keep the one-third provision, eliminate the enhancement statutes but use them as guidelines for the Parole Commission so that prisoners wouldn't be eligible for parole until they served two-thirds of a sentence, then eliminate good time and establish a record system that reports to the Parole Commission if they misbehave.

Mr. Murphy responded that this a very good idea and one that is very workable and would mesh with the elimination of good time. Mr. Murphy stated that if he had one wish from this committee, it would be the elimination of good time.

Representative Herndon asked if the Commission on Pardons and Parole followed the recommendations from the Department of Corrections regarding parole. Mr. Murphy responded that they followed those recommendations 80% of the time. The main problem the Department of Corrections has with the Parole Commission is when they make a parole decision based on the amount of time served recommending parole for somebody that is in prison.

In response to a question by Representative Herndon, Mr. Murphy stated that overcrowding at the prison is not considered by the Department of Corrections when making parole recommendations.

Senator Bray inquired when the Department of Corrections makes recommendations to the Commission on Pardons and Parole regarding parole, what part does the fact that it was a violent or nonviolent crime play in these recommendations, and how does Idaho's average on amount of actual time served compare with the national average?

Mr. Murphy responded they made more recommendations regarding nonviolent crimes. When comparing Idaho with the national average most disparity would occur on violent crimes. One example was cited where a person was sentenced by the judge to life in prison for murder. The Parole Commission reduced that to an indeterminate sentence of 20 years, and he was paroled at 12.5 years. In most states, that person would not have even been eligible for commutation until he had served 15 years. Most states make persons serve one-third of their sentence for a nonviolent crime and two-thirds for a violent crime. Idaho's average for both violent and nonviolent is one-third.

In response to a question by Representative Bayer about Mr. Murphy's objections to eliminating the Parole Commission, Mr. Murphy said that if we did eliminate the Commission it would give the Department of Corrections a system that can't be managed because there won't be enough money available to build the prison facilities that will be needed. He then gave statistics regarding the population of the prison today and what it will be five years from now.

Mr. Murphy also stated that if sentencing laws are changed so that prisoners must actually serve a larger portion of their sentences, in five years the population would go from 1,225 now to 2,516 plus, or a doubling of the population in five years. He said they are now at 130% capacity. So before any changes are made regarding sentencing and parole guidelines, the impact it will have on prison population and the availability of facilities to hold this population needs to be considered very carefully.

In response to a question by Representative Stoker, Mr. Murphy stated that federal and state court rulings have an impact on the Department of Corrections regarding conditions at the penitentiary. Some of these conditions can't be complied with because of limited facilities and soon it will come down to the fact that courts will order mass reduction in the prison population.

To make bed space available for more prisoners under minimum security, Mr. Murphy feels that many persons serving under minimum security could be supervised as easily on probation; however, there is a definite need for maximum security bed space.

Representative McDermott inquired about the possibility of a regional maximum security facility for Idaho and some surrounding states. Mr. Murphy stated it was a realistic idea; the trouble is getting everyone to agree how it should be operated. It has been tried in other states, but not with very good results.

Senator Fairchild asked if deterrence is effective in preventing crime. Mr. Murphy indicated that everyone always thinks he won't get caught. Mr. Murphy added that harsher penalties for some crimes like burglary are a deterrence; but for crimes of passion like murder or rape, he's not sure. He said it does make a difference when laws are firm and those persons know exactly what amount of time they will serve. He stated if they know they will serve an additional five years for using a gun when robbing a store, they won't carry a gun.

Mr. Murphy stated that it is most important that the committee develop a credible criminal justice system, and more important that it be understandable.

Representative Harris asked about the Department of Correction's need for greater ability for record keeping. Mr. Murphy responded they are just switching over to a data-based computer system and that will be beneficial; however, inmates make up the largest percentage of persons entering that data into the computer and therefore the data will only be as accurate as the operators of the computer.

The committee adjourned for lunch and reconvened at 1:30 p.m.

There was discussion about what action the committee should take regarding the changing of Idaho's sentencing laws. Senator Darrington and Senator Fairchild agreed that the committee should look at making those changes and then be prepared to solicit funds for the Department of Corrections for whatever additional facilities it will take to facilitate the increase in the prison population.

Representative Speck indicated the committee should work in two areas: (1) Come up with the best solutions possible to improve Idaho's criminal justice system, then (2) decide just how much the state is able to afford.

Senator Rakozy suggested that one item the committee should discuss is the possibility of private enterprise being able to handle incarceration of inmates at a less expense to the state than incarceration at the state penitentiary.

Senator Fairchild made a motion, seconded by Senator Rakozy, that the committee not consider presumptive sentencing and delete further comparisons to actual sentencing. He said that evidence has shown there really isn't disparity in judges' sentences. In response to a question by Representative Stoker, Senator Fairchild indicated his motion did not preclude an exchange of information between judges on what they are doing in different areas of the state.

Senator Fairchild withdrew his motion with the consent of the second because of a lack of a quorum, but he indicated that it would be assumed that this committee would operate on the basis set forth in his motion. This was the consensus of the members present.

Senator Darrington posed the question to the committee if it wants to get involved in the area of commutation. Senator Rakozy responded that the committee definitely should look at the area of good time.

Senator Fairchild added that he felt the Parole Commission has changed its attitude regarding commutations and parole since the Senate sent strong messages to it this last session of the legislature, and he didn't feel he could support an effort to do away with commutation. This would take an amendment to the constitution. He feels there are times when commutation of sentences is appropriate.

Representative Speck agreed with this premise and further stated that we needed to project definite criteria to the Parole Commission for their use in making parole determinations.

Senator Darrington expressed an opinion that perhaps the committee should change the criteria that is used then appointing Parole Commission members. Representative Speck voiced his agreement with this statement.

Senator Fairchild made the suggestion, and it was agreed to by all committee members present, that one item on the agenda for the next meeting should be a rewriting of the Code section pertaining to the appointment and qualifications of the Commission on Pardons and Parole. The section should give equal weight to deterrence, retribution, and rehabilitation when appointing Parole Commission candidates.

Representative Stoker indicated we must be careful we don't just change one section of the Code at a time, but must change every section of the Code dealing with this subject.

Representative McDermott thought we should have a Code search and put the entire criminal justice system into an orderly manner.

Representative Stoker proposed that the committee segregate its responsibility into the following areas: (1) Classification of offenses (crimes) in Idaho Code; (2) Sentencing guidelines for judges; and (3) Functions of Commission on Pardons and Parole and guidelines for the Commission, defining their rights in making commutations, etc. To be included in this is the appointment process of the Parole Commission and how it is set up. (4) The financial impact on the state of the other three. (Suggested by Representative Herndon.)

Representative Montgomery stated his opinion that as the committee goes through the Code sections to find discrepancies, our primary goal is simplification of the Code and considering these possibilities: (1) The elimination of good time; (2) Elimination of enhancements, etc., to set the minimum number of different kinds of sentences that can be imposed and still get the job done.

Representative Stoker stated he felt that his suggestion of classifying crimes would automatically take care of enhancements.

Representative Stoker made a motion that sections of the Code pertaining to good time be repealed, seconded by Representative Bayer.

Representative Montgomery indicated that before the committee take final action pertaining to good time or other sections of the Code, the committee should hear testimony from judges and other experts and consider the impact of such action.

Senator Fairchild agreed with Representative Montgomery and said that at this point the committee needs to define which areas need particular emphasis and how we are going to approach the solutions to those problem areas.

Representative Stoker said he felt it was the consensus of the committee that good time isn't doing our system any good, that our system should be structured so that an inmate isn't automatically given good time but has to earn it.

Representative Stoker withdrew his motion with the consent of his second, but it was the consensus of the committee members present that the topic of good time be placed on the agenda of the next meeting with high priority emphasis.

Representative Montgomery made the suggestion that the committee divide into subcommittees to work on the various areas of responsibility that the committee has decided upon.

After much discussion it was decided that the committee would break into two subcommittees that deal with (1) the pulling together of the sections of the Idaho Code dealing with the criminal justice system, the classification of crimes, guidelines for judges and sentencing criteria; and (2) the area of pardons and parole.

The next meeting will include a morning session whereby the committee will receive testimony from judges, personnel from the attorney general's office, and other interested professionals; and an afternoon session of breaking into two subcommittees with persons with expertise in those areas meeting with the subcommittees to make recommended changes to report back to the full committee at the end of the day.

The next meeting of the committee was scheduled for June 20, 1985.

The meeting adjourned at 3:00 p.m.

APPENDIX B

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

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

Others present were Jeff Shinn, Division of Financial Management; Ray Stark, Legislative Budget Office; Gary M. Haman, Douglas D. Kramer, Ed Lodge, and Peter D. McDermott, District Judges; Carl Bianchi, Administrative Director of the Courts; Pat Kole and Marc Haws, Deputies Attorney General; Olivia Craven and Tony Skoro, Parole Commission; and Representatives Forrey and Fields.

A motion was made by Senator Rydalch, seconded by Representative Speck, that the minutes of the last meeting be approved as distributed. The motion carried unanimously.

Carl Bianchi, Administrative Director of the Courts. Mr. Bianchi gave a brief update on statistics regarding actual use of mandatory, fixed and enhanced sentences. He indicated that the one statute that has made the biggest impact on sentences was the 1977 statute allowing alternative fixed terms in the discretion of the judge. He stated there has been a 117% increase in the number of defendants incarcerated under Section 19-2531A since 1981.

Douglas D. Kramer, District Judge. Judge Kramer stated that great care should be exercised before Idaho adopts a plan that totally relegates individuals to a social security number, and frees judges from making studied and informed judgments under existing guidelines. He stated a system must be devised that discourages crime and protects potential victims and he does not feel that presumptive sentencing is the answer to the problem.

Judge Kramer stated that unless the legislature intends to alter its philosophy with respect to sentencing, Code provisions should remain essentially intact. He said they are good guidelines for the judiciary which respect the independence of the judiciary. Each crime and each defendant must be treated separately. This includes victims as well. The basic purpose of sentencing, in addition to punishing the defendant, is to protect society and deter crime.

Judge Kramer indicated that a careful analysis of sentencing would reveal that there is not as much disparity as claimed. The public perceives this as a problem, but no law, short of absolute mandatory sentences, will correct this perception. Judge Kramer feels that absolute mandatory sentencing can be one of the most inhuman acts of intolerance that society can impose on its fellow human beings.

He continued that if there is disparity in sentencing, it most likely is caused by sentencing statutes that are passed. In 1971 the Idaho legislature adopted a new criminal code which adopted many reforms and clarified many problems. However, it was repealed the next session. Judge Kramer suggests this committee review the work that was done in 1971.

Judge Kramer stated that the Idaho Constitution created the State Board of Corrections and gives it the constitutional power to control the penitentiaries and adult probation and parole with powers and duties as may be prescribed by law. It is his opinion that having a constitutional Board of Corrections rather than a statutory board puts shackles on the legislative and judicial branches of government. He stated that until this section is repealed by Constitutional amendment, a stumbling block is in the way of "truth-in-sentencing." Rules should be prescribed for the Board of Corrections to follow concerning pardons and probation, and commutations should be left to the governor.

Judge Kramer feels that enhancement statutes leave the degree of crime strictly in the hands of the prosecutor. If the prosecutor does not charge the defendant with an act creating the enhancement penalty, the court cannot impose the penalty. He feels indeterminate sentencing is good, but is inconsistent with enhancement statutes. Enhancement statutes create more plea-bargaining and less truth-in-sentencing.

On the subject of good time, Judge Kramer noted the inconsistencies in the good time statutes. Idaho Code §20-261 permits credit for good time in county jails, but only on the recommendation of the prosecutor and the sheriff; the Court has no say. He feels this puts all the power in the prosecuting attorneys.

The section of the Code concerning good time at the state penitentiary has too many variables in Judge Kramer's opinion. The result is a game and judges really have no idea how much time a prisoner will actually serve when he is sentenced. He feels either the Board or the legislature should determine good time.

Judge Kramer stated that plea bargaining is a necessary thing to reduce court delay. Often defendants are charged with greater crimes to encourage guilty pleas to lesser crimes. Often times, sentence bargaining is involved with revelation by the defendant as to others involved in crime. More bluntly, cooperation with authorities may deter other crimes. To outlaw plea bargaining leaves the courts out of a good part of the system. It would put the police and prosecutor in charge of the ultimate sentence by giving them total discretion regarding the ultimate degree of the crime.

Judge Kramer stated that Idaho has adopted the Uniform Post Conviction Act. He feels it duplicates the Constitutional right of Habeas Corpus. Judge Kramer indicated he did not agree with this act and feels that defendants are constitutionally guaranteed "speedy trials" but not "speedy appeals." He stated the public perception problem does not exist in the trial courts as much as it does in the proceedings after trial.

Judge Kramer continued that thought should be given to permit the courts to levy a fine in every criminal sentencing whether specifically provided or not. In our capitalistic system this is sometimes a greater punishment than incarceration.

Representative Speck asked Judge Kramer if he had any problems with rearranging guidelines so that rehabilitation is not necessarily the top priority when determining length of sentence. Judge Kramer indicated that that statute had been a great help to him in determining what the legislature expects of judges in posing sentences. He emphasized that the legislature leave the judiciary the discretion of alternative sentencing plans. Rehabilitation takes into account alternative sentencing programs such as community service, helping senior citizens, etc. It may humiliate that defendant and benefit someone in the community at a savings to the taxpayer.

Judge Kramer presented the committee a list of sentencing problems and inconsistencies currently in the Idaho Code. The list is available for review at the Legislative Council.

Gary Haman, District Judge. Judge Haman stated that the committee needs to take a very close look at the criminal statutes so that there is uniformity in the sentencing scheme.

Judge Haman stated the committee should examine the uniform criminal code that was adopted in 1971, and then repealed the following year. He said there were some things in that code that were not good, but that there were some good things in it, and one thing that would have come out of that law was uniformity in the sentencing scheme.

Judge Haman cautioned the committee on the definition of crimes. He stated that over the years, when crimes are defined, certain words and phrases become "words and phrases of art" - they mean things to lawyers and judges that they wouldn't mean to lay persons. If the definitions are changed in the statutes, in effect what happens is that all the body of law that has come down over the years by case law decisions is eliminated. These are not just decisions from the Idaho Supreme Court or other high appellate courts in the United States, but laws that go back to the common law courts of England.

Judge Haman said that he is of the opinion that felonies should be classified into categories. Perhaps the same type of scheme could be adopted for misdemeanors as well. Then the statutes could be written so that different classes of crimes would receive different amounts of time when sentenced.

Judge Haman said judges need to know just exactly how much time a defendant will serve when he is sentenced. There needs to be "truth in sentencing." He said he doesn't have any philosophical objection to good time per se, if it is just exactly that, "good time." He does not feel there should be automatic good time. He feels there needs to be some form of commutation available but he feels the commutation powers that are now there are being abused. He agrees with Judge Kramer that the commutation power needs to be tightened up.

Judge Haman stated that now judges can retain jurisdiction over a defendant for up to 180 days. He stated that retained jurisdiction is an effective tool and should be kept in the statutes. He suggests that judges should retain jurisdiction at all times.

Judge Haman stated he didn't think there was sentencing disparities in the state. He also stated he was opposed to presumptive sentencing because he feels each case needs to be treated separately. He said that judges get a certain feeling about a defendant just from talking with them and dealing with them face to face.

Edward Lodge, District Judge. Judge Lodge stated it is very important to allow judges to have discretion in the sentencing process because each case is different and the judge has a complete history on the facts of the case, the defendant and the victim and he can evaluate the pros and cons to be considered in the various sentencing philosophies. He stated a judge is in a better position to do this than the legislature, not because he or she is unique or more intelligent, but because the facts are before the court at the time of sentencing. To take discretion away from the court does not eliminate discretion or disparity in the outcome of a case, but merely shifts this decision-making process away from an impartial tribunal back to the prosecuting attorney's office. There it is not only subjected to the political pressures of the office, but things go on behind the scenes where it is not open to public scrutiny.

Judge Lodge stated that when we attempt to arbitrarily eliminate what may appear to be a disparity by presumptive sentencing, or mandate certain prescriptive guidelines without knowing the facts, or impose criteria within a structured format to be followed as they have tried in certain states (California particularly), the record shows that the number of appeals goes up dramatically because you build into the system automatic grounds for disagreement.

Judge Lodge continued that it is most important that there be honesty in sentencing. The system must be credible and understandable, not only to the people involved in the system, but to the public. He stated that much of the concern over what is alleged to be disparity in sentencing or abuse of judicial power has come about because of a distortion of the facts by the press or lack of responsibility for accuracy in their reporting.

Judge Lodge indicated that judges must weave their way through the moral claims of society on one hand and the legal complexities of the law on the other, and still try to individualize the sentence to meet constitutional mandates. Additional guidelines and criteria only tend to put the court in a straight jacket and limit the court's discretion. What the courts really need are available sentencing alternatives. One example of these alternatives is withheld judgments and the 120-day program. These are a valuable tool for the court. The 120-day program allows the court to have a young offender see the penitentiary firsthand and yet escape the roadblocks of a felony conviction.

Judge Lodge stated it was his opinion the indeterminate sentence needs to be reevaluated, not necessarily with the idea of eliminating it, but making it more honest and credible. The sentencing by courts and the function of the Parole Board should be totally separated. He stated that the length of parole should be decided on the basis of the defendant's performance in prison and the nature of the crime, subject to limitations imposed by the legislature, but without regard to the sentence imposed by the court. Parole should not be determined by what is left over in the sentence by the court.

Judge Lodge is of the opinion that under our present system the indeterminate sentence is abused by some judges by passing the buck to the Parole Board and impressing the public with a lengthy sentence. Except for the habitual criminal or the person you are warehousing, lengthy sentences are contrary to the best interests of society and the defendant. They often cause the person to lose their family, they are expensive and make a person's training obsolete, and they destroy any positive self-image a defendant may have had.

Judge Lodge stated that good time in the manner in which it is now allowed is wrong. Convicts thrive on something for nothing, but it is totally contrary to what we are trying to teach them. He stated that many judges were unaware of the effects good time has on a sentence. He feels good time should not be given automatically; it should be given on merit only.

Judge Lodge continued that enhancements have primarily been a plea bargaining tool rather than of any real assistance to the Court as punishment. The underlying charge has generally been more than adequate for the length of sentence necessary. It also has resulted in commutation hearings because of the restrictions placed on prisoners in prison serving consecutive sentences.

In response to a question by Senator Rakozy, Judge Lodge stated that he would prefer to retain jurisdiction over a defendant in the manner he now does; and would not like to retain jurisdiction over a defendant throughout the period of time of his sentence.

Judge Lodge submitted written comments to the committee. The comments are available for review at the Legislative Council.

Peter McDermott, District Judge. Judge McDermott indicated he didn't think there was much disparity in sentencing in Idaho. But judges need discretion in sentencing because each case is different. One problem judges have in Idaho is that they really don't know how long a person is actually going to spend in prison when he is sentenced. Sentencing has become a game. Judge McDermott also feels good time, the way it is awarded now, just adds to that game. He stated that good time should be just that, "good" time.

Judge McDermott feels, on an indeterminate sentence, no matter how long the sentence is, a certain percentage of that sentence must be served before a prisoner is eligible for parole. It could be 30%, 40%, or 50%. But at least when a district judge is sentencing someone, he'll know the minimum amount of time that individual will serve. Then that person should serve the remainder of his sentence on parole. He would have no objections in limiting the amount of time they spend on parole, but feels the Parole Board should retain jurisdiction for a period of time over each person released from prison if they have not served their entire sentence.

Judge McDermott stated there is no rehabilitation in the prisons; prisoners are just being warehoused. And some individuals do not belong there. They end up being worse than they were before they were sent to prison. Judge McDermott recommends there be a maximum security prison in Idaho.

Judge McDermott continued that taxpayers need to know how much it costs to keep a person in prison. If the public demands mandatory minimum sentences, they must be informed of the cost. He feels the sentencing guidelines are good as they are now.

One other suggestion Judge McDermott offered was that he would like to see legislation enacted that would provide that as a condition of probation an individual would have to serve a specified amount of community service projects; picking up trash, mending streets, etc.

In response to a question by Representative Bayer, Judge McDermott stated he would not want to retain jurisdiction over a defendant till the end of his sentence; he indicated it would end up being an absolute quagmire. Defendants would be continuously filing motions to have the judge reduce the sentence. He feels the Board of Corrections and the Parole Board are in a better position than the judge to know how the prisoner is doing in prison.

Regarding sentence enhancements, Judge McDermott feels if an individual is sentenced to a long prison term with an additional enhancement sentence to be served consecutively, the Parole Board should commute the enhancement sentence and not the longer sentence. At present, the Board is doing just the opposite

Olivia Craven, Executive Secretary, Commission on Pardons and Parole. Ms. Craven reviewed the makeup of the Commission, explained how often the Commission meets, and explained how cases are reviewed for parole consideration. A copy of the Policies and Procedures of the Commission for Pardons and Parole is available for review at the Legislative Council.

Ms. Craven explained how an inmate is interviewed and how their hearings are scheduled before the Commission. She reviewed the list of persons that are notified

of parole hearings; i.e., county prosecutors, judges, sheriffs, chiefs of police, Department of Correction employees to allow opportunity for input. These same persons are notified of the action taken following a hearing.

Ms. Craven reviewed the criteria the Commission considers when considering a parole: The crime, the seriousness of the crime, aggravation or mitigation of the crime, the inmate's criminal history, failure or success at past parole hearings, their institutional adjustment, including their ability to conform to established rules and procedures, etc. Also considered in the strength and stability of a proposed parole plan are job or maintenance prospects, care, and an adequate residence.

Ms. Craven explained the involvement of parole officers in the parole process. They check out the residence and job and any treatment program that is outlined. The parole officer decides whether to accept or reject the person on parole. The Commission will not release anyone on parole until the parole officer has investigated the case.

Ms. Craven also reviewed her role in the parole process. She provides all the material to the Commission members and conducts preliminary interviews with the inmate. Ms. Craven plays an important role in the parole process, making decisions, conducting hearings, etc., that do not go through the Parole Commission.

Ms. Craven also explained how a parole is revoked, and how a person is discharged from a parole.

Ms. Craven then explained commutation hearings. Commutation powers are given to the Parole Commission by the state Constitution. Commutations are decided by the entire five-member Commission. She also explained the process involved in an application and subsequent hearing for a pardon.

Ms. Craven said they are in the process of trying to gain accreditation by the American Correctional Association. She thinks it is important because it brings them in line with proven procedures that other commissions have adopted. The whole Corrections Department wants accreditation. Most things are in line with the ACA standards now. There are a few policies that need to be changed.

In response to a question from Representative Bayer, Ms. Craven indicated she thinks Idaho should have a maximum security prison.

Ms. Craven stated that the Parole Commission has a policy and procedure manual which gives all the policies and procedures the Parole Commission follows in the parole process.

Representative Sorensen stated his opinion that it is interesting to note the imbalance of expertise in the criminal justice system. At the top end we have prosecutors who are attorneys, judges who have excellent qualifications, correctional people who are professionals, and it comes down to a system of five part-time commissioners and one individual that has been with the Commission for a year who have the power to commute, change determinate and indeterminate sentences, and have pardoning powers. He feels this is the most deplorable discrepancy he could ever imagine existing. He feels the weak link in the system is with the Parole Commission. He doesn't feel it is entirely their fault because of monetary situations, staffing situations, etc.

Ms. Craven stated that even though she has only been with the Commission for one year she has been in the corrections field for twelve years. Each member of the Commission is a professional in their own right; one having been in law enforcement for 27 years, two are attorneys, one a college president, and one a successful farmer.

The next meeting was scheduled for Thursday, July 25, 1985.

Work Session on Pardons and Parole
June 20, 1985
1:15 p.m.
House Caucus Room

The work session was called to order at 1:15 p.m. by Chairman Senator Fairchild. Other members present were Senators Bray, Rakozy, and Darrington; and Representatives Sorensen, Keeton, Speck, Crane, and Herndon. Staff present were Nugent and Wood.

There was discussion from each member on what the main actions of this work session were to be. One of the main areas to be considered is good time. The main problem caused by good time is the way the statute is worded. It makes good time something the inmates expect and feel they are entitled to. The courts have been swamped with court cases from inmates because corrections personnel have attempted to take some good time away from the inmates. The burden of proof is on the Department of Corrections to be able to take good time away from an inmate. The statute should be changed to put the burden of proof on the inmate so that he must prove the director was wrong in taking away his good time.

Another item to be considered and cleared up about good time is the fact that the longer sentence a person receives and the more serious his crime is entitles him to more good time.

Some members indicated they felt good time should be eliminated. They felt the possibility of parole should be the "light at the end of the tunnel" for inmates that want to get out of prison. If they don't behave while in prison, they aren't eligible for parole. It was brought out that to abolish good time would probably increase the prison population about 50% in the next two years. Also the abolishment of good time would eliminate a management tool of the Department of Corrections.

There was consensus that there should be some logic to the awarding of good time. It should be earned and not a right. Earned good time should be a tool of the Department of Corrections to control the inmates within the institution. The criteria for parole should have nothing to do with past behavior; it has to do with their fitness to survive back out in society.

Pat Kole, Deputy Attorney General, suggested that before legislation is drafted changing the good time statutes, copies of statutes regarding good time should be acquired from other states so that we can draft the best legislation possible. He also stated that if we do modify the good time statutes, we need to decide what will happen to persons already serving sentences at the prison. This information will be presented to staff so that draft legislation can be prepared. The members felt that any proposed legislation should be reviewed by Al Murphy prior to discussion by the committee.

Senator Fairchild stated he felt that sentence enhancements are causing more plea bargaining, case law problems, appeal problems, and problems for the Pardons and Parole Commission. He continued that it is his opinion that enhancements should be abolished so that there isn't the problem at the prosecutors' level; there isn't the burden of proof in a trial. He said we should define those crimes, legislate policy, and give guidelines to the Pardons and Parole Commission that if a person has done the type of a crime for a sentence enhancement, they are not eligible for parole until two-thirds of their sentence has been served.

The members felt that crimes should be categorized and certain sentences should be given for each category of crime. Then a percentage of their sentence, based on the category of crime, would have to be served before they are eligible for parole.

Pat Kole stated that prosecutors feel they can file charges on an enhancement-type of charge and get a plea bargain to the underlying charge; then the enhancement can be dismissed. This is a tool that prosecuting attorneys make a lot of use of and he doesn't know what their reaction will be to losing that tool.

Mr. Kole also recommended that we not abolish the sentencing enhancement statute regarding the habitual offender. This statute is used consistently by prosecuting attorneys around the state. There has not been a problem in using this statute in the past.

In response to a question by Representative Sorensen, Mr. Kole explained that felonies could be classified into three categories. The percentage of sentence a prisoner would have to serve before being eligible for parole would depend on the total amount of sentence. For example:

Class I	10-15 years to life	66 2/3%
Class II	5-10 years	50%
Class III	0-5 years	33 1/3%

Representative Speck stated that in order to put credibility into the system, it must be set up so that people know the minimum amount of time that person will serve.

Senator Fairchild stated that putting crimes into categories, Class I being a more serious crime than Class III, could serve the same purpose as enhancements.

Marc Haws, Deputy Attorney General, stated his opinion that if we pursue this approach too far we will end up coming right back to where we are right now. When we try to make sentences uniform, a lot of frustration is created for judges who have constitutional obligations to tailor those sentences to the individual offender. So when they try to tailor those to the individual offender and take into consideration the particular facts of the crime, some criminals within a category, for example, first degree burglary, deserve to get more time than others who commit first degree burglary. Mr. Haws doesn't think you can categorize and say, "A Class I felony is first degree burglary, Anybody that commits that crime is going to get 10 years to life, and have to serve 66 2/3% of that sentence." It has to be taken into account the individual circumstances. He continued that you can't entirely make sentences uniform for a crime. The facts of how that crime was committed and the identity of the person who committed the crime, his prior record, etc., have a lot to do with the extent with which he should be punished.

Senator Darrington said the way the categories are set up does not take discretion away from the judges. Ten years to life for a Class I crime, or 5-10 years for a Class II crime, gives judges a lot of discretion in sentencing.

Senator Fairchild stated that he agrees with Mr. Haws but he feels this categorization would give directions and guidelines to the Parole Commission.

Representative Speck indicated that he felt judges were asking for more discretion in sentencing and the legislature needs to be very careful about limiting judges' discretion.

Representative Sorensen asked Representative Speck what he would like to do with sentence enhancements. Representative Speck said his quarrel with sentence enhancements is not because it promotes plea bargaining - he is a great advocate of plea bargaining. He continued that some enhancements are good; they are being utilized and should be kept. Others should be abolished. We need to look at each one individually.

Senator Fairchild said the message we are trying to get to the Pardons and Parole Commission is that if a person has an enhancement sentence, we don't want his original sentence commuted and then parole him on his enhancement sentence.

Senator Fairchild stated that commutations play an important role in the criminal justice system, but feels that power has been greatly abused.

Representative Sorensen said he is of the opinion that the commutation power should be removed from the Pardons and Parole Commission and placed in the executive branch of government. Representative Keeton and Senator Darrington agreed with Representative Sorensen. Senator Fairchild stated there could be political ramifications for the executive branch and political decisions could be made in commutations.

Mr. Skoro said he felt the Pardons and Parole Commission has entirely too much power and Ms. Craven stated the Pardons and Parole Commission would not be unhappy if they lost commutation powers. She continued that in those states that puts commutation powers in the executive branch, the parole commission investigates and makes recommendations to the governor before he makes the final decision.

Senator Fairchild stated that if and when there comes a time that the constitution is amended to change commutation powers, he would like a message to be sent to the Pardons and Parole Commission in the meantime that commutation power be used sparingly, and if and when it is used, he would like to have it reported to the legislature.

Senator Fairchild stated he felt the Pardons and Parole Commission should be more separated from the Board of Correction - because the Pardons and Parole Commission is subject to the Board of Correction's budget process, using their facilities and personnel. He is contemplating legislation so the Pardons and Parole Commission members are appointed directly by the governor and not the Board of Correction. Staff was directed to prepare draft legislation on qualifications and appointment of commission members to be presented at the next meeting.

In response to a question by Senator Fairchild, Ms. Craven stated that most of the commission members were in favor of adopting conflict of interest policy and procedure that have already been established by the Department of Correction. Senator Fairchild stated he would like to see those policies adopted formally by the Pardons and Parole Commission and reviewed either by this interim committee or the germane committee of the legislature during the next legislative session.

It was the consensus of the members that the reasons for sentencing should be realigned, if necessary, to determine if the main purpose of sentencing is retribution, deterrence, incapaciatation, or rehabilitation. Senator Bray stated that before we make the decision to build a maximum security prison, we need to think about alternatives to prison. She said that one judge stated that a fine would hurt a person a lot more than prison.

Representative Keeton stated one alternative we should think about is a method they use in Europe - house arrest. Persons are sentenced to their house for a period of

time, for example, six months, and if they do leave the premises, they are sent to prison. Representative Speck stated that also while they are in house arrest, they must pay back the state the cost of prosecution, etc. Ms. Craven stated this concept is used somewhat now and is called intensive supervision, and it is very successful. Some states use monitors that are placed on people to keep probation and parole officers informed of their whereabouts.

The work session adjourned at 3:25 p.m.

APPENDIX C

Legislative Council
Code Revision Working Group
Committee on Criminal Sentencing
Speaker's Office, Statehouse
Boise, Idaho
June 20, 1985

MINUTES

The working group meeting was called to order at 1:25 p.m. by the Co-Chairman, Representative Harris. Members present were Senator Rydalch and Representatives Bayer, McDermott, Montgomery, Stoker and Keeton. Senator Marley was absent. Judge Gary Haman and Marc Haws, Attorney General's office, also attended the meeting. Staff present were Bianchi, Hodge and Cory.

Representative Harris stated that they could talk about the scope of this working group, or hear from staff regarding specific recommendations.

Representative Stoker said they should address scope first so "we know where we're going" and after that get input in areas to focus on that would be helpful to us; otherwise we generalize too much. Representative Harris asked for thoughts on four or five main target areas. Representative Stoker said his understanding of the working group's portion was to first deal with the criminal code itself, what things are charge offenses, felony and misdemeanor, and the penalties that relate to those offenses. His feeling was they need to develop some kind of guideline to plug all these categories into. There is an overwhelming amount of material pertaining to criminal offenses, but some offenses covered in the Code could be done away with, such as polygamy.

Co-Chairman Harris said he thinks there are large areas that can be excluded for now. He asked Representative McDermott to explain how the Code search which she helped push to have done can be used. Representative McDermott said she is delighted the Code search has been made and hopes all criminal provisions have been listed. She mentioned that Judge Kramer brought out the fact there are little laws that clutter up the Code. If you incarcerate people, the public is entitled to know when conduct in which they are engaging can subject them to jail. This is not unreasonable, and she thinks it should all be in Title 18, which is the criminal code title. Representative McDermott said, "When there is some kind of behavior which we desire to curtail, and I've been as guilty of it as many other legislators, rather than sitting down and addressing a penalty and structuring the behavior, we say let's make it a misdemeanor." Then we get outraged constituents because some of these "crimes" most people don't consider criminal, but civil, and suddenly their next door neighbor or partner is charged with a crime. This is true more in areas of misdemeanors. We cannot go through all this in one afternoon. We need time to look at it. It was really helpful to hear from the judges that sometimes we succumb to political pressure and think we are being helpful, but by what we're doing we sometimes accomplish precisely the opposite from the objective we desired to accomplish. "I really think the time has come for a general review of the criminal code. I don't know if we want to go to grading felonies like A, B, C or D -- crimes against people could be one grade, crimes against property another." Representative McDermott added that she thought they rejected the categorization when they did the Criminal Code revision in 1971. Mr. Bianchi said they rejected the idea of just going straight presumptive. Representative McDermott commented that more states have gone to certain classes of felonies carrying certain sentences. I think

we could solve the fears of the public by reviewing these statutes.

Co-Chairman Harris asked a question of both Representative Stoker and Representative McDermott. "Can we make some exclusions here of areas we won't touch, or specify areas that we will give our attention, to come up with a working list at the start?"

Representative McDermott said it will give us a chance to check the Code sections, one useful thing the committee can do, but it will take some time to study. She expressed appreciation for staff going through this. She noted one example, burglary, and personally thinks that any time you are in an individual's house, that is a crime against a person. It may be a different philosophy, but to her being in someone's home is much more dangerous and serious than robbing her law office for instance, or a store, at night. Over the years we have allowed different interest groups to come in and we have turned shoplifting into a 15-year felony. There are other kinds of things that don't have the same kind of penalty. The public wonders what we are doing.

Co-Chairman Harris asked about using the time until the next meeting to go through the Code search and develop a pattern of the areas they want to look at. Representative Stoker said he still thinks they should have some kind of guidelines to approach this and, in his opinion, a classification program may be the best way to handle it. "We talk about levels of offense, but we're really talking about levels of penalty more than levels of offense." If we could get that into a group we are all satisfied with and could individually start plugging into those general areas the offenses we believe should be in that category. The difficulty is it becomes a somewhat monumental task. If you want to do away with misdemeanors and not consider them at first, it might go a lot faster, and then we could just consider felonies, or consider misdemeanors as a follow-up to the felonies. That is just a thought. We need guidelines before studying it; otherwise we will all go in different directions.

Senator Rydalch asked if it wouldn't be very easy to take this list and divide it and categorize or alphabetize it. She noted at the morning session Judge Haman suggested the idea of classifying. Senator Rydalch said they have to get it manageable and workable, so they can break it down and classify or group it. Co-Chairman Harris asked if there were any subgroups or categories that occurred to Mr. Hodge in the preparation of the list. Mr. Hodge said no, there was too much variability in the statutes.

Representative McDermott asked Judge Haman, "In the states that have developed categorization of felonies, such as Class A, assuming this would be for very serious crimes against people, is it by crime or is it just by penalties?" Judge Haman said he doesn't practice in those states but basically it just seems logical that other than what you set aside for consideration of death penalties, you are looking at a spectrum of 0 to 30 years, and to put it into say four categories, it would divide that 30 years and simplify things greatly. As he recalls, the old Uniform Criminal Act or Criminal Code was basically divided into crimes against persons vs. crimes against property. "I don't really recall whether it was adopted as Class A, B, C, or Class 1, 2, 3 felonies, but for beginners, you might want to start looking at this voluminous list. For example, Section 26-1205, Burglary of a bank, obviously part of the banking code. It's a felony, obviously a 5-year penalty. If you're going

to burglarize something, "burgle" a bank and not a car. You might want to go through here and take a look at some of these funny little things that are subject to deletion or repeal, such as Section 18-3311, Keeping gunpowder or explosives in towns. I suspect there are a lot of hand loaders running around that don't realize they might be violating the law.

Representative Stoker said another thing that might help in the development of our approach to this, like Judge Haman said, you get a sentence for a certain length of years. You really don't need a sentence enhancer, it should be built into the offense itself as to what grade or classification or level of seriousness. You shouldn't need a sentence enhancer to do that.

Mr. Bianchi said you have to ask yourself how is this classification adjusted for subsequent crime, such as a Class B felony by a persistent violator. There must be some provision in these states to upgrade if it is a subsequent offense. Representative McDermott said she thinks on a third-time offender, most states have that. Maybe they just make that a separate crime.

Representative Stoker said one of the problems he sees is the judge starts relying on the prosecutor, and one guy will get a habitual filed against him because his attorney doesn't play ball with the prosecutor, so he gets the habitual. The next guy who's willing to deal, doesn't get the habitual, so that says to me it shouldn't be done by the prosecutor but by the judge. He should make the decision on whether an enhancement comes into play on prior offenses. It should be based on whether they put the language in the information. I realize he's conscious of the fact there are prior offenses and a philosophy should be developed on how that should be done. That's something that we have to deal with too. Co-Chairman Harris said he and Senator Fairchild agreed both subgroups should look at enhancements.

Representative McDermott said after listening to the judges, plus her experience in the system, those enhancers have become counterproductive to what the Legislature originally intended. I don't know of one district judge who doesn't give prison time to anyone who uses a firearm in the commission of a crime, even if it is the first offense. I think sentencing flexibility can be built in. The judges today gave us good ideas. Representative McDermott said she would like to go back through and get rid of the sentence enhancers in the Code and get that flexibility in the sentencing system, whether you do classification or within the parameters of the sentence. If we have time to do a good classification and build it into the system, you're going to create a better system. Representative McDermott felt most would agree that "good time" really has to be dramatically and substantially changed in the way it is administered. Perhaps if we required a minimum amount of time to be served, even on an indeterminate sentence; that way a certain amount of time would have to be served. It would be a very fair trade-off and we may have the constitutional authority if that's in the arena of the mandatory minimums. We could do our mandatory minimums that way.

Representative Stoker discussed the habitual offender provision. It seems if we categorized the offenses as class 1, 2 or 3 or 4, or however we're going to do it, you could simply add language to the Code, if it is a second or third offense in a certain period of time, you will increase the penalty by "x" amount of years. You could blanket-cover all felonies by doing something like that and still deal with the greater offenses -- just make it a part of

sentencing. If it appears a guy has prior convictions and that's not reduced, the additional penalty will be potentially available within a given sentence.

Representative McDermott asked Judge Haman if it was not in the statutory criteria now. Judge Haman said it is as far as discretion. He thinks that every judge places great weight on a prior record. A different situation exists when you are dealing with a defendant with no prior record or a traffic violation or two than when you see, in the last five or ten years, two or three burglaries and grand theft entries. You know you're dealing with a whole different person. The same goes with a lot of the alcohol-related offenses and there are many more besides just "driving under the influence," because alcohol abuse leads to a lot of other things. If you see two, three or four DUI's cropping up within the last five years, you know you are dealing with an alcoholic. That prior record is really crucial. It makes a great difference in the sentence.

Mr. Bianchi said in 1971 Idaho had set up degrees of felonies and misdemeanors. For example, they classified felonies in the first, second and third degrees. With respect to both fines and imprisonment, they set up categories separately. There were degrees of misdemeanors also. They did the same sort of thing on the sentences. The other thing they did, they have penalties for sentences. If that person was sentenced to imprisonment for a felony, ordinary terms, and then they have something called sentencing to imprisonment for a felony, extended terms. Apparently that's where they get into the persistent violator. They upgrade the amount of the sentence, and then they say when an extended term can be imposed for a felony, when a defendant is a persistent offender and his commitment for an extended term is necessary for the protection of the public. Mr. Bianchi said an awful lot of this bill explains the burdens of proof, the standards, what is intent, what is commission of a crime, all the stuff that is case law. Enactment of this would wipe out about 150 years of case law. It would be a disaster to enact something like that. Representative McDermott said she served on the committee, and at the time it was put in at the request of about two dozen prosecutors who then turned around and panned it. Co-Chairman Harris asked if the committee feels this is a guideline to start from. Representative Stoker said a copy of the Code that was enacted would be most helpful to refer to as a resource if nothing else. Mr. Bianchi asked if he meant the whole thing or just that section, and Representative Stoker said the whole thing.

Representative McDermott said that wasn't the "model code." The one that was finally enacted was the one from an interim committee that had worked on it for at least two years. There were statewide meetings with the Bar Association, the courts and the public, where the legislative committee went around gathering public input. The final draft that ended up in the Code was a result of those public hearings, so it isn't really a "model code", per se. We have since modernized some of the crimes, even better than they had in the 1971 act. Judge Haman said it was a whole redraft of Titles 18 and 19.

Representative Bayer asked Judge Haman how much weight they put into case law. The Judge responded, "Sometimes an awful lot." Representative Bayer asked the Judge if he could give one or two examples of where common law was relied upon. Judge Haman said when things are defined in the law such as presumption of innocence beyond a reasonable doubt, these phrases have come down to us from English common law and have been incorporated into our criminal law for

literally hundreds of years. They have been subject to interpretation by literally hundreds of courts in hundreds of decisions. They provide a framework, a background, that you can go back and look at the reasoning of why it was interpreted in this particular fashion, to be applicable or not applicable. Judge Haman said he fears this framework being thrown out. There are all kinds of things in the law that become words or phrases that we call "term of art." They mean things totally different to lawyers and judges than they might to somebody on the street. In burglary law, we interpret "curtilage" to define that area around a person's dwelling house within which it is possible to commit a burglary and that's the boundary. People today don't use the term "curtilage" very often. That term comes up in search and seizure questions. Does a person have a reasonable expectation of privacy, within the curtilage, there's that boundary of law that says today he does, beyond it he doesn't, it's an open field. Those are the kinds of things that I fear being thrown out if we start tampering with definitions. That's why, frankly, the prosecutors got up in arms and a lot of us judges because we were caught napping, maybe because of our own fault. We did not understand what had happened until after the fact. That was the main objection. It wasn't just prosecutors, it was the judges in the same boat.

Representative Bayer said he was more concerned with setting precedent on a certain case that went through the system, saying this was a pretty good example, and suddenly everything starts to streamline in that one direction. So much is based on case law today that sometimes the original premise, the original idea has totally fallen by the wayside. Judge Haman said that is true, and that is why sometimes a judge has to get "gutty" and say that's not going to be the law any more. Representative Bayer asked Judge Haman if he sees that happening more and more as a trend, that we are basing more on case law than on anything else. Judge Haman replied that he doesn't.

Representative McDermott said she thinks a better example would be maybe some law that was passed in the 1890's and everyone's forgotten it's there. If you have the vehicle of case law you can at least not cost an automatic injustice one way or the other. Sometimes the courts will say it makes no sense, that you've got to go to the Legislature because the law is unclear and ambiguous. Representative Bayer said what he is saying is that case law does not alter or change the original law without a legislative process. Representative McDermott said sometimes it does. Judge Haman said it depends on what you mean by alter or change. Basically, when you are talking about the criminal law, it is substantive law that is statutory. It is made by the Legislature. Unless it's unconstitutional or void for some other ground which would almost always be unconstitutional, no case law is going to totally abrogate that statutory law. What the case law can do is interpret, in certain phrases. Sometimes what comes out of the Legislature is not all that clear. Then it becomes our job to try to determine intent, and you hear this, "the intent of the Legislature was" -- is there any such thing? There is no one intent. We interpret what we think you meant and in that way it could alter it to some degree, but that is the limit of it.

Representative McDermott said a lot of the currently defined criminal conduct has been illegal since before Idaho was a state. By Code we have changed the common law definition of burglary, which was that there needed to be a breaking and entering. That is gone now. You just need to be there with the intent to commit certain itemized kinds of crime, so that's legislative

modification of the old common law. I think in the area of criminal law there are certain kinds of conduct and a great deal of case law that does not need to be changed that much. Judge Haman added that he hoped it would not be.

Senator Rydalch noted that someone mentioned having the University of Idaho Law School participate. She asked, "What do you perceive our committee doing that we could direct the Law School to do?" Co-Chairman Harris said as an example, during his second term he was appointed to a committee with the Idaho Law Foundation to review the corporation code which everybody agreed was antiquated, and some of the major businesses throughout the state put up the money for the study. The key staff work was done by Mr. McDonald, the Assistant Dean of the Law School, who had his students do the work. He reviewed this and brought it back to the committee. After we set a framework and agree on such a move, that would be the way it would be approached now. Co-Chairman Harris asked Mr. Bianchi if that was the way it might work, if that is a good example. Mr. Bianchi said it was a good example but wasn't sure how it could apply here. In that instance the funding was kicked in by the area corporations, here it would have to be funded by defendants. He agreed they should look to some expertise. When they did a sentencing manual for judges which explains sentencing and discusses a lot of these issues, they hired a local attorney, Byron Johnson, who was associated with Tway and Webb, and they were the staff people. The people in that firm practiced in that area of law. We worked with them and they helped us do some of the technical work at that time. The product has held up very well.

Mr. Bianchi said it is difficult, in the area of code revision of criminal law, for any one person to serve as a resource. He has developed some expertise just by working with the statutes, Mr. Hodge has some, and the reason Judge Haman can be helpful is he has had practical experience. The three of us could never answer all the questions you might come up with. There would have to be specialists in corrections and certain areas of law. You can work with the library, plus the wide variety of experience of the committee which is helpful, but you may want to consider the University or some kind of staff help. We don't know what the scope is going to be. First decide the scope and if it's going to be that broad a scope, we can't do it alone.

Representative Stoker said you talk about changing sentences, but you are also changing definitions when you talk about grades of offense. He agreed with Representative McDermott that burglary is one area that needs to be changed and worked with. There are a lot of offenses that should be terminated, done away with. The murder statutes are archaic. I define voluntary manslaughter the same way I do first degree murder. It's a nightmare. There is no case law on murder. There is work that needs to be done there. We should address those problems. If the statute's good and the language is good, leave it, but if it's not good, then change it. If we avoid that we are avoiding part of the responsibility. If all we are going to do is deal with sentences, then let's just change all the penalties and be done with it.

Co-Chairman Harris asked how they would get at defining those areas. Representative Stoker said that's the rub. Who takes the burden of going through? Co-Chairman Harris asked if enhancement would be one area. Representative Stoker said that's an area that has to be dealt with. That's going to be in the realm of sentencing. Co-Chairman Harris asked if firearms is another area. Representative McDermott said that would be part of enhancement.

Representative Stoker said it would be in the sentencing criteria. Co-Chairman Harris asked about the general classification of minors. Representative McDermott said "Now you are in two other codes." Representative Stoker said he doesn't think we are dealing with that -- that's under the juvenile code. Representative McDermott said except for alcohol and tobacco, where we still jail. When we get into certain felonies, if a child is 14, then he's suddenly an adult. Co-Chairman Harris asked about drugs and that connection. Representative McDermott noted that Title 37 was included in the list. Representative Stoker said the kind of thing we're dealing with here is how do you classify various felonies in relationship to each other? If we add lawsuits to it, there are going to be two opinions and you might get a good product out of it and you might not. The best thing would be if you have five judges sit down and do it, but that's out of the question too, because we don't have enough funding and they don't have the time. So then it comes down to saying do we do it, and if we do it, how do we do it? Mr. Bianchi said even if you had five judges do it, you'd have 40 legislators that disagreed with them and 35 prosecutors that didn't agree with what they did, and you'd have that problem.

Representative McDermott said one example of this occurred a couple of years ago when we redid the assault and battery statutes. That was an example of good solid legislative work. Before we changed it, assault with just a threat of injury carried a heavier penalty than the injury itself, so we flipped it around. Overall there are still some crazy definitions within that statute. That took a fair amount of work and was just one specific crime. As far as some of these sentence things are concerned, the committee can go through and some of these things that really obviously ought to be civil, we should get rid of the criminal penalties and let the specific industry decide if they want to up the fine or not.

Judge Haman said another example was the legislation that basically codified theft with the grand theft area and lumped various other things like embezzlement and receiving stolen property into that whole bag. I have some disagreement on the penalty but other than that it has been very workable legislation. Representative McDermott said it depends on how much the judges ignore what it says and use the case law, and then everybody's happy.

Mr. Bianchi said if they don't agree that these crimes ought to be classified, then we don't need to go through and classify them. Would it help to have some discussion by the committee on whether it is a good idea to seek to classify them into a classification like this prior attempt and ask what are the advantages and disadvantages? If there aren't any tremendous advantages, perhaps it isn't worth the undertaking. If there are and everybody wants to do it, then we can proceed to try to get the resources. The Co-Chairman agreed they will ask that question.

Representative Stoker commented that it is classifying whether you call it classification or not. The judges said they all see the anomalies of having someone come in on voluntary manslaughter and the penalty is less than for first-degree burglary for stealing a tape deck out of a guy's car, or a guy that's there for delivery of cocaine. I think the example used was that he's looking at a life term. You've got to classify and the only way you can do it is as a composite picture. You should classify your level of felony, whether it be in three or six classifications, but you should start setting some grades and plugging some offenses into that so that when you start looking at

the whole picture you have some continuity.

The Co-Chairman suggested they obtain an informal classification scale and then address that scale to see what we want to do about it. Representative McDermott said if you want a crazier area of the law, and this has just been an amalgamation of the Main Street merchants lobby, the bank closes your checking account -- you are out of town and don't get the notice and the bank's closed. You write a five cent no-account check. On a no-account check I can't remember if that's five or 14 years. If you write an insufficient fund check of $50.01, that's a three-year felony. Yet if you steal $149 from me, that is a misdemeanor. The punishments for bad checks are just crazy.

Mr. Bianchi said there is a certain logic to what Representative Stoker says. If we really believe we've got to go through and straighten out some of these inconsistent crimes, I don't know how else we'd do it but set up crime classifications. You're either going to be comparing numbers of years or you're going to be comparing classes, in order to do it. If you compare in numbers, you are in a sense doing it in classes. Is there validity to that? Co-Chairman Harris asked "Can we do that and start with felonies only or do we have a cross curve between felonies and misdemeanors?" Representative Stoker asked if he could throw something out which is kind of a curve, and he hates to throw another curve in this, but when they initially did the division between felony and misdemeanor on theft, the division line was $150. The division between felony and misdemeanor, if it had kept pace with the cost of living and inflation, we'd be talking about a division line of $500. Perhaps it's something we should consider, starting to change the money levels, whether it's a misdemeanor or felony, and bring it back more into compatibility with what was initially intended, considering values of the present day society.

Representative Montgomery said this is an area in which he has a lot of listening to do, as this is not his area of expertise. It appears we have a consensus that we lack uniformity and have developed a hodgepodge over time, and the sentences don't relate in a fair way with one another. I'm persuaded by the comments that the best way to get at that is a classification system where we group crimes according to the weight we want to give them in society. Then we can compare the sentences within those classifications. That seems to be the way to go at it. Beyond that, my question is, I wonder if we could get the College of Law, or some people in that organization, to give us some volunteer effort? He asked Mr. Bianchi if that would be possible. If necessary, maybe we'll have to go back to the Speaker or the Council and indicate that we have to cover out-of-pocket expense for some paperwork and processing. I wonder if there might be some students of the College of Law, under the direction of one of the professors, that would be willing to participate on a gratuitous basis in this kind of an important effort and maybe even get credit for it. The point is, this is too big for us as a committee to do. Somebody that could really pour some time into this and have a little bit of expertise is going to have to take on this kind of a project, at least initially, to do the classifying. I sure don't have the expertise to do it.

Representative McDermott asked, "Don't we have the notes from the old interim committee on sentencing? Couldn't that be a start? I think the classification part on that old criminal thing wasn't that bad. It wasn't really grand." Utah has a classification system and they just spent a ton of money

going through theirs and they're very pleased with what they've done. Representative Montgomery thought that might be a start to find some other states that have done it and Representative McDermott added, "recently." Co-Chairman Harris mentioned his one experience was with Assistant Dean McDonald of the law school. Dean McDonald supervised it very carefully and brought back the findings himself and I would encourage that sort of thing. Representative McDermott said she didn't think they had the budget. Co-Chairman Harris agreed they don't right now. Representative McDermott said a lot of those people, their sole source of income in law school, is when they can get paid for doing those research things. As the Judge says, if they got credit for it like a senior essay class or something, and it is the sort of thing that would really interest them.

Representative Bayer said he feels they should never forget this is really also a philosophical question. The more input we have from a much broader spectrum outside the law community, the better it would be, because I'm sure we will have differences regarding the relative seriousness of a particular crime. If we get into the realm of trying to classify the crimes, I think we should have outside input. I think it's very important because of this philosophical nature. Representative McDermott said she felt what Representative Stoker and Representative Montgomery have said is accurate. As I've been sitting here listening, I have become increasingly convinced that some kind of a classification framework is a very good idea. Maybe in today's society, something that 15 years ago would be a Class D felony might now be moved up to a Class B, or vice versa, but when you have this classification system, the Legislature still makes those general philosophical determinations as to what kind of crime fits into what category. As far as the differences in philosophy is concerned, the classification system accommodates that very well.

Representative Stoker commented that another thing we would like to do with this working group is to determine the number of classes we want to have, perhaps structure them as they did in the other code, with the amount of penalty we want to go with them. Basically, we'll have the penalty to refer to that's going to apply to that particular class. It seems to be a place we can start with this committee, this philosophy, without plugging into a particular offense.

Representative McDermott said the death penalty obviously has to be the most serious. Mr. Bianchi said you could treat it outside of the class. Judge Haman said the death penalty is extremely severe.

Mr. Bianchi said one of the things they could do, if the committee thought it was worth pursuing, is make a recommendation to try and come up with a classification system by the next meeting. Look at what was done in 1971 and in the Utah system and the other systems. Ron has access to the other statutes around the country. At least pick out the kind of classification system you want and then it would be a matter of going through and plugging everything in. The Legislature is ill equipped to deal in a vacuum. Legislative committees usually deal better with bills in front of them to react to. If you could determine a classification system without plugging the statutes in, then you could propose someone in whom you have confidence make a first run plugging in the statutes and present it to you. You could then go through yourselves and weight the severity of the sentences, whether this should be Class A or Class B, etc.

Senator Rydalch said that was her comment initially, that it is in the data base and it would be very easy to establish the classifications, plug this in to the classifications and then make alterations from that point. It gets it into a workable form rather than a voluminous thing. Mr. Bianchi said the problem with giving it to the University is it takes a judgment call as to what goes into the various classes. The person doing it initially doesn't have to be right, because you are going to change it around anyway, but they should have some feel for what ought to go where, whether you turn it over to a university group, a private attorney, or have one of us do it.

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.

Senator Rydalch said her concern is that she doesn't want us to ever shuffle off our work. If it's our duty to do something as a committee, or as legislators, I don't want to hand my job to someone else, even if it takes us a year.

Co-Chairman Harris said his understanding from the discussion is that no one is backing away from this list, no matter how many pages it is. What we are looking for is some common purpose so that we can all look for the same idea. Representative Montgomery said he recommends that the committee do it, but was just looking for some help on the "pick and shovel" part. Representative McDermott said when she seconded the motion she assumed we would have some resource material available. Some of the things our judges have said today and with the changes in our society, I think those old categories were too broad. I think we need a few more categories. When I think of the case law, no matter what the parameters are, if it's within the parameters set by the Legislature, then the sentence isn't excessive. To oversimplify, that's what the court generally says, and I think maybe we have the responsibility in our classification to be narrow in the range and to be more realistic. I think maybe what we'd have to couple that with, as part of our classification, is addressing the business of the "good time" and the minimum amount you're going to serve on a sentence. I think for a start we can get those classifications as a resource thing, and there's going to be some philosophy that goes into that.

Mr. Bianchi asked the Co-Chairman if they could also use those classifications to apply our judgments on the "good time" and parole limitations? In other words, can we say that for a Class 1 felony, you must serve at least "x" amount of time before eligibility for parole, and allow "good time" the same way. There shall be no "good time" unless .... . Representative McDermott said she thinks there would be a constitutional problem if you say no good time on certain kinds of felonies. If you are going to do a mandatory minimum, then do it. I think good time is going out the window anyway. I hate to get those Title 19 things wrapped up into the legislative Title 18 sentences.

Judge Haman said everybody has talked about this good time in relation to how it is applied by the Board of Corrections out here at the penitentiary, but don't forget that we also have a good time statute that applies to local incarceration and, to my knowledge, that has not been abused, and I think it is a good thing to keep. Basically, it is applied once each 30 days in jail and it has to be approved by the Sheriff who, hopefully, knows if the guy is really truly being good. On the other side of the coin, the prosecutor has to approve. Basically, the difference is, it's "earned" good time. That's the crucial point -- it's not automatic.

Representative Stoker commented that as far as the classifications are concerned, if we agree to do a classification, before we contact the College of Law or anybody else, as a matter of philosophy, we can determine the classifications we want to use -- if it's a crime against a person; if it's a malum prohibitum felony; if it's a violation of a license law or similar violation; a theft crime; or a crime against property. Mr. Bianchi said it's a nice idea but doubts it can be broken down that easily. Representative McDermott said they can go in that general area. We will hone and then there'll be a haggle -- is this a crime against property or is this a crime against a person? Mr. Bianchi said "or a crime against livestock." Representative McDermott said, "well, we know where that is -- that's above everything else."

Representative McDermott said she thinks most people regard crimes against children as more serious than crimes against adults. To oversimplify, crimes against people generally ought to be punished more heavily than crimes against property. Mr. Bianchi generally agreed, but said some crimes will be moved from one category to another. Representative McDermott said philosophically, she thinks a crime against a person, no matter what you call the crime, is more serious when it involves violence on a person.

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 passed, and he declared, "so ordered."

Upon a suggestion that the working group look at preliminary categories, Representative Montgomery said he is concerned that is he is not prepared to discuss categories until he does some reading. Senator Rydalch suggested the expertise is here. Representative Montgomery said elimination of enhancers and going in lieu to indeterminate sentences, not being eligible for parole until a certain amount of the sentence is served, so the judge knows what will be served from the outset, was emphasized rather strongly this morning. Mr. Bianchi said there are recommendations from the last committee together with recommendations from the judges which could be reviewed and preliminary determinations made.

Co-Chairman Harris asked Judge Haman if there were any guides he would care to give on the direction the committee is going. Judge Haman said he agrees with eliminating enhancements. At the time of passage, he thought they sounded great, but they have become a bargaining chip for prosecutors and have

not accomplished much. It would be cleaner and more clear-cut to everyone in the system, including the defendants, to make it a straightforward thing. Judge Haman also said they have to retain some kind of handle, some type of percentage of the term that will be served. Bottom line, that's what they look at. He would like to keep the concept of having determinate sentences and feels the committee is on the right track. He added that he hopes it will not be a "quick fix" type of thing, even though the committee is limited in its time and power.

Judge Haman stated that he is a judge who uses fixed term sentences sparingly, only when he is totally convinced there is no possible prospect of rehabilitation or deterrence -- nothing will work with this particular offender. He knows that all he can do for the protection of society is keep him out of society for as long as possible. He gave an example of a persistent offender on a rape charge. That possibility must be reserved by setting guidelines somewhere along the line. He posed the question, "When should a fixed indeterminate sentence be imposed?"

Representative McDermott commented that they need to leave the judges with authority to set a determinate sentence. She would like to see fixed and determinate sentences left intact. Representative Stoker said there would not be the disparity of sentences when judges use a fixed sentence.

At this point, the working group took a brief recess. Upon returning, Co-Chairman Harris asked Mr. Bianchi to guide them through some of his material, which consisted of suggestions he had received from various Idaho judges.

Mr. Bianchi said Section 19-2520E, Idaho Code, which specifies no more than one enhancer, has a technical defect. He stated that some judges recommended certain enhancement statutes be abolished, particularly pertaining to the 1981 great bodily injury, sex offenses and kidnapping. Currently, there is no one in the penitentiary on those enhancers. The prosecutors aren't using them anyway. If those enhancers are eliminated, Section 19-2520E about multiple enhancers can be repealed. There is no particular reason to get rid of Section 19-2520D.

Representative McDermott said Section 19-2520D is not really an enhancer. It is in the wrong section and belongs with the persistent violator portion. She asked if it was duplicated in the persistent violator section. Mr. Bianchi responded no. Representative McDermott said it belongs there anyway.

Mr. Bianchi expressed concern about minimum consideration for parole, Section 20-223. For certain listed felonies -- "and no person serving a lesser sentence for any of the following crimes; ... shall be eligible for release on parole until said person has served a period of five (5) years or one-third (1/3) of the sentence, whichever is the least. ..." This should be extended so that the person would serve more of a minimum sentence before being eligible for parole.

Mr. Bianchi mentioned the violations that have enhancements and that they need to do something with the guidelines for minimum period for parole.

Representative McDermott said some district judges are putting people in

the county jail. Rather than the judge trying to guess which way the wind blows on good time, if there was a law saying "25% of your sentence becomes a mandatory minimum," you could have a longer sentence. Mr. Bianchi said there are different approaches and other ways of achieving this. The minimum periods for consideration for parole are too short for certain crimes, if not all. The penalties listed for some offenses and some assaults are. He noted it is a judgment call on the minimum period for parole eligibility for indeterminate life. He recommended revision but not abolition of the good time statutes to lessen the impact. No judge thought good time should be completely abolished. Again this is a judgment call.

Representative Bayer asked if the judges are aware of the mechanics of good time, how it occurs, or if they don't really know the ins and outs of good time. Mr. Bianchi said there is confusion regarding good time. He is not so sure some of the Parole Commission understands. He does not know what actually happens. There are three different kinds of good time -- automatic, earned, and calculated but not awarded. Sometimes it is awarded automatically by their rules and regulations.

Representative McDermott suggested that Ralph Newburg would be a good source. He classifies people and finds out the sentences. He would know how it works. Mr. Bianchi said the way it has been represented to us conflicts with the Department's own rules and regulations. Representative McDermott commented that their own statute is squirrelly. Representative Bayer said the original idea was to encourage good behavior. If someone is denied good time, then he actually has an avenue via due process of law to bring litigation. Representative Montgomery said this can be changed by statute. Co-Chairman Harris said there was a strong recommendation on good time from the other working group. They will spend time discussing good time particularly and a recommendation will be forthcoming that we can consider. Mr. Bianchi suggested that they not have progressively greater good time awards. It should be made clear for the judges. The committee should determine the application of any good time changes to existing prisoners, i.e., would it apply retroactively, or determine if existing prisoners can be denied good time if it is changed. He asked, "Constitutionally, can we do it?"

Representative McDermott said it is constitutionally fragile and is not worth the expense of lawsuits. A permanent change in the structure should be prospective. When prosecution is not initiated prior to the effective date, it cannot apply. It cannot apply to people sitting in the yard already.

Mr. Bianchi said Judge Rinehart suggested adding an alternative fixed term sentence to fixed degree murder penalties. In reality, you can give indeterminate life and be considered for parole in 10 years, or fixed life, and not considered for parole at all. Ten years is not enough, fixed life is too much. There should be something in between. He feels this is a good suggestion and worth looking into.

The next item on Mr. Bianchi's list, #7, is in the line of a housekeeping measure. There is a conflict between statutes on the maximum period of probation. There should be a general catch-all statute to allow for imposition of a fine in addition to the sentence in felony cases.

Mr. Bianchi said Pat Kole has suggestions from the Attorney General's

staff. Mr. Bianchi wrote to all the prosecutors asking for suggestions but to date has received nothing. Representative McDermott said a defense counsel might be more sensitive to sentencing disparities in terms of inconsistencies in the law. Mr. Bianchi suggested that Ron Hodge send a letter to defense counsels, public defenders, and possibly Vivian Klein, Executive Director, Idaho Trial Lawyers Association.

Mr. Hodge said the suggestions on his list were taken from the transcript of the first meeting of the criminal sentencing committee last year. It identified the people who made the suggestions. They went over it at the first meeting this year also, so they are well aware of it.

From Mr. Hodge's list, the working group noted Mr. Bianchi's statement on sentence enhancers and Judge Burnett's suggestions. Judge Burnett recommended the creation of an "adjustable term sentence," consisting of a fixed term sentence combined with an indeterminate sentence. It cannot be accomplished by the judges under the present Code. The fixed term would be served first, followed by an indeterminate sentence, which would insure that the person would serve a certain amount of time.

Also mentioned in Mr. Hodge's list was Judge Burnett's discussion of the problem of commuting enhanced sentences. Often, an enhanced sentence is commuted so that parole can be for the longer underlying term. Judge Schroeder, Al Murphy, Glen Walker, and Ellie Kiser also mentioned the occurrence of this problem. Judge Carey and Judge Schroeder asked for the power to levy fines. Representative McDermott stated it makes sense and might be effective.

Co-Chairman Harris asked what they need to add after hearing Mr. Bianchi's and Mr. Hodge's presentations. Representative Stoker said a lot of these problems will be taken care of in terms of categories, e.g., repeat offenders, enhancements, etc.

Co-Chairman Harris asked Mr. Hodge to go through the original motion and fold these two reports in. Mr. Hodge said that Judge Kramer's written comments also contain a lot of recommendations. The working group was in agreement. Co-Chairman Harris mentioned they would be receiving an edited copy of Judge Lodge's recommendations and suggestions.

Mr. Marc Haws, Attorney General's office, said a problem they see very frequently is there is no real difference between first and second degree murder. If you go beyond a first degree murder conviction and prove aggravating circumstances, you might get the death penalty. It is a negotiating tool, a point of compromise for juries. It is confusing with instructions on first and second degree murder and manslaughter. Juries are confused regarding sentence rather than a charge difference. Mr. Haws said he would like to see a re-examination of those statutes. Instead of a proposal to restructure the two different kinds of charges, maybe we can get rid of second degree murder. He recommended looking at the penalties. Right now there really is no difference. It requires study and careful thought changing the elements of a crime.

Representative McDermott asked if Mr. Haws' office agrees that in addition to indeterminate life or death on death penalty cases, the court should have the alternative to set a determinate sentence for first degree murder.

Mr. Haws said their official position would be more in line with "let's restructure the power of the Parole Commission" so they don't parole after the prisoner has served one-third of the sentence. Get rid of the low alternative of 10 years on a first degree murder conviction.

Representative McDermott asked if they should have specific recommendations for the full committee to vote on. Judge Haman said the death sentences group should be a subject all by itself. On life sentences, the courts interpret indeterminate life as 30 years.

Mr. Bianchi said they need a classification of 1, 2, and 3 felonies and capital felony. Representative McDermott said Class 1 or A has to be a life sentence, murder one with aggravating circumstances.

Representative McDermott moved, seconded by Representative Montgomery, that the working group recommend to the full committee that we seriously consider abolishing the enhancements we have discussed today.

Discussion on the motion followed. Representative Stoker said they would be doing away with enhancers in their present form and work them into statutory language. They would still be there, but perhaps in a different format. Representative McDermott agreed they would be imposed where they are not now.

Co-Chairman Harris asked the question on the motion and the motion carried.

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.

Representative McDermott envisions the classification system would have a range of years and maximum fine. Restitution is totally different and separate. There is a statute in effect on that now. Mr. Bianchi said the victims' rights bill contains such language.

Co-Chairman Harris said the wording should be clear and then present it to the full committee. The next meeting will be in reverse order. The two working groups will meet in the morning and convene together later on, so there will be a final opportunity to clarify our motions.

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

Mr. Haws said this introduces greater uniformity in sentencing and decreases individual discretion.

Representative Montgomery noted that the judges said "Sentencing would be easier if we could know at the time of sentencing that we could impose a certain sentence and a specific percentage of that sentence will be served." If

all crimes are classified on the basis of the seriousness of the offense, then a range could be adopted so there is a relationship. Mr. Bianchi said currently, they are setting a maximum term not to exceed -- sentences up to so many years -- with no bottom under the new system. You would need a bottom and 120-day period. Representative Montgomery said the judge must retain that kind of discretion. The hue and cry is that they don't know how long a term they will serve. That's what the judges say.

Representative McDermott noted that's what Judge Lodge was saying. If an individual can be rehabilitated and is given too long a sentence, it is counterproductive. Representative Montgomery said if it is a repeat offense it sets a higher category. The judge would have several options, 120 days, etc., that is why I said range. Mr. Bianchi said you could have a range and still have options. Representative Montgomery said it could create a problem with public perception.

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.

Discussion on the motion contained the following comments: We should recommend a change from a maximum security unit. We need another place where people who don't belong in the yard, such as a youthful offender, could be institutionalized. Halfway houses were mentioned, but it was noted that Mr. Murphy doesn't like that approach. The present penitentiary is a paper tiger -- it could never be a maximum security facility.

Co-Chairman Harris mentioned a smaller unit geared to incorrigibles. A different one could be used for medium security types. Representative Bayer said he primarily meant that somewhere the violent people must be separated from the nonviolent. The underlying consideration is the way to go about it. Representative McDermott said they have a sophisticated prisoner classification system in California. Representative Bayer said we do have a classification system at the present time. In some places it is strictly adhered to and works well. He said we should seriously consider that something has to be done with the problem of housing these people. Co-Chairman Harris said we do not have a proper maximum security system right now. Senator Rydalch commented there is no preventive maintenance along the way.

As a preface to a substitute motion, Representative Stoker said this is not in the sequence of events we are going through now. The present problems at the prison are not this committee's responsibility. We are getting away from what we are supposed to be doing.

Representative Stoker moved that the previous motion be tabled pending our deliberation. The motion failed for lack of a second.

Representative Montgomery returned to discussion of the original motion. He concurs fully with Representative Stoker. The concern is legitimate and we all share it, but it probably does deviate from the mandate we were to consider.

Representative McDermott said she concurs with that assessment. She agrees with Senator Rydalch in terms of necessity but it is not within the parameters of this working group's charge. If this working group can evolve in mandating classification, we will have addressed a lot of problems in the criminal justice system.

Senator Rydalch said if we are mandated to do this classification and accomplish it, we will change a lot of things in our system and penitentiary requirements will be one of the things. Maybe it will evolve anyway.

Representative Bayer said if we forget to consider the impact of our recommendations later on the correctional system and the housing of prisoners, we will be in a greater dilemma than we are now.

Representative Montgomery said the minutes will reflect your concern. We have taken on a monumental task of restructuring sentencing. It would not be in proper form to start discussing maximum security facilities.

Co-Chairman Harris said the parole group had a specific point on their agenda. It is before them as they work with the parole people to determine parole policy impact. They should come up with a response to that on their agenda, but there is nothing wrong with making a recommendation on our own and discussing it in the committee of the whole.

Representative McDermott said there is a vast difference between a recommendation for a maximum security facility and a mandate on the Legislature to attach a specific piece of legislation. She cited the Utah example. Any time there is a mandatory minimum sentence or anything that will impact local government, you have to hone down the cost and estimate how many people will be incarcerated, and know exactly what the cost will be. This motion is different than a recommendation to construct a certain kind of facility. We could recommend that this Legislature begin to have a coherent planning and coordination effort. Sentence classification will go a long way.

Representative Montgomery said there could be language to allow the judge to impose community service as a part of sentencing, if there is nothing already in the statutes. Mr. Bianchi said it is a condition, a term, of probation. Representative McDermott said one section in the sentencing criteria says you cannot mandate work for a charitable organization or contributions to it. Mr. Bianchi said it is in the Supreme Court rules. They were recently amended where you cannot require them to donate money, but you can require them to do community service work for that organization. Representative McDermott commented that it is Title 19, Chapter 45. Mr. Bianchi added that it is in the Supreme Court rules also. Representative Montgomery said he is satisfied, if the need isn't there. The request was made for assistance to check the appropriate rule and statutory authority.

Representative McDermott moved, seconded by Representative Montgomery, that pertaining to the extent to which a judge is unable to mandate community service due to the gap in the law that precludes a court from ordering community service or contribution thereto, we recommend that gap be closed. The motion carried.

Mr. Bianchi said they should obtain a prison impact analysis. If a recom-

mendation could be made to the committee that whatever sentencing plan the committee comes up with, a request should be made to the Department of Correction to conduct an impact analysis of the plan so this committee can be advised as to what the impact would be.

Co-Chairman Harris said the other group has an agenda item regarding population consequences of the various decisions.

Representative Stoker moved, seconded by Representative Montgomery, that the meeting adjourn. The motion carried and the meeting adjourned at 4 p.m.

APPENDIX D

June 21, 1985

MR. CHAIRMAN - SENATOR FAIRCHILD

REPRESENTATIVE HARRIS

MEMBERS OF THE LEGISLATIVE COMMITTEE
ON CRIMINAL SENTENCING

I recently read in the Judges Journal published by the ABA that the impact of Judges on the liberty and property of the people before them is profound. Individually, trial Judges directly affect the lives of more people than any other single public official. The article said, "More people can be helped or hurt by almost any Judge than by the President of the United States, any Governor, or any Legislator."

For this reason, I am sure there are many Judges who would prefer mandatory sentencing or strictly structured quidelines for crime categories to avoid responsibility for their actions. In my opinion, however, this is a 'cop out' for accountability. Equal judgment in cases involving different facts can be the greatest inequality or injustice there is. Reasonableness is the fundamental requirement in sentencing, and no two cases are alike. It is not until you have a complete history on the facts of the case, the defendant and the victim that you can possibly evaluate the pros and cons to be considered in the various sentencing philosophies. I believe a Judges is in a better position to do this than the Legislature, not because he or she is unique or more intelligent, but because the facts are before the Court at the time of sentencing.

To take discretion away from the Court does not eliminate discretion or disparity in the outcome of a case, but merely shifts this decision making process away from an impartial tribunal back to the Prosecuting Attorney's Office. When handled there, of course, it is subjected not only to the political pressures of the office, but goes on behind the scenes where it is not open to public scrutiny. The trial Court must sentence the individual and not the crime category to meet the constitutional requirements. To do this, the sentencing process must allow flexibility so that it is humane and sensitive to all the interests involved.

While the Courts cannot satisfy everyone, they do sit within the community where they are responsible, and they necessarily react to the pressures of the community and, thereby, act as its conscience. This is not a static environment and is constantly shifting with the attitudes and feelings of the community. There always will be some disparity within certain crime categories based on the values of a particular area. (For instance, cattle rustling is going to be viewed differently in Owyhee County than it might be in Canyon or Ada Counties.)

When we attempt to arbitrarily eliminate what may appear to be a disparity by presumptive sentencing, or mandate certain prescriptive guidelines without knowing the facts, or impose criteria within a structured format to be followed as they have tried in

certain States (California particularly), the record shows that the number of appeals goes up dramatically because you build into the system automatic grounds for disagreement.

We have experienced that to some degree in Idaho by attempting to follow the criteria now set forth in I.C. 19-2520 and 2521.

It is meritorious, of course, to be pursuing a policy of honesty in sentencing. The system must be credible and understandable, not only to the people involved in the system, but to the public. It is mandatory that the right hand knows what the left hand is doing and why.

Much of the concern over what is alleged to be disparity in sentencing or abuse of Judicial power, however, has come about because of a distortion of the facts by the press or lack of responsibility for accuracy in the reporting of the same. (Judge Lodge highly publicized for granting a convicted murder previously sentenced to forty-five years a new trial when, in fact, the only issue before the Court was whether or not another Judge had abused his discretion.)

The Courts are legally obligated to inform a defendant of his or her rights and the potential ramifications of a sentence and when, as presently, we have to weave our way through the moral claims of society on the one hand and the legal complexities of the law on the other, and still try to individualize the sentence to meet

constitutional mandates, the Courts are faced with an awesome task that could only be helped if simplified.

Additional guidelines and criteria, regardless of how well intended, however, only tend to put the Court in a straight jacket and limit the Court's discretion. What the Courts need are available sentencing alternatives. This allows the Court to be innovative and to design a sentence that can be individualized to meet the complexities of the problems we deal with.

Withheld Judgments and the 120 day program are examples of sentencing alternatives that are frequently misunderstood but valuable tools for the Court. While they are frequently seen by the public as mere slaps on the hand, the following types of things can be accomplishe that could not be with a mandatory prison term:

A defendant can be given a withheld Judgment, placed on probation with special conditions to include, but not limited to

Restitution
Substance abuse counseling at his or her own expense
Jail time with workout to support family, etc.
House arrest when not working, etc.

and still have the ability to bring the defendant back at any time while he or she is on probation for a violation and sentence said defendant as though he or she was before you for the first time.

The 120 day program allows the Court to have a young offender see the penitentiary first hand and yet escape the roadblocks of a felony conviction. If the defendant successfully completes the 120

day program, the penitentiary sentence is suspended, and the defendant is placed on probation. If the probation is completed satisfactorily, the sentence is commuted to a misdemeanor or dismissed entirely. Both society and the defendant are benefited in that the defendant can go on to college, sit on a jury, secure a hunting license or obtain a passport if the felony conviction is avoided.

A better understanding of the ramifications of a sentence needs to be conveyed to the public in terms of costs and liability. (very few people understand that the present cost for incarecerating a person for one day is $20.00 in the County jail and approximately $30.00 in the penitentiary. Unless you absolutely have to, it does not make much sense to incarcerate someone for thirty days at a cost of $600.00 - $900.00 for a $50.00 theft or bad check when there are other remedies available.

In my opinion, the indeterminate sentence needs to be re-evaluated, not necessarily with the idea of eliminating it, but making it more honest and credible. The sentencing by Courts and the function of the Parole Board should be totally separated in my opinion. Courts should say what they mean, if we are to be believed. It is important that we not only do justice, but have the appearance of doing justice.

The time of sentencing is the only real public forum for the teaching of cause and effect relationships. The system is not credible when you say one thing and something entirely different is seen to happen. Parole and commutation do not have the same public exposure.

Therefore, the length of parole should be decided on the basis of the defendant's performance in prison and the nature of the crime, subject to limitations imposed by the Legislature, but without regard to the sentence imposed by the Court. Parole should not be determined by what is left over in the sentence by the Court. (This would take legislation, but I believe it could be done in the same manner we are handling enhancements, i.e., the Court would impose its sentence and then advise the defendant that the sentence includes up to the maximum period of time prescribed by the Legislature for parole based on his or her conduct while in prison.)

Under our present system, the indeterminate sentence is abused by some Judges by passing the buck to the Parole Board and impressing the public with a lengthy sentence. Likewise, the Con, rather than the first time offender, often benefits most from this sentence because he or she knows how to work the system, and they do not make the mistakes while adjusting that many first offenders make. The public is now conditioned to feel that, unless the defendant gets ten to fifteen years, he or she has not received any punishment at all. Except for the habitual criminal or the person you are warehousing, this is contrary to the best interests of society and the defendant. (Lengthy sentences often cause the person to lose his or her family, are expensive and make a person's training obsolete, destroys any positive self-image a defendant may have had; yet at some point, they are still going to be your or someone else's neighbor. Most of the studies

that I am aware of indicate that maximum benefits are accomplished in relative short periods of time. Letters to this Court verify that the first six months to one year are the real hard times for prisoners and in many instances, I believe, the State would be better served by shorter and more realistic sentences.)

Good time in the manner in which it is now allowed is wrong. This was not my perception of how good time applied, and I think it is contrary to most peoples' understanding of how it does work. Convicts thrive on something for nothing, but it is totally contrary to what we are trying to teach them.

Enhancements in my experience have primarily been a plea bargaining tool rather than of any real assistance to the Court as punishment. The underlying charge has generally been more than adequate for the length of sentence necessary. It also has resulted in commutation hearings because of the restrictions placed on prisoners in prison serving consecutive sentences. Likewise, it creates additional work for the Courts because of the various motions that are filed to try and escape the penalties of an enhancement, and many times it adds unnecessary proof problems for the Prosecuting Attorney.

There needs to be a better understanding between the Courts and the Board of Pardons on the purpose and reasons behind a sentence so that rules and restrictions within the pentientiary do not defeat desireable goals. (Example - A Court may impose a consecutive sentence

and retain jurisdiction for 120 days on the same for the sole purpose of being able to bring the defendant back, place him or her on probation so that restitution can be ordered as a special condition. This is particularly advantageous when you have a defendant who has committed a serious crime and who needs to be punished, but you also have a number of people who have been hurt financially.)

The penitentiary apparently takes the position at the present time that because of the consecutive sentence, the defendant is restrict in what he or she can do, and that their time for parole consideration is automatically lengthened. This destroys any incentive the defendant may have to pay the restitution, and the public sees it as another example of how the Courts fail to see that justice is done.

Few, if any, Western Nations rely on prisons for their punishment as much as the United States does. Instead, they rely much more than we do on fines, which supplement tax revenues, rather than incarceration, which depletes them. With the development of the restitution program in Canyon County as a tool for the Courts, we went from $75,000.00 to $500,000.00 in three short years.

The public seems to cry for incarceration so long as it does not involve a family member or friend, but at the same time balk when it comes time to pay for the same. I believe the concern of the public is well intended, but their understanding of the system is grossly misunderstood. The prison is full - most jails are full.

Finally since a big portion of our time is spent in the handling and disposition of criminal cases, it necessarily follows

that one of the attractions to the Judiciary is the challenge and responsibility in sentencing.

If that accountability is taken out of the Court system by legislatively prescribed sentences, then I believe the quality of the Judiciary will diminish proprotionately.

We recognize that protection of society is paramount in the sentencing consideration, but to accomplish that goal, we need the tools to work with and not a framework that may be counterproductive in the long run.

I believe in punishment and incarceration when appropriate, and I also believe we should say what we mean and mean what we say.

There is no substitute for experience on the Bench and common sense in evaluating cases on a case by case basis.

A bad case can make bad law, but I trust this Committee will see it for what it is and be guided by the big picture and the totality of the circumstances.

Thank you,

Edward J. Lodge
District Judge

APPENDIX E

Legislative Council
Code Revision Working Group
Committee on Criminal Sentencing
House Lounge, Statehouse
Boise, Idaho
July 25, 1985

MINUTES

The working group meeting was called to order at 9:15 a.m. by Co-Chairman Representative Harris. Members present were Senator Reed, replacing Senator Marley, and Senator Rydalch and Representatives Bayer and Stoker. Representative Montgomery joined the group subsequently, having sat in briefly on the Pardons and Parole working session. Representative Keeton was absent. Also in attendance was Ms. Myrna Stahman, Office of the Attorney General, and Carl Bianchi, Administrative Director of the Courts. Staff present were Schlechte, Hodge and Cory.

Representative Harris noted there were two corrections that needed to be made to the minutes of the working group meeting held June 20, 1985. (1) The terminology was used that Representative McDermott "pushed" for activity and consideration of the Code reclassification. Instead of "pushed," the word "encouraged" should have been used; (2) The minutes do not show that Senator Rydalch's motion on page 17 passed. This should be recorded and this action should be covered in the form of a motion.

Senator Rydalch moved, seconded by Representative Stoker, that corrections to the minutes of the working group meeting held June 20, 1985, as cited by Representative Harris, be made. The Chairman declared the motion carried.

Representative Harris said they are approaching hard decisions. The Director of Corrections has had several drafts on the "good time" statute from the other working group and there has been great difficulty encountered in arriving at a workable version. Representative Harris received a letter from Mr. Murphy this morning with his version, which should go to the other working group and will become a question to be debated when the two groups convene together later on today. Representative Harris stated that the Attorney General has reservations and comments concerning code revision in a complete form which will be expressed later.

Representative Harris asked Mr. Hodge to advise what he had learned about possible participation of the Idaho College of Law in the classification project. Mr. Hodge said the subgroup requested him to contact the College of Law to determine whether law students could be used as a resource for the committee. Putting aside the matter of funding for the present, he asked Dean Vincenti what his reaction would be to having law students go through the Code and reclassify criminal penalties according to classifications set by this committee. Dean Vincenti said he would be interested, with law students earning credit. He suggested two ways to accomplish this: (1) using interns that are already in the Attorney General's office, or (2) starting the program when the academic year begins the second or third week of August. He or a faculty member would supervise the students.

Representative Harris mentioned that the Attorney General, on whom we are relying for intern assistance, will have some reservations in his comments. It is, however, a basis on which to proceed.

Senator Rydalch asked Mr. Hodge if there is any feeling concerning these

law students, whether they would be picked randomly at the Dean's discretion, or if there would be any guidelines for us to give as far as caliber of students is concerned.

Mr. Hodge responded that they did not discuss specifics beyond using interns in the Attorney General's office. Mr. Pat Kole advised Mr. Hodge that the interns are quite good and are hard-working individuals. Mr. Hodge felt that participants would be limited to second- and third-year students, not first-year.

Ms. Stahman said the interns are very high caliber, in the top of their class, and are very well qualified. Ms. Stahman said she had worked with Dean Vincenti in the past, and the interns actually wrote briefs for the Attorney General's office. However, they had opened it up to more people than those at the top and that was a mistake. A really good product can be obtained from the top people but they do not have the experience that is really needed for something as complex as this committee is talking about.

Representative Stoker felt it is the place to start. None of us individually have the time to sit down and go through this. Representative Harris said ultimately they will need to make a choice of whether there are certain support things that need to be done in a limited fashion or go to a complete code revision in this area. That will be a major undertaking that will draw in the Attorney General, the prosecutors and the courts. Representative Stoker said this committee can make a determination as to the number of categories they want and work with the interns and the law school.

Senator Rydalch said Mr. Hodge mentioned that cost was not discussed. Representative Harris commented that the two aforementioned students do not need further work in criminal law and are more interested in other areas, so having them do the work for credit is less of a possibility than was intended. Ms. Stahman agreed that this is her understanding.

Representative Harris said this is an important project. We have been assured if we say we really need the money, the Speaker would try to find it for us, but we would have to be solid and prepared to support that request. The door is still open. It will largely be based on our consideration if we go through it.

Mr. Hodge briefly discussed the statutes from the criminal codes of other states which had been distributed to the members. The material contains various approaches to classification of crimes and has been combined with portions of the model penal code passed by Idaho in 1971. The 1971 model code had three classifications plus the capital punishment division. Most of the states reviewed had similar setups: the State of Oregon has four classifications, Utah has four, Florida five, New Jersey four, Kentucky four. The only real difference in this group is North Carolina, which has 10 classifications, including a presumptive sentence for each classification. The presumptive sentence is the mid-range for each classification range. The judge applies mitigating or aggravating circumstances in order to deviate from the regular classification system.

Reading through the New York material, Representative Stoker noted that they have Class A, B, C and D plus Class A-1 and A-2 and a reference to Class E, several subparts to the classes, and are perhaps getting into the neighborhood of 10 classifications. Representative Harris said he received a similar

impression. It is a big state and a complicated system.

Mr. Hodge said one of the problems with the old New York statutes was that they contained 13 different maximum felony sentences. They experienced the same problem as Idaho with inconsistency in sentences and decided to approach this problem with a classification system such as we are discussing.

Representative Stoker said a lot of time can be saved if they review some of the states that have undertaken this project and find something close to our situation.

Representative Harris said there are areas that need to be clarified. Representative Stoker said his feeling at the start was if you approach it looking at the criminal statutes, the place to start is a classification system and determine the grades of the offense. It may be broken down into subparts, for instance burglary. You have a violation of both the privacy of an individual as well as property. He added that the rape statute may need to be graded, and lewd and lascivious conduct with minor children needs to be looked at. If we have a classification system, we can plug those in. It has a significance as a starting point in our approach.

Mr. Bianchi said he is not sure he heard the working group decide they were going to rewrite any laws. The reason for classification developed in the last committee meeting was the disparity in sentences. The only way to do it was to set up classifications of crimes. Setting up guidelines was a practical conclusion. The human mind has to categorize things, so they need to categorize the various crimes to approach the problem of disparity.

Ms. Stahman said according to Judge Burnett's comments to this committee, there is no disparity in the judges perception. She asked, "Is it disparity or perceived disparity?"

Representative Stoker said disparity from the judges standpoint doesn't exist. There is disparity in the types of sentences given for crimes. The judges can easily say every situation is different, but there is disparity. A study on a case currently on appeal reveals there is disparity all over the place. Lots of times the circumstances are not that different. You never really get rid of disparity -- it will always be there to a degree. The judges are conscientious and do a good job, but we have to deal with the whole criminal code as it stands. We should determine the classifications that we as a committee think are appropriate and put the rest of this behind us for the moment.

Representative Harris said Judge Kramer and Mr. Bianchi reported that a review between judges for the different areas of the state showed there was not that much disparity. The judges had more or less worked out some concurrence on procedures or rationale for sentencing, but there is a need to do some work on the Code for the basis of what the judges refer to.

Representative Bayer said this is very true. Depending on the severity of the crime, there is discrepancy and disparity within the Code itself. One crime should carry more weight than another. The disparity is definitely there. We can use a classification system as a framework to start.

Representative Stoker recommended discussion of the types of available alternatives, realizing they are still not that well informed on methods used

in other states, not having read all the material, and approach ideas needed to make a decision.

Representative Harris asked if there would be an objection if they proceed to discussion of classifications. Representative Stoker said capital offense can be used as a basis. This would be a classification by itself. All the statutes have a separate class for capital offense. That's easy. The question is, how do you deal with multiple offenders, a stepped-up class for repeat offenders. Normally there will be a probationary term for the first offense on burglary. He asked, "How do we work in multiple offenders?" New York has a separate classification. We need to recognize the reality that on a first-time felony, unless it is a violent offense and there are real aggravating circumstances, a person will get a probation. We could set a really low penalty for a first-time offense, then go into the next classification for a second-time offender and property crimes. We have the option of considering the first-time offense as county jail time. Representative Stoker said he has always believed that on a first-time felony the person ought to spend some time in the "slammer" even if only in the county jail, to get a taste of what it's like.

Representative Stoker said there is the use of a weapon and injury to a person, armed robberies, rapes, lewd and lascivious conduct with a minor, aggravated batteries and assaults. This would give us a fairly easy category to determine at the start of the spectrum. He would recommend five classifications plus the capital offense category.

Senator Rydalch said they need to separate classification sentencing from terms. Representative Stoker said a classification is determined by the kind of penalty that is assessed. The penalty is what determines the classification. Right now the Commission on Pardons and Parole has changed a little and is inclined to think one-third of a sentence should be served before considering parole. It is the practice by judges to give them the maximum. The person goes up for 15 years on voluntary manslaughter and the same length of time on an indeterminate sentence. We should start with lower classifications having less severity of sentence. Senator Rydalch asked how many categories there would be under the designation of the offense -- felonies, misdemeanors and infractions. Representative Stoker said there should be five categories for major types of sentences. There should not be a category of voluntary manslaughter. Homicide should be at the top in a category by itself. Then there are aggravated assaults and batteries. Most everything else falls in a theft area. There are two types of drug violations, the delivery of a substance or a violation of a license. They cannot practice medicine without a license. It is not so much a moral crime as a violation of public policy.

Representative Harris asked Representative Stoker how far away his recommendation is from the 1971 classification. Representative Stoker said the 1971 model code had three felony classifications, first, second and third. Mr. Bianchi said that pertained to the length of sentence and they also had classifications for fines. Mr. Bianchi discussed upgrade of sentences. Section 18-2206 provided for extended terms.

The Chairman asked Mr. Schlechte for his recollections of the adoption of the 1971 classification system. Mr. Schlechte said committee consideration was between three and five categories. Mr. Schlechte continued that the primary reason the Idaho Code had first, second and third was because the model penal code had it. They changed the number of years to reflect local conditions. The 1971 version dealt primarily with the crimes in Title 18. There was no attempt

to go through the massive number of crimes existing outside Title 18. Mr. Schlechte said rationale was developed as to the categories of crimes. There were ordinary terms, extended terms, and mitigating circumstances.

Mr. Schlechte said the consolidation of the theft statutes basically follows the 1971 version. It is extremely difficult to pick and choose specific and limited areas in the Code in order to reorganize. Mr. Schlechte said he was surprised they could do it in the consolidation of the theft statutes. Mr. Schlechte added that he thinks Representative Stoker has been expanding the classifications more than the 1971 system, resulting in a more flexible, better-working system.

Moving from felony to misdemeanor, Mr. Schlechte said in 1971 they wanted to add a third category of offense, now called infractions and nonmoving traffic violations. These were things not serious enough to send a person to jail, but just a slap on the wrist. Enactment of the infraction process got by the 1890 syndrome that there are only felonies and misdemeanors. These are other types of offenses the public needs to speak to that are not serious enough to warrant going to jail, but you want the offender to know the public does not like it. The sentencing mechanisms were out of the model penal code, particularly the enhancement statutes.

Mr. Schlechte said Mr. Bill Roden was a consultant on this project, practically hired full-time. Mr. Roden would be an excellent source to share some of his experiences.

Representative Harris asked Mr. Schlechte if it was possible to revise the theft provisions to consolidate them, is there any reason we cannot take an area like Title 18, together with related areas, and address revisions there? Mr. Schlechte responded that the easiest category to do now is homicide. The second easiest would be crimes against a person. It is extremely difficult to pull out one particular area.

Representative Harris asked if they could go through these areas that lend themselves to revision and Mr. Schlechte responded affirmatively. Representative Harris said that it could have a ripple effect, relating to other areas of the Code. They could bite off more than is intended. Mr. Schlechte said there is always a ripple effect and they have already bitten off more than can be accomplished before the next session. He felt they could do it, but added that criminal law revision is not for the "short of breath." They are in a more advantageous position now in the mid-80's than in the late 60's or early 70's for a number of reasons. There is awareness. Mr. Schlechte again referred to the infraction process. The reason you are here is because of the effects of the system in putting people in prison. The public is more aware of what's going on so you are in a uniquely vulnerable position in having to respond. That vulnerability was not there in the 60's and 70's. It was more of a continuum. Now there is a reason why it's appropriate to change the criminal laws even though your main thrust and charge is the sentencing. Mr. Schlechte commented that he thinks the committee can succeed this time.

Representative Harris said there is a responsibility here and now that was not present in 1970. He predicts they will be here again next year. They do not know how much they will need to draw on resource people like Mr. Roden, the judges, and prosecutors, or how much involvement of their time will be required.

Mr. Schlechte said the number one need is for a working draft of a "rearrangement" rather than a revision. The main emphasis is the sentencing. To get to that you have to do some redefinition. Representative Stoker said most are in agreement as to the necessary approach -- the question is how do we do it? We need to delegate someone or some group to undertake the project of plugging the offenses into the four or five classifications. Mr. Schlechte said one of the discussions in the 1969-70 era was whether to continue the death penalty. That has been firmly settled. There are now about three crimes in Idaho for which you can receive a sentence of death. You need to have staff put something together to look at.

Ms. Stahman posed a question. It is her understanding there is some concern as to crimes not covered in Title 18. In looking at the materials Mr. Hodge has put together, more than 50% of the crimes specified in the Idaho Code are contained in Title 18. If we use the 1971 act as a basis, could someone incorporate into that all of the crimes specified, beginning at Title 2 and going to Title 72? Mr. Schlechte said he would advise that the first draft deal primarily with Title 18 crimes. Mr. Hodge said crimes outside of that code can be worked into categories included in the criminal code and be addressed by using all-inclusive boiler plate language. One approach the working group can consider is working on Title 18. Representative Stoker admonished that drug charges must be included. Title 18 does not now have them. The boiler plate approach may be the best way to handle it.

Ms. Stahman asked if the committee had received feedback from the prosecuting attorneys association. In two weeks the prosecutors will have their meeting. It would be a good time to attempt to respond to them. Representative Harris said Greg Bower, Ada County Prosecuting Attorney, would be at the meeting this afternoon. He added that if they want them specifically to answer questions, now is a good time to put it before them. Mr. Schlechte said the input, advice and well-being of the prosecuting attorneys is valuable, but they will not respond until they have a working draft in front of them. Mr. Bianchi added that he wrote asking for suggestions. Mr. Rood, the prosecuting attorney in Emmett, responded saying "don't monkey with the sentencing statutes." Mr. Bianchi echoed Mr. Schlechte's comment -- most people respond better to a specific proposal.

Representative Harris asked if there was a specific motion or action they needed to take now. We can review the motions made at the last meeting, then at the joint meeting of the full committee we will have reviewed those motions, agreed whether they are still applicable and whether we want to make those recommendations.

Representative Harris asked how they draw up a proposed classification? Mr. Bianchi said they have to make a decision whether to rewrite the substance of law or classify existing crimes. They could do either of those. If you are going to rewrite substantive crimes, you will, in effect, be changing case law. There is a whole body of law that the courts have interpreted. If you change a few words in the Code, you will be starting all over again. You could go either way -- take the existing laws and classify as to penalties and rewrite those areas that are inadequate or not properly framed.

Representative Harris said Judge Lodge commented that the judges do rely on case law. We should be careful about actions that would overturn this. Mr. Schlechte said these are the most significant policy decisions the committee will have to make.

Representative Stoker said it was hard when they dealt with the homicide statutes. It was thoroughly researched. Knowing there is case law, acceptance by the court of language interpretation is vital. In most cases they have adopted the language of the statutes.

Mr. Bianchi said it is not just the judges. There will probably be a reaction from the prosecuting attorneys, saying "don't change case law." That was one of the things that led to the repeal of the 1971 criminal code and you should be aware of that when you do the revisions. It will make it harder to pass the package. In 1971, the prosecutors said we are changing all the case law and fought that.

Representative Harris asked if there is further action on this point or a move toward a classification system and a working document, a rough draft. Mr. Hodge said perhaps an alternative would be to take a couple of chapters out of Title 18 and work that way. It would be pushing to have a full reclassification ready by mid-September.

Representative Stoker said he has a problem with saying don't rewrite substantive law. If you are setting up categories for crimes, you are rewriting substantive law. Maybe we should approach two or three top categories, such as life imprisonment, one category dealing with violent offenses, and work those three through. We could toughen the ones that logistically deal with nonviolent crimes, but there are so many. If we did the ones that are violent, perhaps use of a firearm or repeat offender categories, that would give us a basis and we could perhaps have that at the next meeting. Representative Harris asked Mr. Hodge if this would be more attainable and he agreed it would.

Mr. Bianchi said they could list all the things the working group would like to do and figure out which goals are attainable within the immediate future. It must be looked at as a long-term project. Categories can be set up and particular crimes fitted in, and maybe rewrite substantive law -- what could be attainable by this session or the next session. You have the option of moving beyond Title 18. It may be a three-year project, but you need to identify some things that can be done for this session. Decide the category structure without putting the crimes in by September, then start fitting crimes into the categories.

Representative Harris asked if the committee feels this is included in the motion that was passed last time which will be taken as a recommendation to the full committee. Representative Harris read the motion made by Representative Montgomery at the last meeting, and asked "does that motion cover what we have in mind? Is it still a valid motion to be recommended to the full committee?"

Representative Bayer said a somewhat methodical approach is warranted. It is a two-pronged situation -- in the long run an overall bird's eye view, and a methodical top to bottom revision, which will probably take years.

Ms. Stahman said they need to set up a classification system as in the 1971 statute. Take the statutes you want to revise and plug them in to the classifications. You could start with the statutes the prosecutors or the public are happy with, plug those in and see how it works, not changing case law, only changing problem areas that exist. You can deal with areas where people do not perceive problems. It would be easier to carry through than

starting with the homicide statutes. The theft offenses have already been rewritten and the prosecutors are happy with it. She recommended plugging into a classification system rather than taking a big bite and causing people to be overly concerned.

Representative Stoker said the difficulty now is maintaining a penitentiary that will hold them all. We don't have the facilities to keep these guys in. His perception is if the sentence is five years for delivery of drugs, the person should basically serve that five, not be paroled in four years. That's where we are failing. A myriad of penalties are thrown in with no rhyme or reason of putting those together. Representative Stoker discussed the grades of offenses. There should be limited time off for parole, but the majority of a sentence should be served rather than a minority as it is now. This would be the reality of what can happen. You are inviting disparity with a 15-year penalty. When you start classifying, say to the criminal public, "you will serve a good portion of that penalty." Otherwise, don't put the penalty in there. Quit carrying on a facade and see how the system is going to function.

Representative Harris reiterated the need for a working draft to look at. Is it covered in the first motion from the last meeting? The consensus was yes and the Chair declared it is covered. In essence, the motion reads:

> "... 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, ... 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. ... at least make an inquiry of the College of Law as to whether there might be students interested in participating with us in an effort to compile that kind of classification."

Discussion then moved to motion #2, that it be recommended they consider abolishing enhancements in their present form, that are set up in the present system. Mr. Bianchi reminded the committee that did not include persistent violators or use of a firearm. Representative Stoker said they are not really doing away with enhancements so that a persistent violator will not receive a harsher penalty. Representative Harris said the motion will stand as is.

It was determined there is no concern with motion #3 recommending that every felony carry a potential fine in addition to penal incarceration. Motion #4 recommended that the full committee consider elimination of current mandatory minimums and adoption of a general statute to require when a sentence is imposed, that a certain stated percentage of the sentence be served. As a matter of clarification, it was noted that it would not be only one statute, but certain minimums for each class would be built into the classification system.

Senator Rydalch discussed motion #5, stating she is not sure it belongs in this group. The other group had the same kind of motion. The Chair responded by saying they realize this is less specifically a part of our charge but have decided this and the area of enhancements would emanate from both working groups. The motion is in order. In the process of having the "good time"

drafts compiled, the Director of Corrections pointed out the difficulty on the wording and applicability of automatic good time. When you consider the criminals, the wrong people are going out on that basis. If this is changed, it affects the housing capacity. It goes back to finding a basis to approach more capacity, greater housing and its costs.

Representative Harris declared "so ordered" on motion #5, gearing toward, planning and budgeting for a maximum security unit, and stated that Senator Rydalch would present this to the full committee.

Motion #6 providing for full statewide applicability of community service was discussed.

> "... that pertaining to the extent to which a judge is unable to mandate community service due to the gap in the law that precludes a court from ordering community service or contribution thereto, we recommend that gap be closed."

Representative Harris said this is very much needed, but might be the only motion where the applicability or priority is a little lower. Mr. Hodge said this is included in Rule 33 in the packet under Idaho criminal rules. The new amendment to that rule allows a judge to order rendering of labor or services to charities or governmental organizations, not monetary contributions. Ms. Stahman questioned if there is a statute contrary to that rule, and whether it is procedural or substantive. Mr. Bianchi said it is substantive, and legislative enactment would overrule. Mr. Bianchi said the reason for the original enactment of this rule by the court was that it allowed a judge to order community service in lieu of assessing a fine or restitution. Abuses of this were found in the early 1970's. The last change was made to specifically allow judges to require performance of community service for a charitable organization. Mr. Bianchi said a change is not needed, so the recommendation is unnecessary. It has become such a morass when they are paying court costs, restitution and fines. It would only make it worse to throw in a charitable contribution.

Representative Harris asked if motion #6 is valid or if the committee feels the court rule has helped solve the problem for the present. He also asked if community service can be ordered now by judges throughout the state. Representative Montgomery said the wording of the motion was "to the extent that a gap exists." Discussion ensued on whether it was necessary to rescind or defer motion #6. Mr. Bianchi said it is not a problem, but he wondered why they should take up the committee's time. The judge can now order service to any community organization.

Representative Stoker moved, seconded by Representative Bayer, after review and discussion, that the subgroup delete motion #6 and not present it to the full committee. The motion carried.

Representative Montgomery commented on a statement by Mr. Marc Haws in the other meeting that, in his judgment, the subject matter of our first motion was a monumental undertaking, not to be done by this committee, even with the help of the College of Law. The tenor of the comments was that this task could not be undertaken successfully as a committee. The feeling was, if attempted, there may be a second failure, which would further delay the time of a code revision. Successful code revision with respect to sentencing would require a significant amount of time. His opinion was that it could not be done before

the next session. Representative Montgomery said he is still in favor of moving in that direction.

Representative Harris said they have gone all through this and heard Mr. Schlechte say what they need is a working document to start on. Representative Harris said Representative Montgomery's original motion covered this, so the recommendation will be made to the full committee before referring to any groups for assistance. It is necessary to have a document to look at. Staff time will be held to certain specific things. Representative Harris asked if anyone wishes to change anything at this point.

Representative Montgomery asked to make a quick comment. At the other group meeting this morning, Senator Fairchild expressed the view that we had bitten off more than we could chew and anticipated that the committee would "burn out" if this is undertaken. We need to be braced for that response.

Mr. Bianchi said he is not sure there is the difficulty involved with this motion that the Attorney General says. It is a classification system. He is not necessarily suggesting rewriting the substantive law -- maybe one can be done without the other. He would defend this recommendation as something that is achievable, although it is not going to do everything we want to do.

Representative Montgomery said the concern was that one cannot be done without the other, because of overlapping statutes. Once we are involved, we may find ourselves in the process of revision of substantive law.

Representative Stoker said it is a policy decision, of life in prison being 30 years or expanded to a higher term. The court adopted 30 years by interpretation. Ms. Stahman said a fixed life term is a fixed term, not 30 years. On an indeterminate life term, there is eligibility for parole after serving 10 years. Ms. Stahman explained that she handled two murder cases before the Supreme Court from the Court of Appeals. The Supreme Court decision was "fixed life means fixed life."

Representative Stoker said sentencing is usually in five-year increments, with the minimum being two-thirds of the sentence. The more serious the offense, the greater the penalty, so sentence enhancements would not be needed. The sentence terms might run one year, five years, 15, maybe 25 years, life, and death.

Mr. Bianchi said they could talk about rewriting the criminal code. This working group decided there is a problem with disparity between what the judges sentence and disparity in the laws. You can set up classifications with penalties in those classifications. The committee should decide whether it wants to rewrite the Code, if you should get embroiled in an argument in the full committee.

Representative Harris asked the various individuals to present their original motions to the full committee and the working group meeting adjourned at 11:00 a.m., to join the other working group at 11:15 a.m.

APPENDIX F

Legislative Council
Criminal Sentencing Committee
House Caucus Room
Statehouse
Boise, Idaho
July 25, 1985

MINUTES

Work Session on Pardons and Parole

The work session was called to order at 9:00 a.m. by Chairman Senator Fairchild. Other members present were Representatives Herndon, Speck, Sorenson, and Montgomery; and Senators Rakozy and Bray. Staff present were Nugent and Wood.

Also present were Representative Bengson; Jeff Shinn, Division of Financial Management; Olivia Craven and Tony Skoro, Commission on Pardons and Parole; Al Murphy and Ron Martin, Department of Corrections; and Marc Haws and Myrna Stahman, Office of the Attorney General.

Mike Nugent reviewed RS 11687 with the working session explaining to them the portions of the Code which he deleted and new language that was added. At the last working group meeting it had been the consensus of group members that language stating qualifications of the members of the Commission on Pardons and Parole be omitted and new language be inserted stating what the four main objectives of criminal punishment are. These objectives are:

1. Protection of society
2. Deterrence of the individual and the public generally
3. Punishment or retribution for wrongdoing
4. Rehabilitation

Following discussion the working group approved RS 11687 for recommendation to the full committee.

Mr. Nugent indicated that at the last meeting members of the working session on pardons and parole expressed concern that the Board of Correction had too much control over the Commission for Pardons and Parole and felt that the statutes should be changed so that the governor appoints the Commission members rather than the Board of Correction. RS 11688 addresses this issue and was approved by the working group for recommendation to the full committee. RS 11687 and RS 11688 will be combined into one piece of legislation.

Working group members felt that the power of commutations should be held by the governor of the state and not the Commission for Pardons and Parole. Mr. Nugent reviewed two pieces of proposed legislation dealing with this subject. RS 11697 creates a new section in the Constitution giving commutation powers to the governor. Also contained in this legislation is the provision that "there may be created a probation and parole commission with power to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime."

Tony Skoro, Chairman, Commission on Pardons and Parole, stated that the Commission does not supervise persons on probation and expressed concern about having that responsibility.

Al Murphy, Director, Department of Corrections, expressed his concern about the new language, stating that the Parole Commission has no authority over probation. This authority is with the judiciary now. The proposed language expands the Parole Commission's authority. He also expressed his concern about giving the Pardons and Parole Commission authority to supervise persons on probation and grant paroles. The power to supervise gives them the power to dictate over the Department of Corrections what happens in field supervision. He feels the balance of power that is currently existing is a good balance.

Mr. Murphy commented on RS 11689 which amends the Constitution relating to the granting of commutation. The new language provides "that a commutation granted by the Board of Pardons shall not be effective until approved by the governor in a manner to be provided by law." He said this concept works well in many other states and feels it is something this state should do.

Marc Haws, Deputy Attorney General, felt that pardons granted by the Pardons and Parole Commission should also be approved by the governor before being effective. Upon consensus of the working group members, this language will be added to RS 11689.

Senator Bray asked Mr. Murphy if he felt this type of authority could result in political favoritism. Mr. Murphy replied yes, but usually it is a political issue in a positive vein rather than a negative one.

Senator Fairchild asked Mr. Murphy if it were possible for a person in prison to be deserving of a pardon or commutation and the governor refusing it for political considerations. Mr. Murphy said he didn't recall of this ever happening but it was certainly a possibility. But he did feel we would see people getting pardons and commutations much further into their sentence than we are now. In other states he is familiar with, very seldom do you see a person being granted a pardon or commutation on the first recommendation.

Representative Herndon expressed concerns regarding the political overtones of having the majority of members on the Parole Commission being from one political party and the governor being of another political party.

Mr. Murphy stated that the Board of Corrections should not be making appointments to the Pardons and Parole Commission. This authority should either be in the governor's office or with certain other elected officials. He said the state of Oklahoma has a part-time parole board and they are appointed in this manner: The governor appoints the chairman; the state supreme court makes one appointment; the attorney general appoints one member; the speaker of the house and the senate pro tempore each appoint one member.

Senator Fairchild indicated this had been suggested to him before and traditionally all appointments have come from the governor and he feels tradition is very important in the continuity of our government. If we break away from this tradition he feels there would be a complete diffusion of the political power and tradition with some dangerous results. He added that he would be unable to support this concept.

Senator Bray stated that she felt having various state officials make appointments would make accountability diffused. She feels the best way to have the Commission on Pardons and Parole is to have it isolated so that they are looking at it objectively and there is no politics involved and the governor isn't making decisions based on what the public response is going to be.

Senator Fairchild suggested that perhaps a commutation or pardon should also be approved by the sentencing judge before being granted. Marc Haws stated that a defendant already has the ability to come back before the sentencing judge through two other means; one through correction of sentence (Rule 35), and the other through post-conviction relief where they attack the court's judgment. This leads to a lot of litigation and courts are continually besieged with lawsuits. He has had district judges say to a defendant in court: "I've considered your sentence; I've considered it again under a Rule 35 motion and I don't want to see it again." Mr. Haws doesn't feel it's a good idea to send it back before the same judge, or any other judge.

Olivia Craven, Executive Secretary, Commission on Pardons and Parole, stated that they used to contact all the judges on every commutation and many indicated that they didn't want to be involved. It is the Commission on Pardons and Parole's policy now on a fixed term to contact the sentencing judge but it was the judges' feeling that they didn't want to be involved in a commutation process on an interminate sentence.

Representative Montgomery stated he hoped it was the working group's intent to simplify and not further complicate the matter regarding pardons and commutations and he feels getting the judges involved in the process is complicating things.

Representative Montgomery moved that the working group recommend RS 11689 to the full committee with the addition of the pardoning provision, seconded by Representative Sorensen. Motion carried.

Senator Fairchild stated it was his feeling that the enhancement statutes should be eliminated and then take those enhancement-type crimes and give legislative direction to the time served before they are eligible for parole.

Marc Haws stated that the Attorney General's office feels that if this committee gets into the reclassification of substantive crimes; i.e., those crimes enumerated in Title 18 and throughout the rest of the Code, you're going to get into a real morass because it's not just a question of looking through the statutes and determining what the penalty is. You're going to find that there are a lot of overlapping statutes and there are some statutes that probably should be repealed or modified. It is really an entire criminal code revision if it's done right. The Attorney General's office is not opposed to a criminal code revision; it is overgrown and needs to be pruned and revamped.

Mr.Haws continued there is a lot of skepticism and the Attorney General's office would rather not see any effort to reclassify or reexamine the code unless there is a complete code examination. They don't feel this can be done by any single legislator or a single law professor with many interns. If the legislature is interested in a complete code revision, they recommend that it be done with a subcommittee composed of judges, prosecutors, defense attorneys, people who deal with this area of the law every day, because these are the people that are going to using the law.

Senator Fairchild stated that it would take a concurrent resolution and an appropriation through the legislature to bring outside members into this project. He feels it will take a lot of staff and professional practitioners.

Representative Sorensen stated the general consensus of the working group was to eliminate a lot of the enhancements and be left with a minimal amount of enhancements as a philosophy. He doesn't know whether it's possible to eliminate every sentence enhancer we have but there has been great abuse by application of the sentence enhancement.

Senator Rakozy pointed out that some of the judges had stated that they felt sentence enhancements were good and led to plea bargaining.

Al Murphy stated out that often a person serving time on an enhancer will do less time than one serving a straight sentence. For instance, if a person did armed robbery, and the judge wanted to make sure that person served ten years and he used an enhancer as opposed to not using an enhancer, the judge will give him six years for the armed robbery, four years for the enhancer. That means with good time, that person would be out of prison in five years.

If the judge had given him a straight ten-year sentence and dropped the enhancer, with good time he'd be out in six and two-thirds years. The enhancer will work to the benefit of the prisoner, at least on good time. Also the Commission on Pardons and Parole will most likely parole them sooner if there is an enhancer. They will commute the straight sentence to the enhancement sentence, and then parole them off the enhancer.

Senator Bray stated that the reason the enhancements were in place was to increase the penalty that was being imposed upon the people committing the crimes. The weakness is in its application and its use by the Commission on Pardons and Parole. She feels we should prohibit the use of the enhancements as one on which their length of stay was determined. She feels enhancements are good if they are causing a person to be punished longe, if they used additional tools that make the crime more reprehensible.

Marc Haws addressed the problem that Director Murphy brought about the person actually serving less time with the enhancement sentence and said the real problem is with good time and the committee really should look at how the good time statute works and probably eliminate most forms of good time. It's really a lack of understanding on the part of the sentencing judge as to the interfacing of good time rather than a problem with the enhancement provisions per se.

Mr. Haws continued that most the most commonly used forms of enhancement occurs when a person is a persistant violator or because they use a firearm in the commission of a crime. He would hate to see these eliminated. Some of the other enhancements are used rarely, if at all.

Senator Fairchild stated that if the committee's suggested legislation in the area of pardons and commutations become law he feels most problems with enhancements will be eliminated.

Al Murphy explained to the committee that consecutive sentences work the same way as sentence enhancers; i.e., you serve one sentence and once that is served you serve the second sentence. He explained statistics to the committee which showed that persons serving straight time got about a third of their sentence off but persons serving consecutive sentences ranged from having 50 to 60 percent of their sentence off. This is because of a combination of good time, commutations, pardons, and parole.

One example was a person that was sent to prison for 15 years for second degree murder. While in prison he received a consecutive sentence of three years for aggravated battery; he stabbed his cellmate's eyes out. He was discharged from his original sentence to his consecutive sentence and then paroled from the consecutive sentence. Mr. Murphy stated that person actually served eight years. The Commission on Pardons and Parole discharged him from his original sentence to his consecutive sentence under the philosophy that its better for a person to be on the street under

supervision than to be on the street with no supervision. Mr. Murphy opined that this particular individual should probably never have been let out on the streets.

Mr. Murphy continued with two suggestions: (1) The Parole Commission's philosophy is incorrect for the simple reason that this person is on the street without supervision anyway because there's no way you can control somebody like this and if a person is in administrative segregation and they can't be controlled there, you sure won't be able to control them on the street.

Mr. Murphy added that consecutive sentences, because of good time, can still work to the benefit of the prisoner. He stated that there is nothing the matter with enhancement laws and consecutive sentences; he's not implying that. The enhancements and consecutive sentences are there for a purpose - to keep that person off the street. In the example above, the judge looked at the defendant and said, "You murdered one, you just stabbed somebody's eyes out, you've got 30 violations in prison, I'm going to put you in a position where you're never going to get out. You're going to do your 15 years and I'm giving you an extra three years." That was the judge's intent and it was a good one. But Mr. Murphy said it just doesn't work that way.

Senator Fairchild stated the working group's frustration over this happening and continued that when a person is sentenced for 18 years, the public expects him to have to serve a major portion of that time. Plus, the public expects that for that full 18 years that person is accountable to society and he's only out of prison through the good graces of the parole commission and his good behavior.

Mr. Murphy stated they have to give good time because of statute.. The prisoners have a liberty right and the Department of Corrections ends up in court all the time for denying good time. It can be violated and good time can be taken away; but there is no way you can take as much good conduct time away from them as the law allows them to have. He indicated that he felt this committee had two decisions to make: (1) Public safety - before deciding anything on good time it has to be decided whether these types of persons should be out in the community; and (2) the impact it's going to have on the Department of Corrections. If, for instance, the good time statutes were revoked completely, the population at the prison would increase by 250 people. But he stated that some people released in the last year don't deserve to be out on the street.

Mr. Murphy presented the committee with an proposal for "meritorious reductions of sentence." This would eliminate good time and give persons time off for meritorious conduct. It states in part, "Each person convicted of an offense against the state and confined in a state correctional facility for a fixed term other than life, may be awarded meritorious conduct reduction of their sentence by the Director of Corrections. Meritorious conduct reduction of the sentence may be awarded when an inmate completes an extraordinary act of heroism at the risk of his own life or for outstanding service to the State of Idaho which results in the saving of lives, prevention of destruction, prevention of a major property loss during a riot, or the prevention of an escape from a correctional facility."

It was the consensus of the committee that Mr. Nugent and Mr. Murphy would incorporate various ideas from the members to include that meritorious time off (1) would be given only for an extraordinary event; (2) is a privilege, not a right - it is not mandatory; and (3) is only given at the discretion of the director. The warden can recommend this time off but only the director or the Board of Corrections makes the decision. This proposal would be presented at the next meeting of the committee.

Senator Fairchild stated that he thought we had solved the problem with commutations and parole and now he understands there is another word to add to the spectrum of the whole thing in reducing sentences - discharge. He said he wasn't faulting the present Commission on Pardons and Parole but thought it might be the fault of the legislature because for the past 20 years they haven't been paying attention and understanding the circumstances at the prison and have been putting the Commission on Pardons and Parole in a position to deal with a small penitentiary and no attention. He said this committee wants truth in sentencing. When the judge says you're doing 18 years the public believes they are going to do 18 years with maybe a little good time, very little good time, and maybe a parole if they behave themselves and make an effort of rehabilitation. We don't want enhancements; we don't want good time; we don't want discharges distorting the public's view of what the original judge's sentence was.

Senator Fairchild said we then have to put this all together and look at the consequences of what this does to the prison population and we all have to say, "Are we going to stand up in the legislature and vote the money for a new prison, and how much of a new prison?" He continued that the whole crux of what he is trying to get at is how we can draft language to say the Commission cannot alter the original sentence, that if the judge says, "You do three years for injury to property, three years for insufficient funds, and three years for burglary" the Commission should just look at an amalgamation of nine years and not alter that nine-year sentence.

Representative Sorensen stated he feels basically the working group has developed legislation that takes care of this problem and thinks that if we add the word "discharge" to legislation concerning commutation and pardons that this would clear up this area. The problem with good time has been addressed.

Senator Fairchild said we probably have handled it as long as the existing attitude is on the Commission for Pardons and Parole. But as soon as we go three or four years down the line, and we're gone or thinking about different things and we have a different board, they could invent another word rather than discharge and we'd be right back where we started. And he said he doesn't want to do all this work for a short time period.

Myrna Stahman, Deputy Attorney General, stated that we could rewrite the parole statutes such that if there are consecutive sentences they would be considered as one for parole eligibility. So, if a person is sentenced to 15 years for robbery plus 3 years for using a firearm during that robbery, it would be considered an 18-year sentence for parole eligibility. This would get completely away from the problem the Parole Commission has as to why they commute the one sentence so they can get onto the consecutive sentence.

Marc Haws said that he felt with this concept we would be just going in circles. What you're really saying is a consecutive sentence isn't a consecutive sentence. Why even have it? The judges are essentially going to make up their mind as to how much time a person should serve. Maybe we should just tell them there's no such thing as enhancements or consecutive sentences. You tell us how much you want him to do and the Parole Commission will take over from there. It's really not a consecutive sentence if you're going to say the whole thing is considered as one.

Senator Bray said if a second offense happens after the first one has been charged and sentenced for, then the second sentence has to come at the end of the first sentence. But it seems like when you're considering them for parole you'd want to look at the whole picture, not just parts of the picture at two different times.

Al Murphy stated that consecutive sentences are really a problem. His feeling is that a person shouldn't be eligible for parole at any time, to be discharged to a consecutive or an enhancer, unless he's served at least two-thirds of the original sentence. If he receives more than one consecutive sentence, he should serve two-thirds of the first sentence before he can be discharged to the second consecutive sentence; then he would have to serve two-thirds of the second sentence before he could be discharged to the third consecutive sentence.

Representative Stoker suggested that paroles should become consecutive at the end of a person's sentence. But we just need to make it clear that whenever a person is sentenced to a certain amount of time in prison, he will serve a minimum time; i.e., if he is sentenced to 5 years he's going to serve a minimum, no matter what. If he's sentenced to 25 years, he's going to serve a minimum, no matter what. And if we need to build a bigger prison, we'll build it.

Senator Bray agreed that the parole time at the end of each sentence should be maintained so that the Commission on Pardons and Parole still would have jurisdiction over the prisoners for a longer period of time.

Representative Stoker said we must decide if we want to keep parole. If we want parole, then we need to say they are going to serve two-thirds of their sentence and leave a portion of their sentence available for parole. If we don't want them to have parole, we want to make sure they serve the whole sentence, we should be saying that. If they go in for five years they're going to serve five years. If we say a person's going to serve a minimum of two-thirds, or one-third, we know what the period of time is he's going to serve. If he has consecutive sentences, these will follow after he has served two-thirds or one-third, or whatever.

Representative Sorensen asked the working group if we really want to keep parole? Are we fussing over something that we should eliminate completely? Is it really working?

Al Murphy responded that he couldn't endorse getting rid of parole. He also has some concerns about parole. Fifty to sixty percent of people that go out of prison on parole come back. But if you do away with parole there's a problem as far as a management system. But he said Idaho's parole supervision system is the best in the country. But he said in his estimation there are people getting out on parole that should not be on parole. But there is a value to parole. But he said the Parole Commission should never parole someone from inside the main prison. If they haven't advanced to being in minimum security, they should never be on the streets. But if someone is doing great in a work release center, he doesn't see any sense in keeping them in prison. They should be out on parole under supervision, or out on house arrest.

Ms. Stahman said from a prosecutor's viewpoint, it is better to have a person on parole rather than no supervision because if they commit another crime it's easier to revoke parole than to take them to a full trial and convict them of a crime they committed on parole.

It was the working group's consensus that these words should be added to RS11689: "...provided, however, no commutation or pardon, reduction, alteration, discharge, or any other mitigation of the sentence granted by the board shall be effective...."

Senator Fairchild requested Marc Haws, Myrna Stahman, Representative Stoker, and Al Murphy, and others interested, to draft three or four alternatives of legislation to be presented at the next meeting.

MINUTES - CRIMINAL SENTENCING COMMITTEE

The meeting of the whole Criminal Sentencing Committee was called to order at 11:30 a.m. by Co-Chairman Senator Fairchild. Other members present were Senators Bray, Rakozy, Reed, and Rydalch; Co-Chairman Representative Harris, Bayer, Herndon, Montgomery, Sorensen, Speck, and Stoker. Staff present were Hodge, Nugent, and Wood. Senator Darrington and Representatives Crane and McDermott were formally excused previously. Representative Keeton was absent.

Others present, in addition to those at the working sessions, were Russell E. Webb, Idaho Trial Lawyers Association; Eugene Larsen, Department of Corrections; Carl Bianchi, Administrative Director of the Courts; Representative Forrey; Attorney General Jim Jones; and Greg Bower, Ada County Prosecuting Attorney.

Representative Montgomery reported to the full committee the recommendations of the Code Revision Working Session. These recommendations are:

1. Put together a classification of crimes based on the seriousness of the offense for the purpose of achieving some uniformity in penalties.

Representative Montgomery stated that it was never the intent of this working group to propose a substantive revision of the penal code. Our intent was only to achieve some sort of classification of crimes based on levels of seriousness and then through that mechanism achieve greater uniformity in the length of sentences. The question is whether we can do one without the other. If we cannot, that's an issue we'll have to address. If the two can be handled separately then there's a question of whether we would want to get into that revision at this point in time.

2. Consider abolishing enhancement statutes.

Representative Stoker said enhancements can be built into the penalties addressed in the classification of crimes. If a person uses a firearm in the commission of a felony, his crime will be in another classification than it would be if he didn't use a firearm. If he's a repeat offender that could be entered into it as part of the classification as opposed to the enhancement statutes.

3. For every felony, the option to impose a fine in addition to penal incarcertaion.

4. Consider eliminating current mandatory minimum sentences and adopt in lieu thereof statutes which would provide that when a judge imposes a sentence that a given percentage of that sentence must be served before the inmate is eligible for parole.

5. Gear up to budgeting for a maximum security unit.

Senator Fairchild indicated that he had directed Senator Smyser and Director Murphy, who have worked extensively on this subject, to bring forth plans to the next legislature for a maximum security unit.

Senator Fairchild directed staff to prepare legislation on recommendations of both working groups and they will be on the agenda for the next meeting of the whole committee.

The committee recessed at this time and reconvened at 1:30 p.m.

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.

Address of

THE HONORABLE JIM JONES
ATTORNEY GENERAL OF IDAHO

Before

Criminal Sentencing Committee

July 25, 1985
Boise, Idaho

I am pleased to have this opportunity to address this joint legislative committee and to set before you my recommendations regarding the imposing task before the Committee. The actions which this group takes may have a far reaching influence upon our state's criminal justice system.

I believe that whatever changes you propose in the sentencing, incarceration, and parole processes should have the effect of clarifying our statutory procedures, making it easier to determine how much time an incarcerated person must serve, and increasing the accountability to the public of corrections and parole officials who take over responsibility for the inmate from the sentencing courts.

These objectives can be achieved without redefining the elements or the punishment or classifications of our legion statutory offenses, an undertaking which some persons advocate. Allow me to comment further why reclassification and recalibration of prescribed punishments or criminal offenses is not appropriate at this time. Any attempt to reclassify the multitude of criminal offenses set out in our code must necessarily entail an examination of each criminal statute. What the committee would find in such a study is that there are many criminal code sections which should be repealed, consolidated, or redrafted. This would lead, in final analysis, to complete code revision. While such an undertaking would undoubtedly be appropriate, it is a divergence from those

concerns which initiated the formation of this committee. Unless the legislature is willing to undertake a complete, thorough and scholarly revision of the criminal code (along with the many other titles which define criminal offenses) it would yield untoward consequences to set out upon reclassification. I have heard it suggested that a revision could be successfully accomplished by a law professor with the assistance of a couple of legal interns. This would be a mistake. The prosecutors and judges of our state who, along with law enforcement and corrections officials, daily deal in this area, must be an integral part of any code revision efforts. For many years now, we have recognized the need for code revision. Because of the somewhat overgrown and dilapidated condition of our code, the legislature undertook a recodification in 1970 and 1971. Negative vestiges of that legislative experience deter us yet; one need only mention criminal code modernization to be reminded by any informed listener of the confusion occasioned by the abortive adoption of the Model Penal Code. Although the Model Penal Code was a thoughtful and comprehensive act constructed over several years by some of the foremost criminal scholars of our nation, the lack of input from the criminal practitioners in the enactment process and their frustration in the implementation process led to the repeal of the code. Let us not, therefore, presume that a better product could be advanced by a law school professor

with the help of a few law students, who have never prosecuted, defended or judged a criminal trial. Yes, we need a code revision; but we must continue to function without it until the state legislature is prepared to support an effort which will be comprehensive and effective. A half-hearted attempt at comprehensive revision which ends in failure not only increases the skepticism which presently accompanies such a suggestion, but effectively postpones the day when such a code revision can be accomplished.

The Attorney General, therefore, respectfully submits that there are areas of fruitful study wherein specific changes can be made now to improve the criminal justice system. These areas are: First, restructuring and restricting the powers of the Commission of Pardons and Parole; second, clarification of sentencing statutes to make more definite the amount of time that a convicted person must serve; and, third, a fiscal response which will carry the corrections system through the impact of the proposed changes.

Restricting the Power of the Commission of Pardons and Parole and Making It Accountable to the Public. In past years reformers went overboard in removing the parole, pardon and commutation system from the elective process, thus removing much of the accountability from the system. The time has come to return a reasonable measure of the responsibility for pardons, commutation and parole decisions to the Governor.

This could be accomplished by having the governor appoint the members of the Commission and requiring that the governor endorse any commutation or pardon. The effect would be to make the members of this powerful body accountable to the public for its decisions through the chief executive. This would, of course, require constitutional and statutory changes. But I believe that the public temper is favorable for such changes.

Whether or not such restructuring of the Commission under the auspices of the governor is achieved, the open meeting laws should be amended to clearly embrace the hearings and deliberations of the Commission of Pardons and Parole. The Attorney General has advised the existing Commission that the open meeting laws do apply to it, but the Commission has thus far declined to follow this counsel.

The qualifications of the persons comprising the Commission of Pardons and Parole should also be reexamined. "Knowledge and interest in sociology, psychology, and rehabilitative services" (Idaho Code § 70-210) without the realism that comes from the experience of apprehending, prosecuting, and judging criminals does not fit the qualifications for members of this body. It is an understatement to say that pardon, commutation and parole cases are difficult; but the public mood demands that there decisions be made with more than a "bleeding heart." Through cavalier use of the pardon, parole and commutation powers, the difficult, lengthy, and costly work of

police, prosecutors, and judges is often undone by a few lay individuals with little or no background in the criminal law and no experience in dealing with the manipulative personalities of the persons who fill our prisons.

In some specific areas the Commission of Pardons and Parole should be clearly restricted. The Commission should be precluded from considering eleventh-hour petitions of capital prisoners and the Commission should be statutorily prohibited from initiating consideration of commutation in all case, particularly death penalty cases. Parole consideration should not be available until every prisoner has served at least one third of his sentence and, in the case of prisoners who have committed crimes against persons, it should not be available until two thirds of the sentence is served. This would involve amendment of Idaho Code § 20-223, about which I will comment further in a moment.

Truth in Sentencing. In order to achieve greater certainty in sentencing, our judges should be able to predict from our statutes what will happen to the criminal defendant once he is sentenced and responsibility is transferred to the Department of Corrections and the Commission of Pardons and Parole. At present, because of the duplicative effect of the good-time credits, and the parole powers of the Commission of Pardons and Parole emanating from Idaho Code § 20-223 (which in enumerated serious felonies makes the prisoner eligible for parole after one-third or five years of his sentence is served, whichever is less), our judges and prosecuting attorneys and defendants

themselves, really do not know how long the prisoner will actually serve under the pronounced sentence. The result of this confusion is that the judge -- the person most familiar with the facts of the case and the background of the individual standing before him -- imposes a sentence calculated to protect society, to exact retribution for the crime committed and to promote the rehabilitation of the defendant; but the judge has little control over whether that sentence will be carried out. The end result may be a sentence entirely different from that which the sentencer envisioned. Greater predictability could be achieved by repealing all but the most extraordinary form of good time.

Idaho Code § 20-101(A) describes three different forms of good-time which an inmate in the state penitentiary may accrue. The first is a form of automatic good-time, or "gain time," which accumulates so long as the inmate has faithfully observed all the prison rules. It begins to run on the day that the inmate is sentenced. The amount of good-time is calculated on the basis of a sliding scale with more good-time being awarded to those who serve the longer sentences. The second form is for industrial or meritorious good-time which is awarded to a prisoner for doing a good job in his work. The third form of good-time recognizes exceptionally meritorious or outstanding services performed by an inmate to be awarded by the Board as a lump sum. It is recommended that the first two

forms of good-time be abolished. In view of the indeterminate sentence provisions and the power of the Commission and Parole to grant an early release, there is no justification for automatic grants of good-time. Moreover, forfeitures of automatic good-time by prison officials creates administrative problems rather than enhancing administrative control of inmates for the reason that when such good-time is forfeited as a disciplinary measure, the inmate has an automatic right to a hearing and can lead to time consuming burden for correction's attorneys and personnel when the inmate seeks review in the courts of the actions taken by the prison officials. Good-time, except for exceptionally meritorious services (which should be more explicitly defined by statute), which is endorsed by the director of the Department upon the recommendation of the warden, should be abolished.

Mixed Sentences Should Be Made Available to the Courts. At present our sentencing judges have the option of imposing a determinate or an indeterminate sentence. It is recommended that they be given statutory authorization to structure the first part of a sentence as a determinate sentence to be followed by an indeterminate sentence. In this way the judge will know exactly how much time an inmate will spend before he will be eligible for parole, while still allowing the Commission of Pardons and Parole some latitude in dealing with the prisoner.

Idaho Code § 20-223 which establishes when certain offenders will be eligible to apply for parole should be changed. It should be simplified and made more comprehensive. It is suggested that Idaho Code § 20-223 be made applicable to all prisoners by requiring that all prisoners serve an indeterminate term of one-third of their sentence before they are eligible to apply for parole and serve two-thirds of their sentence where they have committed crimes against persons. At present, all prisoners under an indeterminate term who are not covered in the enumerated list of serious offenses set out in Idaho Code § 20-223 are, theoretically, eligible for parole the day they walk into the penitentiary. This statute, it is believed, gives Idaho some of the most liberal parole provisions in the nation.

Another suggestion which the Committee should consider is increasing the size and availability of fines as a sentencing alternative. The statutory fine for misdemeanors is $300 unless otherwise provided. Unless otherwise prescribed, the fine for a felony is $5,000. These sums should be modernized to real dollars. Many statutes do not specifically provide for a fine as an alternative or additional punishment to incarceration. Idaho Code §§ 18-112 and 18-113, could be amended to accomplish these purposes.

Fiscal Impact of Proposed Changes. At present, the state penitentiary is a revolving door institution. Because of capacity limitations and because of our present sentencing and parole provisions, when a prisoner enters the front door, another prisoner is released out the back door. Usually, this exit is accomplished with very little notice to the public or to the sentencing authorities. The result is a justified cynicism on the part of the public about our criminal justice system's ability to be stern with criminals. Legislators often aggravate this credibility gap by campaigning on a promise to get tough with criminals. Because of public sentiment toward criminals, legislators have enacted enhanced punishment provisions and mandatory sentence provisions without increasing the capacity of our penal institutions. The main yard is now full beyond capacity. Lawsuits challenging this overcrowding are now in federal court. We have already reached an alarming situation for which there are three solutions, none of which are appealing. First, and worst, is that we increase (rather than decrease, as I've already recommended) the power of the Commission of Pardons and Parole to prematurely release serious offenders. In other words, we could turn up the speed of the revolving door. When overcrowding occurs, Idaho faces a second alternative--the prospect of intervention by a federal district judge who will run the prison for us. The third alternative is to appropriate the necessary funds to construct additional

capacity for our prisons. A building program should commence soon with the priority being a maximum security facility. The overcrowding situation is critical and must be addressed. This third alternative is the only responsible answer for the integrity of the criminal justice system and protection of our citizens.

In conclusion, let me point out that we have lost credibility with the criminal. He knows that if he commits a crime he may not get caught. And if he gets caught he may not get convicted; and if convicted he will not spend the amount of incarceration time which the judge imposes. Without credibility there is no deterrence. Without the changes which I have recommended, we are doing little to discourage the criminal.

Thank you.

EXHIBIT B

LAW OFFICES
RADIN & WEBB
520 "D" STREET
POST OFFICE BOX 939
IDAHO FALLS, IDAHO 83402

July - 85

JOHN L. RADIN
RUSSELL E. WEBB

TELEPHONE 523-9808
AREA CODE 208

IDAHO SENTENCING CODE REVISION

I. Critical Realities

A. Primary Function of Courts in Sentencing

1. In theory, the function of the courts is to determine guilt or innocence of the accused. Most jurisdictions, however, see guilty plea rates of 80-95% and this means the court's number one job is to determine the penalty.

2. Sentencing phase must include written sentencing decisions with factual findings and stated reasons for the sentence. This would require strict standards of due process at the sentencing hearing.

3. Appellate review needs to be more refined than at present, and appellate courts should develope a "common-law" of sentencing and thereby ensure rational sentences with reasonable uniformity.

B. Enhancement and Mandatory Minimum Statutes are a Sympton not a Solutuion

1. Purpose was to force judges to "be tougher" in the exercise of sentencing discretion. It is debatable whether perceived softness by judges is in fact true.

2. Problem: they are a crude overlay over existing statutes, can result in absurd sentences, don't bring about fundamental upgrading of the law, and don't necessarily restrict judges in a positive way.

3. Note that the Washington grid system is a different way of attacking the same problem: insure that past crimes and violence are given adequate weight.

C. Corrections must have Adequate Support

1. Need a place to put them until their ultimate release, and punishment is the deprivation of liberty and not treatment in prison.

2. Correctional system must be able to ensure a phased re-adjustment to life outside the walls.

3. Most inmates do return to the street sooner or later. Their education and training is one way for society to protect itself.

D. Objectives of Sentencing are Universally Acknowledged

1. Protect Society.

2. Deter possible criminals.

3. Rehabilitate the offender if possible.

4. Retribution ("just deserts"; also, express society's moral outrage).

E. Length of Sentence Imposed is Very Complex Determination

1. Prosecutors can't try all cases.

2. This increases defendant's bargaining power, especially as to more severe sentences.

3. Mitigating and Aggravating facts are to be considered.

II. Most Productive Approach: Comprehensive Overhaul of Sentencing Laws

1. Goal should be a logical, integrated code.

2. Classify crimes in a sensible manner to reduce unjustified disparities in code sentences and to promote the efficient administration of sentencing.

3. Sentencing ranges should be consistent as to comparably serious crimes.

4. If parole retained, (for prisoner control and as incentive to prisoner's release planning), require a grid system to release determination as in federal system. Retain goodtime as prison control and management tool.

5. Court's should consider guidelines for sentencing judges with development of "common law of sentencing" a responsibility of appellate courts.

6. Retain a flexible sentencing discretion in trial courts, preserve mitigation/aggravation function.

7. Repeal current enhancements and minimums but perhaps delineate mandatory fixed terms under certain circumstances with top end indeterminate.

8. Code should ensure that the criminal is being punished and not just the crime.

9. Change "abuse of discretion" standard now used on appeal so that appellate review will promote consistency, prevent excessive disparity and make sentencing a true matter of record.

10. This process requires:

    a. Long term commitment by all in system.
    b. Committee staff.
    c. All cards on the table.

III. When the System Works, then there is "Truth in Sentencing"

1. "Truth in sentencing" really means that the system is intellectually honest and functions reliably and coherently.

2. There is never truth in sentencing if you merely lock them up and thow the key away.

3. "Truth" is seemingly easy to achieve in the public's abstract consciousness. Real cases in courtrooms are rarely easy and never abstract--most judges do agonize.

4. The public is entitled to the best sentencing system we can devise.

RESPECTFULLY SUBMITTED,

Russell E. Webb

EXHIBIT C

July - 89

STATE OF IDAHO
COURT OF APPEALS

DONALD L. BURNETT, JR.
JUDGE

537 W. Bannock Street
Boise, Idaho 83720
(208) 334-5168

July 23, 1985

MEMORANDUM

TO: Legislative Sentencing Study Committee

FROM: Judge Burnett, Idaho Court of Appeals

Thank you for the kind invitation, relayed through Carl Bianchi, to share my views on Idaho's felony sentencing system. My comments are attached. I will appear before the Committee on a future date to discuss these comments and to answer any questions.

Thank you, again, for considering my views.

Don Burnett

Donald L. Burnett, Jr.

gmr

cc: Carl Bianchi
Ron Hodge

July - 90

IMPROVING IDAHO'S FELONY SENTENCING SYSTEM: ONE JUDGE'S PERSPECTIVE

Donald L. Burnett, Jr.
Judge, Idaho Court of Appeals

July 18, 1985

"Reform, sir, reform! I've heard enough about reform. Things are bad enough as they are." These words, uttered by a member of the English House of Lords during the 1840's, reflect a human tendency to tinker with problems rather than to find comprehensive solutions for them. The difference between tinkering and comprehensive reform is nowhere more striking than in current efforts by many jurisdictions to improve criminal sentencing systems for felony offenders. The Idaho Legislature, by creating a Criminal Sentencing Committee, laudably has undertaken an examination of the system in our state. In my view, we have problems demanding genuine reform.

1. The system is confusing. The Idaho Code now provides for fixed sentences, indeterminate sentences, mandatory minimum sentences and enhanced sentences, together with varying forms of probation, parole, good time and administrative discharge. A report of the 1984 Governor's Criminal Justice Conference identified "confusion [in] fixed, indeterminate, mandatory and enhancement sentencing" as a problem in our criminal justice system. During the meeting of the Criminal Sentencing Committee on May 17, 1985, the Administrative Director of the Courts and the Director of the Department of Corrections both urged the adoption of a simplified sentencing system. At the Committee's meeting on June 20, 1985, several district judges echoed this sentiment. The public cannot repose confidence in a system that even judges and correctional authorities have trouble understanding.

2. The system's bark is worse than its bite. Sentences pronounced and actually served in Idaho have little relation to the sentences authorized by the Legislature. The Idaho Code prescribes harsh maximum punishments--for example, fifteen years for a nighttime burglary, life imprisonment for a

rape or robbery, and life imprisonment or death for a murder. However, many Idaho felons spend no time at all in prison. During 1983, some 1,871 convicted defendants in Idaho were placed on agency-supervised probation. (This does not include so-called "bench probation" occasionally used for misdemeanor offenses.) Of those persons who received agency-supervised probation, approximately 23% spent some time in pre-probation confinement, usually under the 120-day retained jurisdiction program, but the rest received their probation directly. (Source: U.S. Department of Justice, "Bureau of Justice Statistics Bulletin: Probation and Parole," 1983, Tables 1 and 5.)

Among the offenders who do go to prison, the Director of the Department of Corrections has reported that the average sentence imposed for violent crimes in Idaho is 81.6 months and the average time actually served in confinement is only 18.85 months. (Source: Minutes of Criminal Sentencing Committee, May 17, 1985, page 9.) The Idaho experience is not unique. In 1981, the median sentence imposed for violent crimes in the United States was estimated to be 53 months, and the median time actually served in confinement was estimated to be 17 months. The relationship between sentences imposed and time actually served varied considerably from state to state. For example, in California, the median sentence was relatively low (32 months) but most of it was actually served in confinement (18 months). In contrast, Montana--much like Idaho--had a higher median sentence (69 months); but it had a lower median time actually served in confinement (11 months). (Source: U.S. Department of Justice, "Bureau of Justice Statistics Special Report: Prison Admissions and Releases," 1981, Table 5.)

Thus, in Idaho there is a substantial gap between the "bark" of our sentencing statutes and the "bite" of probation or confinement actually served. This gap has led many Idahoans to urge that Idaho adopt a system of "truth in sentencing." This phrase frequently was used during the Criminal Sentencing Committee's meeting on June 20. During the May 17 meeting,

the Director of the Department of Corrections made a similar point when he declared that a sentencing system should say what it means and do what it says.

3. The system produces disparate sentences. This is a controversial topic. Many judges believe there is little or no sentencing disparity in Idaho. I respectfully disagree.

With the help of a legal extern at the Court of Appeals, I recently examined computer print-outs of sentences administered by the Department of Corrections from 1970 to the present. The ranges of prison sentences are charted on "Attachment A," prepared by the extern. Here is a summary of prison sentences imposed by the courts for all categories of crime in which more than ten cases are reported:

Offense	No. of Cases	Sentence Lengths (in years)* High	Low	Mean
Murder-1st degree	67	death	13 IDT**	IDT life
Murder-2nd degree	122	fixed life	4 IDT	25 IDT
Manslaughter-voluntary	70	15 fixed	3 IDT	10 IDT
Manslaughter-involuntary	67	15 IDT	1 IDT	5 IDT
Manslaughter-vehicular	12	15 IDT	3 IDT	5 IDT
Kidnapping-1st degree	22	death	5 IDT	15 IDT
Kidnapping-2nd degree	66	IDT life	2 IDT	15 IDT
Rape-forcible	59	IDT life	3 IDT	12 IDT
Rape-other	76	IDT life	2 IDT	12 IDT
Lewd/lascivious conduct	287	IDT life	2 IDT	10 IDT
Robbery	633	fixed life	2 IDT	6 IDT
Assault-intent/murder	34	14 fixed	5 IDT	10 IDT
Assault-intent/robbery	22	14 IDT	3 IDT	5 IDT
Assault-deadly weapon	20	15 IDT	5 IDT	10 IDT
Assault-intent/rape	64	IDT life	3 IDT	9 IDT
Assault-intent/L & L	19	10 IDT	2 IDT	4 IDT
Assault-aggravated	132	10 IDT	1 IDT	4 IDT
Burglary-1st degree	1986	IDT life	1 IDT	5 IDT
Burglary-2nd degree	870	20 IDT	1 IDT	5 IDT
Theft-grand***	615	20 IDT	2 IDT	5 IDT

*Some sentences reflect persistent violator status. By telephone the Department of Corrections has informed us of nine such cases. I surmise that there may be others not separately coded on the computer.

**"IDT" stands for "indeterminate."

***"Theft" includes larceny, forgery and embezzlement.

This table shows substantial variations in the high, low and mean sentences imposed for felonies in Idaho. For example, the mean sentence for second degree murder is twenty-five years indeterminate, but sentences as low as four years indeterminate and as high as fixed life have been imposed. An individual serving a fixed life sentence will stay in the penitentiary without parole until he dies (unless the sentence is commuted); but the individual serving a four-year indeterminate sentence likely will be considered for parole in about sixteen months.

The statistics from the Department of Corrections are consistent with my observations as an appellate judge. Wide ranges have appeared in sentences reviewed by the Court of Appeals. From January, 1982, through June, 1985, we reviewed approximately 91 sentences imposed by district courts. Those cases are charted on Attachment "B," which was prepared with assistance from the extern. Because sentences are not appealed unless the defendants consider them excessive, we would expect to find less disparity in such sentences than among sentences in general. Nevertheless, in the crime categories containing the greatest number of appeals, we have seen substantial variations:

Offense	No. of Cases	Sentence Lengths (in years)* High	Low	Mean
Murder-2nd degree	10	IDT life**	15 IDT	25 IDT
Robbery	14	IDT life	5 IDT	15 IDT
Burglary	27	15 fixed	2 IDT	10 IDT

*Some sentences reflect persistent violator status.

**"IDT" stands for "indeterminate."

These figures are, of course, rudimentary. They represent a first-level examination of raw data. More sophisticated analyses would be helpful. Nevertheless, I submit that the statistics from the Department of Corrections and the Court of Appeals point to a genuine issue of sentencing disparity in Idaho. Moreover, it must be remembered that these figures relate only to prison

sentences. For many of the offenses shown, sentences of probation have widened the range of disparity even further.

Does this mean that Idaho judges are arbitrary? Not necessarily. Sentences reflect the varied experiences and values that judges bring to their work. Moreover, sentencing deviations may be justified, to some extent, by differing circumstances surrounding the commission of each crime and by the characteristics of each individual offender. The crucial question is how much deviation is good for our criminal justice system.

Idaho presently has an individualized sentencing system--that is, one which focuses not only upon the nature of the offense but also upon the nature of the individual offender. This type of sentencing system permits--indeed, it requires--a punishment that may not fit the crime. As we have seen, Idaho sentences vary widely from case to case involving the same type of crime. Individualized sentencing gives broad leeway to the trial judge, reviewable on appeal only for "abuse of discretion." Such discretion is seldom found to be "abused." Indeed, the Court of Appeals, operating under this standard of review, has reduced sentences in only two of the 91 cases presented. This record suggests that felony sentences in Idaho generally are not too harsh; if anything, some of them may be too lenient. Rather, the problem is that the sentences are greatly diverse. The system is producing inconsistent results.

In many jurisdictions, individualized sentencing has come under critical review. Its advantages are being weighed against the disadvantages. The principal advantage is that the sentence is "fine tuned" to variable factors in each case. However, the disadvantages are several. Widely diverse sentences erode public confidence in the criminal justice system. The system is viewed as unpredictable. It loses its value for teaching acceptable and unacceptable behavior in society. Diverse sentences may encourage convicted criminals to treat their sentences as "the luck of the draw" in the "game" of criminal justice rather than

as consequences of their own wrongful conduct. Finally, individualized sentences often do not effectively vindicate victims' rights nor do they provide for deterrence of other potential offenders.

Consequently, many jurisdictions are moving toward sentencing systems in which the penalty is determined primarily by the nature of the offense and the past criminal record of the offender. Other "individualized" factors are given secondary weight. Certain base line sentences are prescribed by law. These systems often are described as "presumptive" or "prescriptive."

Many Idaho judges are opposed to such systems. They fear that the systems would eliminate their discretionary authority. With due respect to these fine jurists, I submit that their fears are misplaced. In a properly drafted "prescriptive" or "presumptive" sentencing law, discretion is not entirely destroyed. Rather, it is narrowed and structured. Judges may deviate from the "prescribed" or "presumptive" sentences only to a carefully limited degree and only upon finding exceptional circumstances which must be explained in the record. Because these systems reduce--but do not wholly eliminate--individualized discretion, they pose no constitutional problems as far as the separation of legislative and judicial powers is concerned.

Prescriptive or presumptive sentencing systems usually result in more predictable incarceration of violent offenders. In Minnesota, for example, the percentage of violent offenders sent to prison jumped from 47% to nearly 80% after a prescriptive system was adopted. (Source: U.S. Department of Justice, "Bureau of Justice Statistics Special Report: Sentencing Practices in Thirteen States," 1984, at p. 3.) Such systems often have been accompanied by changes in the parole system and by reduction (but usually not total abolition) of "good time."

The federal government recently reformed its criminal sentencing system along these lines. The Comprehensive Crime Control Act of 1984 provides for prescriptive sentencing guidelines. The chief objectives of the Reagan Administration

and of a bipartisan coalition in Congress were to reduce disparity in sentencing and to diminish the confusing interplay between judges and parole commissioners in determining the length of sentences to be served. (Source: 36 CRIMINAL LAW REPORTER, pp. 2338-2343, February 6, 1985.) Sentencing guidelines in some form also have been adopted recently in such states as Minnesota, Washington, Connecticut, Illinois, North Carolina, New York and Maryland. (Source: U.S. Department of Justice, "Bureau of Justice Statistics Special Report: Sentencing Practices in Thirteen States," 1984.)

In 1984, Idaho's Sentencing Alternatives and Reform Committee (a predecessor to the present Criminal Sentencing Committee) heard a detailed explanation of the new Washington system by the Honorable Harold Clark, judge of the Spokane County Superior Court and a member of the Washington sentencing guidelines committee. Judge Clark noted that presumptive sentencing was adopted in order to bring punishment into closer correlation with the severity of each crime, to protect the public, to enhance respect for the law, to provide for longer and more certain confinement of violent offenders, and to provide for alternative means of dealing with nonviolent offenders.

Making a sentence more closely fit the crime, and reducing sentence disparity, are not new ideas in Idaho. In a 1972 report, the Idaho Judicial Council, quoting former Justice Jackson of the United States Supreme Court, said:

> It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should depend in large part on a purely fortuitous circumstance; namely, the personality of the particular judge before whom the case happens to come for disposition.

The Judicial Council recommended that standard dispositions be established "for each principal type of offense. Departure from these guidelines should be condoned only in cases plainly marked by extraordinary circumstances. . . . [T]rial judges [should] enter into the record an explicit statement of the criteria

applied, and the particular facts considered, in fashioning the sentence under review." (Idaho Judicial Council, "Idaho Justice of the Grass Roots," December, 1972, at p. 44.) In a similar report during 1976, the Judicial Council again observed:

> Whenever the Judicial Council conducts hearings, it receives considerable feedback from citizens and public officials concerning the operation of the criminal justice system. The problems of bail and corrections were analyzed at some length in the last Judicial Council report. What genuinely concerns the Judicial Council at the present time is the broader based and more strident criticisms of the judiciary by citizens and law enforcement officers alike, concerning the leniency of and discrepancies among sentences in criminal cases. The Judicial Council is fully aware of how easy it is to criticize sentences in general without taking into account the particular facts of each case. But public dissatisfaction with the courts apparently has developed to such an extent that the case-by-case approach has lost some of its utility. The conceptual rationale for the case-by-case approach is that in order to establish an effective rehabilitation program for an individual convicted of a crime, the program must be tailored to his individual problems and circumstances. The difficulty is that the more personalized the sentences become, for the purpose of effective rehabilitation, the less effective they become in the public's view for the purpose of deterrence. Deterrence has a legitimate place in the criminal law and it must be given its due weight.

(Idaho Judicial Council, "Report to the Legislature, Governor and Supreme Court," 1976, at p. 31.)

In a monumental study of criminal justice, under a grant from the Ford Foundation, Charles Silberman focused upon public discontent with criminal sentencing. "It matters greatly that people perceive the courts as unjust," he wrote, "for this perception undermines respect for law and belief in its legitimacy." Silberman continued:

> If we are serious about reducing criminal violence, we need more due process, not less; we have to recognize the powerful educating

> role of the courts and the degree to which procedures shape attitudes. . . . What is required, in good measure, is to make the appearance of justice conform to its substance. That, in turn, means making the invisible visible--spelling out the informal norms that guide the actions judges and prosecutors take, so that defendants, not to mention judges and prosecutors themselves, can see and understand what is happening.

(Charles E. Silberman, Criminal Violence, Criminal Justice, 1978, at pp. 297-98.) I personally believe the time has come for "making the invisible visible" in Idaho.

4. The system makes everybody (and nobody) responsible for achieving sentencing goals. Idaho's present sentencing system compels judges and correctional authorities to perform overlapping functions. When judges impose sentences, they consider the case law criteria of protecting society, retribution, deterrence and rehabilitation. After the sentence has been pronounced, and the individual is in the custody of correctional authorities, these authorities use similar criteria to determine when the individual will be released. Such overlapping functions lead to speculation by judges as to what the correctional authorities will do and to second-guessing by correctional authorities as to what the judges have done. As in most situations where "everyone" is responsible for a task, "no one" is fully accountable.

Rather than asking judges and correctional authorities to perform overlapping functions, it would seem more rational to ask each group to concentrate on what they can do best. Judges should determine the period of custody necessary to serve the goals of retribution (including vindication of community values and victims' rights) and general deterrence. These criteria are closely related to the nature of the crime and they can be fully evaluated upon information available to the judge at the time of sentencing. On the other hand, rehabilitation and the future protection of society from the convicted defendant are criteria best evaluated by correctional authorities into whose custody the

defendant is placed. Correctional authorities, after intensively studying an inmate, are better situated than the judge to determine when, if ever, the inmate may be returned safely to the community.

The roles of judges and correctional authorities should be made complementary, rather than overlapping and conflicting. If Idaho statutes were amended to allow fixed and indeterminate components of a single sentence, judges could prescribe a minimum period of confinement necessary to satisfy the criteria of retribution and deterrence. After this fixed period had been served, correctional authorities could ascertain, during the indeterminate component of the sentence, the point in time when the criteria of rehabilitation and protecting society would allow the individual to make his transition back into the community.

5. The system lacks long-range planning. Idaho's district courts handle approximately 5,000 felony cases every year. (Source: Administrative Office of the Courts, "The Idaho Courts 1984 Annual Report: Appendix.") Increasingly, these cases result in sentences placing heavy demands upon the facilities and personnel of our correctional system. Already, the Director of Corrections has informed us that the Idaho State Correctional Institution is operating at 130% of its designed capacity. (Source: Minutes of Criminal Sentencing Committee, May 17, 1985, page 11.) In this regard, Idaho is following a national trend. The number of inmates in this country's prisons and jails has risen 40% since 1980. The increase among prison inmates would have been even larger had not fourteen states given early release to some 17,000 prisoners during 1983-84 alone. (Source: U.S. Bureau of Justice Statistics, cited in American Bar Association, "The Judges' Journal," Spring, 1985, page 2.)

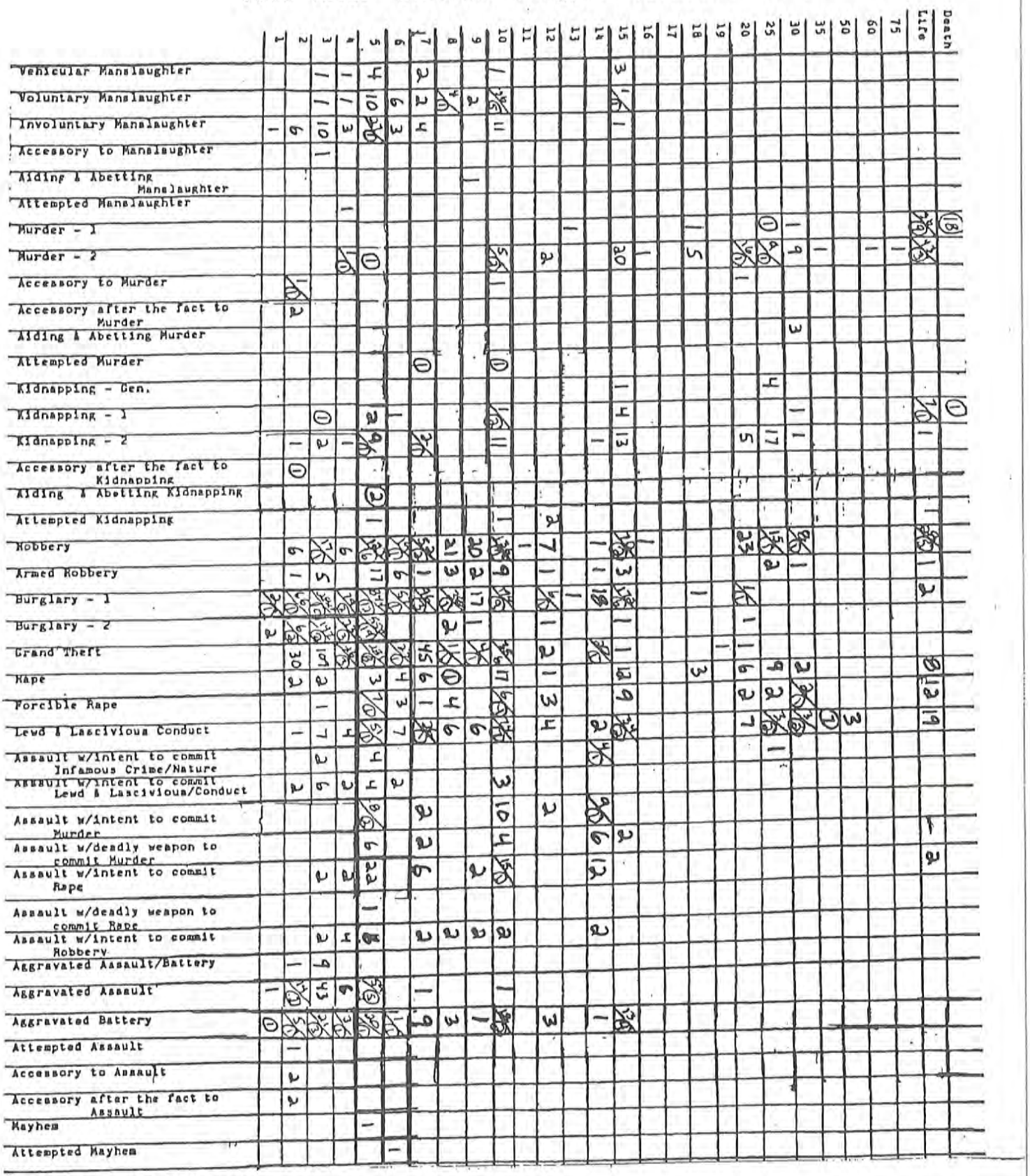
Idaho can learn from the experience of early releases in other states. The lesson is that the capacity of our correctional system must be correlated with the public policy

objectives underlying our felony sentencing laws. This requires a stable philosophy and a commitment to long-range planning. In my view, sentencing guidelines of the kind mentioned above provide a means of articulating and implementing a consistent sentencing philosophy. By combining such guidelines with demographic statistics and data gathered from other states, we could estimate the size and make-up of our inmate populations in the future. We could project the facilities, programs and personnel required to administer these populations and we could tailor the sentencing guidelines to reasonable fiscal restraints. In short, we could foresee problems and address them in an orderly fashion, rather than confronting them in a crisis atmosphere.

In these comments, I have attempted to identify Idaho's needs for genuine reform. We need simplified sentencing. We need truth in sentencing. We need to reduce sentencing disparity. We need more effective allocation of judicial and correctional responsibilities. We need long-range planning. These needs can be met only by a determined, bipartisan reform effort. There are no "quick fixes," nor any "Republican" or "Democratic" solutions. There is only hard work.

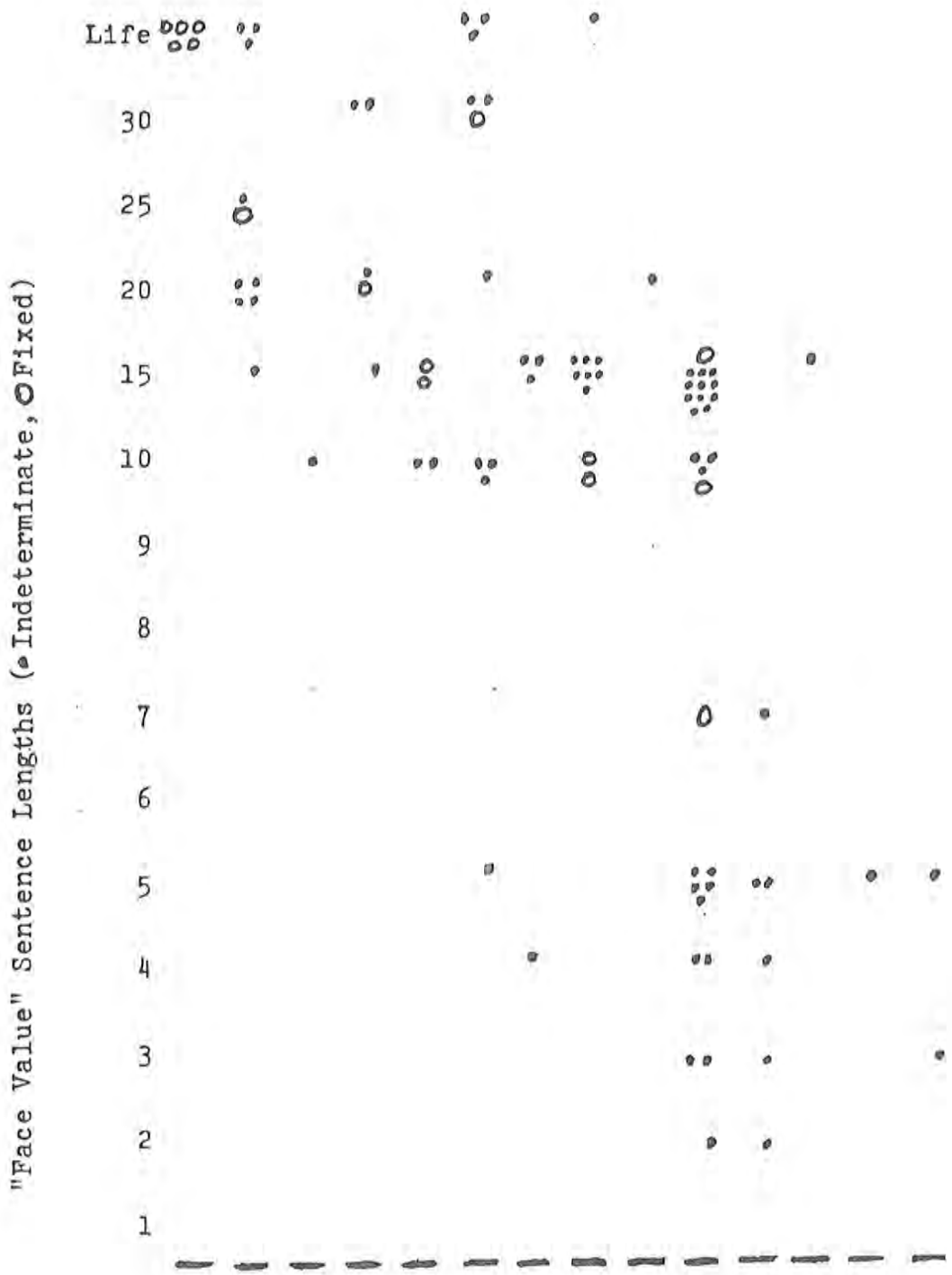
I do not know whether all these reforms can be achieved. But perhaps we can take some comfort in the axiom that "those who try to do something and fail are infinitely better than those who try to do nothing and succeed."

ATTACHMENT "A"
Department of Corrections Data
"Face Value" Sentence Lengths* (compiled 6/85)



*Circled numbers refer to fixed sentences; others to indeterminate sentences.

ATTACHMENT "B"
Sentences Reviewed by Court of Appeals
(compiled 6/85)



APPENDIX G

Legislative Council Committee on Criminal Sentencing
Code Revision Working Group
House Lounge, Statehouse, Boise, Idaho
September 18, 1985

MINUTES

The meeting was called to order at 11:35 a.m. by Co-Chairman Representative Harris. Members present were Senators Reed and Rydalch, and Representatives Keeton, Montgomery and Stoker. Also in attendance were Ms. Myrna Stahman, Deputy Attorney General, Appellate Division, and Mr. Roger Bourne, Ada County Prosecutor's Office, representing the Idaho Prosecuting Attorneys Association. Staff present were Hodge and Cory.

Representative Harris announced that Representative Montgomery would give a report of the complete set of recommendations from this working group to the full committee.

Representative Harris said since the group met on June 20, 1985, Mr. Hodge has done interim work on classification of crimes which is incorporated in RS11717.

Ms. Stahman stated she was requested to make sure the committee members understand that the Attorney General is not supporting a classification system at this time, unless there is a total revision. She will offer advice and the Attorney General wants to be of assistance to the committee, but it is not the Attorney General's proposed legislation and he is not endorsing it.

Representative Montgomery asked for more clarification as to the reason the Attorney General disagrees or prefers not to support this and stated he assumes it is not being suggested that the Attorney General would oppose it for the Legislature.

Ms. Stahman said their position is that there is a need for a complete Code revision by experts in the field. There is some concern about putting something together without looking at Titles 18 and 19 in their entirety. Ms. Stahman said they will be able to determine more today. It is very difficult to clear up a portion of the criminal law. Every time you touch part of it, you touch something else. They suggest that it is a long-term project. It would be difficult to put together a good product for the coming legislative session, but they want to work with the committee in every way possible.

Chairman Harris suggested perhaps Mr. Bourne, the committee and the Attorney General's office would have time between now and the end of the year to work on this project. Ms. Stahman said one of her bosses commented that the only way it would be possible is to get experts, and it would require the full time of two Attorney General's Office attorneys, who are presently not available. They do want something done, but not a "Band-Aid" approach.

Senator Rydalch asked if the same feeling is shared by the Prosecutors Association. Mr. Bourne said he has not had an opportunity to study it in-depth, and does not have enough information to form an opinion, but will listen to the presentation today.

Chairman Harris said Mr. Greg Bower, President-elect of the Prosecutors Association, after working with the Attorney General in the interim, suggested that the prosecutors group be drawn in more closely, and Mr. Bourne had received only a couple of days' notice of the meeting.

Representative Stoker agreed it is a difficult project, but felt it should be viewed from the standpoint of needing a place to start. Representative Stoker commented that the AG's office did not like the criminal statutes proposed last year and stated they can't support it if is not their proposal. Ms. Stahman said it is not their legislation. She did not want to mislead them and agreed there was a misunderstanding, even on her part. The Attorney General's office is working on a comprehensive product to put together down the road.

Consideration of RS11717

Representative Stoker asked Mr. Hodge if a particular state was used as a format. Mr. Hodge replied that he looked mainly at the Idaho Model Penal Code and the State of Utah, as these were the two areas in which the committee had expressed interest.

Mr. Hodge commented that Section 1 gives four classes of felonies, plus capital felonies, and imposes a fourth degree felony for all crimes where specific punishment is not provided. Section 2 deals with degrees of misdemeanors. Chairman Harris noted that the motion concerning felonies included capital offense and four degrees of felonies. Representative Stoker said that was suggested from the standpoint of using classifications to fit the gamut of crimes. As the felonies are put in, there could be subparts, with more or fewer categories. Four is consistent with the average.

Ms. Stahman compared subsection (2) of Section 1 with subsection (2) of Section 2, a fourth degree felony as opposed to a Class B (middle) misdemeanor, if not specified. The current statute picks the lowest classification. She asked if that should be the way the law is -- do you want to tie the judge's hands or afford him additional opportunity if the crime is more serious? A Class B as opposed to a Class C misdemeanor -- this is inconsistent. Mr. Hodge said it was the closest he could come to the present boiler-plate statute. Mr. Hodge said he attempted to draft the reclassification on top of the Code without making substantive changes. Mr. Hodge noted that Ms. Stahman would make more substantive comments and then the conflicts between the two approaches will be apparent.

Ms. Stahman said substantive law is being changed in some respects because it is being categorized. Representative Stoker felt caution should be exercised in the time spent on each section. Today's time should be used for an overall picture. The entire job cannot be done until there is an overview, as they would just talk and accomplish nothing. A lot of time will have to be spent on each individual section before it is completed.

After much discussion about the best approach, Representative Montgomery suggested that Mr. Hodge go through the entire RS as an overview and the working group would then go back through the individual sections as time allows.

Section 3 sets ordinary terms for felonies, beginning with a capital felony, murder and kidnapping sections, with a procedure for the death penalty or life imprisonment. Mr. Hodge continued that for first degree felony, the sentence would be life imprisonment; second degree, 25 years; third, 15 years; and fourth, five years. Mr. Hodge said Representative McDermott suggested 15-10-5 years. The committee will need to look at this. It is important to consider how it fits into the present sentencing system, as it could be difficult fitting in the crimes in the 10-year area, into a format that has five or

15 year sentences.

Mr. Bourne asked if a list had been made showing all the common or more major crimes and their punishments, for comparison with this classification. Mr. Bourne used first degree burglary as an example, whether this increases or decreases the maximum potential sentence. Mr. Hodge advised that there is a list of the crimes in the Code but nothing that would lend itself to comparing the effect of reclassification on present sentences.

Representative Stoker suggested that conceptually, it would be easier to go through if the number of years applying to each category is struck, as all the members may want to make changes.

Senator Reed asked if this is the criteria to use -- the seriousness of the crime rather than subjective crimes. Representative Stoker said it is a classification, whether formal or piece-meal, and must be based on the relative degree of severity of the crimes in relation to each other and whether it is the first or second offense, etc.

Mr. Hodge said Section 4 pertains to extended term sentences for a persistent violator or a person who uses a firearm. The persistent offender language is from the Model Penal Code, with some additions from the current statute. It is the prosecutor's duty to give notice to the defendant that an extended term is being sought.

Subsection (a) of Section 4 is the persistent violator and deadly weapon language from the enhancement area in Title 19, Chapter 25. Subsection (b) sets out extended terms which double the ordinary term sentence. First degree would not be included. Section 4 should be read in conjunction with Section 14, the repealer section, page 8. It was the motion of the committee to dispose of sentence enhancements except for use of a firearm and persistent violators.

Fines and penalties are frequently found to be outdated in the Code. Mr. Hodge wondered if the committee wished to consider this now or at a later time. Representative Stoker said they should talk about inflation, with an increase in amounts, and whether it would mean a total change from a misdemeanor to a felony. Mr. Hodge said there is a way it can be automatically addressed in terms of inflation. Ms. Stahman will have comments on that subject.

Mr. Hodge said he superimposed a classification system on the definitions. The rest of the RS deals with preliminary chapters in Title 18 and definitions. Section 5 imposes sentences for misdemeanors. Section 6 allows the judge to levy fines in all classes of misdemeanors and felonies.

Section 7 adds a felony of the fourth degree to the felony definition statute, and includes punishments as set forth in this act, ordinary term felony, punishments and fines.

Mr. Hodge said this is the same type of changes for misdemeanors in Section 8. It adds different classes of misdemeanors and provides how those classes are punishable.

Section 9 repeals Sections 18-112 and 18-113. Section 18-112 is punishment for a felony where punishment is not specifically given. This is already

included in subsections (1) and (2) of Section 3. Section 18-113 deals with misdemeanors under a boiler-plate provision. This is covered in subsection (2) of Section 2.

Section 10. Section 18-303 superimposes the classification system on nonspecific common law felonies and misdemeanors.

Section 11. Section 18-304 is repealed because it is repetitious. Aiding and abetting is already covered in an existing section in the Idaho Code.

Section 12. Section 18-306 covers punishment for attempts. It was changed slightly because it was inconsistent with the classification and did not fit in with the five-year cutoff point.

Section 13. Section 18-317 is a boiler-plate approach also for nonspecific public offenses.

Mr. Hodge said Section 14, the enhancement repealer, has already been discussed.

Section 15 deals with the effective date and a cutoff date for sentences prescribed under a classification system as opposed to existing law. Representative Harris said at some point an effective date will need to be set for legislation such as this. Mr. Hodge said the effective date can be in 1987 or 1988, or whatever the committee chooses.

Mr. Hodge distributed another handout, with the explanation that he had basically tried to follow Representative Stoker's suggestion. He applied the classification system set-up to various felonies to afford an idea of how the system would superimpose on present crimes.

Representative Harris asked if there is a printout of all the crimes that can be matched against this. These are the ones specifically approached so far. Mr. Hodge said nothing major can be done until the committee decides on specific punishments.

Prior to lunch recess at 12:15 p.m., Representative Stoker commented that everyone should state problems that need to be addressed in order to accomplish a reconciliation, whether discretion is taken from the judge and the amount of sentence set; how to deal with proposed ideas such as restitution on first offenses. Under the present system, burglary carries a 15-year penalty. If this is to be realistic and consistent with the term now being served, it should be reduced to approximately three years. Representative Stoker added that they should recognize that it may be viewed as being more lenient on crime in the public perception, but it is not. Fifteen years is totally out of step with what is actually taking place.

Representative Harris said there will be more salient comments that apply to the whole package. He noted the committee is not ready for numbers of years and amounts of fines. The draft will have to be reviewed on a broad, conceptual basis before resumption of the full committee meeting.

The meeting reconvened at 1:40 p.m. and Representative Harris asked for comments on procedure, whether consideration should be of a "broad brush" nature, or if it should be dealt with section by section.

Mr. Bourne commented about the sentence for first degree felony being life imprisonment, and mentioned aggravated assault and aggravated battery. This proposal doesn't change the maximum potentials on any of these charges. What is the advantage? What are we trying to gain as to felony classifications if this is passed in its present form? Mr. Hodge responded that he tried to match as closely as possible without assuming any policy role. By establishing classifications, it is fairly well agreed that the Legislature has the responsibility to set areas in the Code in which members of the court may exercise discretion. These classifications are the first step.

Representative Montgomery said Representative McDermott repeatedly emphasized the disparity between crime and punishment. He felt they should look at all the crimes where there is real disparity, maybe not these areas immediately, but overall where we find irrational inequalities between crime and penalty.

Mr. Bourne asked, is the object to do away with some inconsistencies such as grand theft being 14 years, but shooting someone carries a 10-year penalty? There are disparities within the punishment range in a particular crime.

Senator Reed said it is the first step in complete long-range planning, the first step in developing a classification system correlated with existing crimes. She feels there can be nothing without a classification system. It is better to have it codified than prison level determination.

Mr. Bourne agreed this is the first step in a long-range program, but the rest of the program is only in the thinking stage. Representative Harris said a couple of meetings were spent discussing the plan as a whole, and many inconsistencies were found. It should be categorized and built from there.

Mr. Bourne said he assumed they are not planning this without looking at the overall picture. Representative Harris said modifications can be made as they go along. Representative Stoker said he would like to hear Ms. Stahman's comments about a general approach.

Ms. Stahman said she would prefer brief comments on a section by section basis, where present law is changed or where there is a need to consider whether present law should be changed in other places.

Representative Harris asked Ms. Stahman if the Attorney General is pretty much in agreement with the committee that this is a proper starting point and that revisions would be made as they proceed. Ms. Stahman said yes and commented on certain areas:

Ms. Stahman referred to Section 4, page 2, the extended term enhancement section. There are six or eight different Code sections that permit enhancement of sentence. Here it is contained in one section. In the present law, for a persistent violator, the sentence can be up to life. In the reclassification, the sentence depends upon the classification of crime that is committed and then the sentence is doubled. That is a big difference. Subsection (1)(a) regarding persistent violators adds more conditions that do not presently exist. If the defendant is over 21 and has committed felonies when he was over 18 years of age, he can qualify as a persistent violator. That is in the present law. Under the age of 16, he can be tried as an adult for certain felonies. Ms. Stahman said she was just pointing out the difference from present law.

Ms. Stahman next cited the sentence beginning in the middle of line 21, page 2, which continues to page 3, on commission of crimes outside Idaho; what if a crime is not considered a felony in Oregon at the time it was committed? Ms. Stahman said the best example of this is possession of marijuana. First, there is the difference between states -- it may be a misdemeanor in another state, but a felony in Idaho. Should it be a felony for the purpose of the persistent violator statute? It is a matter of policy to be decided by this committee.

Representative Montgomery asked what would be wrong with saying "convicted of a felony in another state"? Representative Stoker said another option might be "found guilty of a felony in another state."

Ms. Stahman said in lines 4 and 5, page 3, "the prosecutor shall give notice to the defendant ...". There is no present requirement to give any notice to a persistent violator prior to the preliminary hearing. This could tie the hands of the prosecutor. We might not find out about convictions before the preliminary hearing is held.

Representative Stoker suggested deletion of the last sentence. It has to do with options of sentencing and allows for a greater penalty.

Representative Harris said there is a tentative consensus for deletion of "The prosecutor ..." to the end of the paragraph.

Ms. Stahman said line 21, page 3, is present law, i.e., "This subsection shall apply even in those cases where the use of a firearm is an element of the offense." An amendment to present law was passed a couple of years ago defining a firearm as being capable of firing a projectile. From a prosecutor's viewpoint, it can make some cases very difficult, such as robbing a store, but not actually pulling the trigger, and the gun is disposed of. How does the prosecutor prove he used a firearm capable of firing a projectile? That is a query for the committee. Ms. Stahman noted there is a case on appeal dealing with this specific issue.

Representative Stoker said Mr. Hodge tried to draw from the approach used by the Penal Code and the Idaho Code. If the section is done as he perceives, this language will virtually be entirely removed. If a person commits armed robbery, that offense will subject him to a certain penalty. The seriousness of the offense would be such that he would serve a certain period of time anyway. There is no need for enhanced sentences. It puts it into a higher classification.

Ms. Stahman said robbery is robbery. It is not "armed robbery" in Idaho. Mr. Bourne commented it is robbery with use of force. Representative Stoker agreed.

Representative Harris said each of these crimes identified in the present Code will be placed in a category and the sentence and language established. Representative Stoker said he is suggesting if a weapon is used in the commission of a robbery, that may be graded as a higher offense rather than using an enhancer that the judge has to deal with.

Ms. Stahman said they should look at the law the way it is and then make evaluations later if the needs change.

Mr. Bourne said one-third or two-thirds applies. There is not a lot of difference in the statement as to use of a firearm requiring a mandatory minimum rather than a mandatory maximum. The Parole Commission can roll them on to the next sentence to begin serving. Without changing how they deal with it, what we do here will make very little difference. Representative Stoker said if you do it as a set term, the judicial options are increased and it removes that problem.

Representative Harris said the tentative consensus would be for deletion of subsection (b) on page 3 and the matter will be answered by the classification of the crimes. Ms. Stahman cautioned the committee to realize this is changing the law. Different degrees of crime for every possible offense that can be committed with a firearm should be considered. This needs to be drafted at a later time.

Mr. Hodge said the listed crimes are already on the books, so it is not being enlarged. Representative Harris said it is responding to the problem with minimums. Representative Stoker said there is an enhancement for a persistent violator convicted of prior crimes. It is a higher degree of classification.

Senator Reed said with a proper classification system, an enhancement becomes redundant. Representative Stoker said either way, it is being classified. The amount of penalty applied to a crime makes the classification. It is included in that class and is a cleaner way to do it, so the classifications cover all the options. Representative Harris said it is a legislative approach or response to the problem.

Representative Montgomery asked if it is optional with the judge to impose extended terms. Representative Stoker said everything right now is optional to a degree. With enhancers it is on a mandatory consecutive. It is questionable whether that term will be served. Under this approach, one sentence would be given. Do we by legislative edict say he has to serve two-thirds of the sentence, which would include the enhancer? Representative Montgomery said the court may sentence if it goes to a classification system; if the defendant uses a weapon and it goes to another degree, the judge would be locked in rather than having the option.

Representative Stoker said the area in which the judge can be given a lot of discretion is when dealing with first and second offenders in property crimes. In the area of crimes of violence, discretion should be restricted and a more fixed term specified. Representative Stoker said a provision can be added to limit the ability of prosecutors to reduce charges and get the judge's approval.

Mr. Bourne said he did not think the prosecutors would be opposed, because a lot of times plea bargaining is something that is shoved down their throats. Mr. Bourne continued that violent crime is one of the most serious crimes, but you cannot underestimate property crimes. The people back home feel the impact of property crime more often than violent crime. Most people will be burglarized at some time. The person committing a burglary is caught only once in 25 house burglaries and that is a lot of damage, which we tend to shrug off. That might be an incentive to treat this a little differently.

Representative Stoker said there is also the reality of the actual service of a sentence, which is seldom the statutory maximum 15 years, for example.

Reality should be increased with "truth in sentencing." Mr. Bourne agreed.

Representative Harris asked if the working group wants to finish this particular document now, come back after the complete committee meeting, or approach it in a different way. He noted that they are not yet ready to take a draft to the full committee.

Representative Stoker said the only place he can see headway being made is what they are doing right now. Representative Harris concurred. They have what they asked for at the last two meetings and they should proceed with it and finish.

While Co-Chairman Representative Harris consulted with Co-Chairman Senator Fairchild on timing for the full committee meeting, Representative Montgomery served as acting chairman of the working group.

Ms. Stahman cited subsection (2), page 4 of the draft, where it specifies what the extended term will be. For a persistent violator, the extended term is now "up to life." On page 2, Section 4, subsection (a), a persistent violator who uses a firearm, present law says whatever the sentence is, it can be increased up to life; use of a firearm carries a penalty of 3-15 years. The offender could get a life sentence with a consecutive 15-year sentence, which is not possible the way this is written.

Ms. Stahman referred to line 7, page 5, Section 6(d), setting a fine of $1,000 for conviction of a Class A misdemeanor and noted that is half the present fine.

Ms. Stahman said Sections 7 and 8 are completely redundant. It is unnecessary to put those in -- a word is being defined using the word. Sections 18-111A and 18-111B can be repealed.

Mr. Bourne said under the penalty section for DUI, Section 18-8005, the fine for the first offense is $1,000, the second is $2,000. If it is not a Class A misdemeanor, it would be less than half the second time. Mr. Hodge noted that is covered in item (g) -- "Any higher amount specifically authorized by statute."

Page 7, Section 12, Section 18-306, "Punishment for Attempts." Subsection 2., beginning at line 16. It will cause problems changing something punishable by less than five years. It is now five years or more. Ms. Stahman said in essence, it is reducing the possible punishment.

Mr. Bourne said Section 18-306 reads: "If the offense so attempted ..." This makes an attempt on a second degree burglary two and one-half years now or one year in the county jail. If you change an attempt from a felony to a misdemeanor, it would be less than five years.

Representative Stoker said he sees the need for a change there. Every attempt is one-half the penalty that would have been assessed.

Representative Montgomery said he hopes they keep uppermost in mind, as a top priority, simplification. He sees no useful purpose or reason to treat it one way if it is more than five years, except when there is a compelling reason to go another direction.

Section 12, page 7, beginning with line 24, is talking about "punishable by imprisonment and by a fine," and this is inconsistent with subsection 2. Ms. Stahman said if subsection 2. is retained, it is only up to one year. She cautioned consistency.

Page 8, Section 13, Section 18-317. Ms. Stahman commented on the way the present law is written. Public offense and criminal offense are intermixed. A public offense can be a petit offense and you cannot imprison someone. That's how the infractions act came about. In a case of a traffic infraction, misdemeanor or felony, you have the right to a jury trial. The argument is that it is a petit offense. In common law, that person is fined but not imprisoned. It is not a crime but an offense. Representative Harris asked if they should use the word "crimes" in both places. Ms. Stahman said she would recommend that the words "a criminal offense" be used in line 7.

Representative Stoker said it is "catchall" language. It could be rewritten and see if any act is declared illegal by statute, if it is not classified as a felony or a misdemeanor. Except for petit offenses, it will be a Class B misdemeanor. Representative Harris thought for safety another paragraph might be needed. Senator Reed said if you leave it in, the language would have to be changed.

Representative Stoker commented on Section 1 in conjunction with Section 3, the actual amount of terms placed on any particular felony. If it is a capital felony, by definition, it should be the death penalty, and he wondered if there is a conflict. If it is defined so that a capital offense is that and nothing else, based on aggravating factors found in the sentencing procedure, it would be subject to the death penalty, period. Representative Stoker wondered if it could be defined so that the conviction includes those aspects. Representative Stoker said if the felony is of the first degree, it would be life imprisonment. The law now has a crossover between first and second degree. The death penalty cannot be given unless there are aggravating factors.

Representative Montgomery said even there it is discretionary. How can you get away from "either/or"? As a legislator, he would not be willing to vote for something that says for a conviction of a crime in these categories a man must die.

Mr. Bourne said in some states the penalty is death or a fixed life sentence.

Representative Harris asked if it should then read in line 1, page 2, "death, or fixed life". Mr. Bourne said "indeterminate life" is the language. Senator Reed commented that this takes away all discretion.

Representative Montgomery cautioned in undertaking a major overhaul, to be careful of a red flag that would generate a lot of major options.

Senator Reed asked about possible borderline cases, premeditation and crimes of passion. Representative Montgomery said what the jury struggles with is the guy that is "loony." He would like to see the jury have the other option.

Representative Harris determined the consensus is to leave that out and insure that the judge has the option of a fixed term in regard to that cate-

gory. He is not sure they want a fixed term in the other categories. Representative Stoker said death, fixed (determinate) life, or indeterminate life. Mr. Bourne said "determinate" is a legal term; "fixed" is what the people in the penitentiary know it as.

Representative Stoker said in first degree murder the death penalty will be upheld. Mr. Hodge said in the Code, a kidnapping where the victim is not returned is also, as well as the crime of treason. Representative Stoker commented that he does not think the death penalty for kidnapping would "fly" past the Supreme Court. Mr. Hodge said it comes down to whether you want to statutorily anticipate the Supreme Court or not.

Representative Stoker said when a person is convicted of first degree murder, the minimum is life in prison, with 10 years to be served under the present system before eligibility for parole. It is inappropriate to give the judge discretion where he could "second-guess" the jury. The definition of murder must be dealt with. Representative Stoker recommended redefining murder, as the present definition is not good.

Representative Harris asked Representative Stoker if amendments to the murder statutes could be brought in separately from this RS. Representative Stoker recommended leaving it as it is and later making an adjustment if necessary, but the words "determinate" or "indeterminate" should be added. Adjust the discretion of the judge and we can come back to it later.

Representative Stoker said there is a range of 20 to 60 years in those two options. "Not to exceed 30 years." We can give what we decide is a life sentence and above that anything up to fixed life. Should there be discretion of anything in between? Somewhere there must be a determination of what life imprisonment is. Representative Stoker stated it should be decided as a matter of policy what they consider "life in prison." We could stick with the present term of 30 years in case law. There is a conflict in semantics. Life imprisonment could be defined as the natural life of an individual.

Mr. Hodge asked about the appropriate place to define life imprisonment. Representative Stoker said three options can be given, life, determinate life, or indeterminate life. We need to know what we are saying. Whatever the definition, I suggest we give the judge the option of a fixed term that would be less than the natural life of the individual. Fixed life might be 30 years, but the judge could make it 40 or 50.

Representative Montgomery said that would not make the options any different than at present. Representative Stoker said the judge must give life in prison under the present statute. The next harder sentence is fixed life. It creates disparity with no middle ground. The option to give a determinate sentence of less than life is not presently in the system and it probably needs to be there.

Representative Montgomery said a fourth option is needed -- "or a fixed term of not less than 'x' number of years." Not less than 30 years -- a determinate term rather than determinate life.

Senator Reed said she can see why committees like this one end up with prescriptive systems. It is a question of where the jurisdiction is built in. The judge must prove a unique quality for an exception to be made and we are trying to build it in. Prescriptive sentencing has merit in insuring an escape

valve without loopholes or without tying hands.

Representative Montgomery said they would simply put a maximum with the sentence and use any year up to that maximum. This dilemma is the gap between indeterminate life and fixed life.

Representative Montgomery expressed concern about some people saying it is too big a project for us and a battery of experts is needed. He felt the best chance of coming up with a piece of legislation that could be enacted into law is to leave the Code as intact as possible, but add definitions. He stressed the practicality of getting legislation passed. If it is taken verbatim and placed into a classification system, we are not creating that inequity, then the next time adjustments can be made to the various statutes. It was Representative Montgomery's opinion if an attempt is made to redefine crimes to any degree, the legislation would never pass this year.

Representative Stoker agreed, but added that some adjustment must be made, particularly in the murder statute. We must address some of those penalties in order to make an intelligent decision.

Representative Montgomery said as a first step in long-range plans, crimes should not be redefined, only categorized for penalties. If an attempt is made to redefine murder and burglary, the Prosecutors Association will say they want it left the way it is. There isn't enough time to do a redefinition in a manner everyone can agree to. Classification is an excellent idea and long-range planning for redefinition is an excellent idea, but taking on too much too fast was his concern.

Representative Stoker said these problems may not be as strong as Representative Montgomery anticipates. We can see what the response is to a package we put together, then come back and make a policy statement as to whether changes should be made.

Representative Harris said they can go as far as they can with the guidance of the Attorney General and the prosecutors, then in the coming session, start with a classification system. He added that Pat Kole, Marc Haws and Ms. Stahman are locked in for September, but can give quite a bit of time after that to review what we do.

Representative Keeton agreed with Representative Montgomery. If we get into redefinition of crimes, we will have an awful problem getting it through. He advocated going to a classification system but leaving the definitions as they are. If we try to redefine capital offenses we will be "stopped cold."

Representative Montgomery said that is a political reality, but it doesn't mean it can't be done. If there is a mechanism or vehicle developed to categorize the various crimes and compare penalties, they can be put in the proper level. If we go beyond that, we are in trouble.

Representative Keeton said it is easy for a trial judge to say "you are accused of a crime which is a second degree felony punishable by ... ." Our criminal code is very complicated. This is a dandy start, but with redefinition of all degrees and penalties, we will be in a lot of trouble. We can do it as we go along.

Senator Rydalch said that was the key thinking from day one, the idea of

getting the classification started. Representative Harris concurred. Representative Keeton said all crimes would fit into seven or eight boxes. The judge can grab a box, which he cannot do with the present criminal code. Where his discretion stops or is extended is different from what is being done here.

Representative Montgomery said Mr. Hodge used the right approach in superimposing over the present Code. Representative Stoker said that is the biggest problem. A classification can be done as one statute and if you see something is wrong, it should be addressed, perhaps by a different bill or RS.

Representative Harris asked if the committee wished to accept the wording on the top of page 2. Representative Stoker said they need a definition on life imprisonment -- the natural life of the individual.

Ms. Stahman said there is a complete misconception among attorneys that life imprisonment is equal to 30 years. Life imprisonment is life. Section 20-223 says for indeterminate life or a sentence over 30 years, that person must serve at least 10 years before being eligible for parole. Ms. Stahman cited the David & Kelly Wilson case and added there is no confusion if you look at case law. Subsection (2) says "not to exceed life imprisonment", on the assumption it was a 30 year penalty.

Mr. Hodge said there is no specific assumption as to eligibility for parole. It is just as easy to put in a term of years as it is "life imprisonment."

Representative Harris asked if there are crimes that fit into the category of felony of first degree. Representative Stoker responded that first degree murder with seven or eight aggravating circumstances is the only time the death penalty can be given. Life in prison is the next option. Mr. Hodge mentioned sex offenses, rape and kidnapping. Representative Harris said then that is a valid category.

Representative Harris asked if in line 3, it was the consensus to change it to "up to" rather than "not to exceed" and asked if that would take care of it in any other place in the Code. Representative Stoker said you allow the judge to have discretion in a felony of the first degree to give the guy straight probation, a one year sentence, or a 30 year sentence. The person convicted of that offense will be assessed a certain amount of penalty. Ms. Stahman said there are several sentences with a statutory minimum. She questions this, because in another statute it says all minimums have been abolished.

Senator Rydalch said the judges wanted to close the gap between determinate and indeterminate life. Representative Stoker said the judges have the option of a fixed term and an indeterminate term. We should be putting in firm guidelines that unless there are extraordinary circumstances, he will serve that amount of sentence. Ms. Stahman said she wanted to ask Judge Burnett about prescriptive guidelines, about the Legislature and the judiciary setting guides for sentencing. The judiciary does it in lots of other states. Judge Burnett may not be representing the majority of judges in his feelings on prescriptive sentencing. Senator Reed said allowing a judicial commission to set guidelines is removing those guidelines from legislative review.

Representative Montgomery said he would prefer having a term "up to." Representative Harris asked how today's work should be reported to the full

committee, as they will soon be reconvening. He also asked about a timetable for completion of discussions and suggested that Friday, October 25, might be a possible meeting date. Representative Stoker said they can advise they are to the point of identifying the classifications and the philosophy of locking in the judges on the amount of penalty assessed, subject to extraordinary circumstances.

Representative Montgomery said he feels strongly about the concept of including a mandatory sentence. He likes that concept. It could be a separate part in the classification -- a classification system coupled with simplified sentencing.

Ms. Stahman said she received the impression from the other committee that they want more work time on this, and had suggested three types of sentences -- indeterminate, fixed, and mixed. Rather than minimum time, the judge imposes a fixed term followed by an indeterminate sentence.

Representative Keeton said when judges are picked, they pick practicing lawyers with more than 10 years experience who are recognized as being persons of high integrity and common sense. Sentencing discretion should be with the judges. Representative Montgomery said it gives the judge a tool he wants and does not take away discretion. The Parole Board cannot take it away from him. It would give him the power to advise the Parole Board that they cannot adjust the sentence.

Senator Reed said the main object is truth in sentencing. If the classification is clear, the judge understands and people understand what is being said is actually going to happen, then down the road these other discrepancies are dealt with.

Mr. Bourne said he agrees with most everything he has heard. It is good thinking, but he is worried about changing statutes that affect other statutes, changing one piece and not others that interrelate. If a clever attorney calls this to mind, there can be horrible results. He feels comfortable with a package that shows how the categories mesh and can be looked at from beginning to end.

Representative Montgomery moved, seconded by Senator Rydalch, that the Code Revision Working Group recommend to the full committee to proceed with a classification system along the lines proposed, which would simply set maximums, not minimums, and not attempt to redefine crimes other than where it is absolutely essential to set the proper sentence. The motion carried.

The meeting recessed at 3:25 p.m.

APPENDIX H

Legislative Council
Criminal Sentencing Committee
House Caucus Room
Statehouse
Boise, Idaho
September 18, 1985

MINUTES

The Criminal Sentencing Committee was called to order at 9 a.m. by Co-Chairman Senator Fairchild. Other members present were Co-Chairman Representative Harris, Representatives Crane, Keeton, Montgomery, Sorensen, Speck, and Stoker; and Senators Bray, Darrington, Reed, Rakozy, and Rydalch. Representatives Herndon and McDermott were formally excused by the Co-chairmen. Representative Bayer was not present. Staff present were Hodge, Clarkson, Nugent, Cory, and Wood.

Others in attendance were Senator Smyser; Pat Kole, A. Rene Fitzpatrick and Myrna Stahman, Attorney General's Office; Roger Bourng, Ada County Prosecutor's Office; Tony Skoro and Olivia Craven, Parole Commission; Jeff Shinn, Division of Financial Management; and Ray Stark, Legislative Budget Office.

Senator Rakozy made a motion, seconded by Senator Rydalch, that the minutes of the last meeting be approved as written. The motion carried.

Judge Donald L. Burnett, Jr., State Court of Appeals, shared his views on Idaho's felony sentencing system with the committee. Judge Burnett indicated the current system is too confusing. The Idaho Code now provides for fixed sentences, indeterminate sentences, mandatory minimum sentences, and enhanced sentences, together with varying forms of probation, parole, good time, and administrative discharge. Judge Burnett stated the public cannot place confidence in a system that even judges and correctional authorities have trouble understanding.

Judge Burnett stated the system's bark is worse than its bite. Sentences pronounced and actually served in Idaho have little relation to the sentences authorized by the Legislature. The Idaho Code prescribes harsh maximum punishments; however, many Idaho felons spend no time at all in prison.

Judge Burnett indicated that among the offenders who do go to prison, the Director of the Department of Corrections has reported that the average sentence imposed for violent crimes in Idaho is 81.6 months and the average time actually served in confinement is only 18.85 months.

Judge Burnett indicated he feels there is disparity in sentencing. He said statistics show substantial variations in the high, low, and mean sentences imposed for felonies in Idaho.

Judge Burnett indicated that sentences reflect the varied experiences and values that judges bring to their work. Moreover, sentencing deviations may be justified, to some extent, by differing circumstances surrounding the commission of each crime and by the characteristics of each individual offender. The crucial question is how much deviation is good for our criminal justice system? Idaho presently has an individualized sentencing system — that is, one which focuses not only upon the nature of the offense but also upon the nature of the individual offender. However, the system is viewed as unpredictable. It loses its value for teaching acceptable and unacceptable behavior in

society. Diverse sentences may encourage convicted criminals to treat their sentences as "the luck of the draw" in the "game" of criminal justice rather than as consequences of their own wrongful conduct.

Judge Burnett stated many Idaho judges are opposed to presumptive sentencing. They fear that this system would eliminate their discretionary authority. Judge Burnett indicated he feels their fears are misplaced. He feels presumptive sentencing does not eliminate discretion but makes sentencing more structured and usually results in more predictable incarceration of violent offenders and provides an alternative means of dealing with nonviolent offenders.

Judge Burnett continued that the present system makes everybody (and nobody) responsible for achieving sentencing goals. It compels judges and correctional authorities to perform overlapping functions. When judges impose sentences, they consider deterrence and rehabilitation. After the sentence has been pronounced, and the individual is in the custody of correctional authorities, these authorities use similar criteria in determining when the individual will be released. Such overlapping functions lead to speculation by judges as to what the correctional authorities will do and to second-guessing by correctional authorities as to what the judges have done. As in most situations where "everyone" is responsible for a task, "no one" is fully accountable.

Judge Burnett stated that rather than asking judges and correctional authorities to perform overlapping functions, it would seem more rational to ask each group to concentrate on what they can do best. Judges should determine the period of custody necessary to serve the goals of retribution and general deterrence. On the other hand, rehabilitation and the future protection of society from the convicted defendant are criteria best evaluated by correctional authorities into whose custody the defendant is placed. Correctional authorities, after intensively studying an inmate, are better situated than the judge to determine when, if ever, the inmate may be returned safely to the community. He said if Idaho statutes were amended to allow fixed and indeterminate components of a single sentence, judges could prescribe a minimum period of confinement necessary to satisfy the criteria of retribution and deterrence. After this fixed period had been served, correctional authorities could ascertain, during the indeterminate component of the sentence, the point in time when the criteria of rehabilitation and protecting society would allow the individual to make his transition back into the community.

Judge Burnett said the present system lacks long-range planning. The capacity of our correctional system must be correlated with the public policy objectives underlying our felony sentencing laws. This requires a stable philosophy and a commitment to long-range planning.

Judge Burnett indicated there are no "quick fixes" nor any "Republican" or "Democratic" solutions to Idaho's need for genuine reform in its criminal justice system. There is only hard work.

Senator Reed submitted a report on meetings she attended during the National Conference of State Legislators on "Prison for Profit." She stated she doesn't feel privatization is the solution to Idaho's overcrowded prison problems but offers some benefits, the obvious one being the sharing of capital costs. She said there is no evidence that private prisons are better just because they are entrepreneurial, and they are not necessarily cheaper.

Senator Reed stated the liability question is very much up in the air and there is a question of the incentive to increase prison population because you are actually playing to a growth industry.

Senator Reed also attended meetings on funding of prisons and there are many alternatives such as to pay as you go and general obligation bonds, and she said this is an area where there might be some potential for Idaho to look into. Tax increases, lease purchases, and certificates of participation are ways to get around bond elections and the statutory and constitutional confinements.

Representative Speck reported on meetings he attended during the National Conference of State Legislators and stated the whole subject of privatization has two aspects: partial use of the private sector for providing certain functions within a public-run system or the concept of a purchase by the private sector and the building and running of a prison; and in the discussions on the subject of privatization they didn't differentiate as to what aspect they were talking about. In any event, they did emphasize that anyone that was thinking of privatization of their prison system had to be very careful from the contractual standpoint; that it's very difficult to come up with a contract that covers all the aspects and they have to be very careful about whom they look to for the provision of these services.

Representative Speck spoke about meetings regarding prison industries. As long as a prison system has some provision for industry that stays within the state the system is in fine shape. As soon as goods are coming out of the prison that go into interstate commerce, then there are laws regarding prohibition of interstate transportation of prison-made goods.

Representative Speck indicated most of the private sector involvement has been with juveniles. Also the Immigration and Naturalization Service has a special problem which the private sector can handle better in some instances.

Senator Smyser had been requested to check into prison design and he reported he had visited other prisons in this regard. Senator Smyser reported on prisons he had visited such as Walla Walla Maximum Security Facility, Oregon State Penitentiary, San Quentin, and five additional prisons in the state of Massachusetts. He indicated after visiting these other prisons he doesn't feel comfortable, security wise, at our penitentiary in Idaho in comparison with the other prisons, largely because of the design of our prison.

Senator Smyser stated if this committee endorses legislation that would require two-thirds of a sentence to be served, it must realize the tremendous impact it would have on the prison population in Idaho. This committee must not vote for this type of legislation without immediately voting to fund additional prison space. He also hopes the Governor will recommend the funding of a maximum security prison in Idaho plus the addition of several hundred medium security beds.

Senator Smyser stated that Washington has spent $38 million in just one institution, all court ordered. There is more than one institution in Washington.

Senator Smyser stated the key to the prison systems he visited is that there are separate minimum security facilities, medium security facilities, and maximum security facilities. There is also an area for people that earn their way in, and in Walla Walla it's called their intense management unit. He said they earned their way into these areas because "they're not nice people." One of the biggest problems in Idaho is caused

because medium security inmates are allowed to be in too much contact with minimum security inmates, making the minimum security inmates a risk that we shouldn't have in a minimum security facility.

Senator Bray reported on a Western Correctional Association meeting held in Boise. She had listened to a very impressive speaker who said sentencing should be done to cause the criminal to own the problem. The question to be directed at criminals is "What are you going to do to make it right?" and not "What are we going to do to you?" The speaker said restitution has many benefits and should be used more extensively.

Senator Rydalch stated it's easy for everyone to say, "We need to do this, and we need to do that" and everyone knows the bottom line to what can be accomplished is funding. She said she was most impressed with what Senator Smyser had said about a maximum security prison in Idaho and she feels there is a definite need for minimum, medium, and maximum security prisons.

Senator Rydalch made a motion, seconded by Senator Bray, to coordinate whatever plans the committee has regarding code and parole revisions with the ultimate effect on prison population and the resulting costs of these revisions and that the committee report to the legislature on funding alternatives sufficient to meet the population increase. The motion carried.

Senator Rydalch, Senator Smyser, and Representative Sorensen are to analyze the financial workings of this motion to present to the committee before the next legislative session.

At this time the committee broke into two working groups.

Work Session on Pardons and Parole

The work session was called to order at 11:30 a.m. by Chairman Senator Fairchild. Other members present were Senators Rakozy, Darrington, and Bray, and Representatives Speck, Crane, and Sorensen. Staff present were Nugent, Clarkson, and Wood.

There was much discussion about whether the legislature should give sentencing guidelines and a restriction, within those guidelines, on how much of that sentence is served regardless, before the prisoner is eligible for parole. Senator Fairchild indicated he felt sentencing guidelines couldn't be achieved politically but felt we should set a certain percentage of the sentence that must be served before eligibility for parole. This would help the public understand the system better.

Representative Speck said there are other aspects to "truth in sentencing" besides sentencing guidelines such as good time statutes, parole guidelines, etc. Revisions in these other areas would be helpful in achieving "truth in sentencing."

Most of the working group members felt if we set a certain percentage of a sentence that must be served before being eligible for parole, whether it be 33%, 50% or 66%, that this would give the judges the discretion they need to tailor the sentence to the crime because then those judges would at least know the minimum amount of time that person would serve.

Representative Sorensen stated he didn't feel we would solve all the problems on sentencing this year and felt this committee should be continued another year. He said if

we are going to revamp the entire sentencing structure for all crimes, it will take a group of varied talents from the judiciary and legislature, among others, and it will take many months of study to make it work and come out right. He feels we need short-range goals we can accomplish now and long-range goals we need to work on in the next year.

The working group recessed at this time for lunch, to reconvene at 1:30 p.m.

Mr. Nugent reviewed RS 11688C1 which changes current law so that the Commission on Pardons and Parole shall be appointed by the Governor instead of the Board of Correction and sets out the four objectives of criminal punishment. Those are:

1. Protection of society;
2. Deterrence of the individual and the public generally;
3. Punishment or retribution for wrongdoing;
4. The possibility of rehabilitation.

Senator Darrington stated that Page 2, Line 24, of the RS states that the "...governor will liberally allow the reasonable payment for services of such technical and professional advice and consultation as the commission may require." It was the consensus of the working group that the word "liberally" be deleted and the word "will" be changed to "shall" so that it reads "...governor shall allow the reasonable...."

There was much discussion whether or not one of the objectives of criminal punishment should be "the possibility of rehabilitation" or just "rehabilitation." Senator Bray moved to delete "the possibility of", seconded by Senator Darrington. The motion carried.

Mr. Nugent reviewed proposed language for a constitutional amendment, RS 11689C1, which provides that "...no commutation or pardon, reduction, alteration, discharge, or any other mitigation of the sentence granted by the board shall be effective until approved by the governor in a manner to be provided by law."

Tony Skoro, Chairman, Commission on Pardons and Parole, expressed concern about the word "discharge" being in the proposed language because of the fact that a person serving a fixed term with a consecutive sentence added could not be paroled on the consecutive sentence until the entire fixed term had been served. However, a person sentenced for the same crime, without receiving a consecutive sentence, would serve much less time even though it was for the same type crime because the Parole Commission could parole him after he had served one-third of his sentence. He feels this language takes all the control away from the Parole Commission.

Mr. Nugent reviewed proposed legislation which changes the good time provision in the current statutes. New legislation would provide that "...Each person convicted of an offense against the state and confined in a state correctional facility for a definite term other than life, may be awarded a meritorious conduct reduction of their sentence by the director of the department of correction. Meritorious conduct reduction of the sentence may be awarded when an inmate completes an extraordinary act of heroism at the risk of his own life or for outstanding service to the state of Idaho which results in the saving of lives, prevention of destruction or major property loss during a riot, or the prevention of an escape from a correctional facility. The award of a meritorious conduct reduction may be given under rules adopted by the Idaho board of correction...." It was the consensus that the wording "definite term" be changed to "any term."

Mr. Nugent then reviewed the "grandfather provision" of the proposed legislation for inmates sentenced on or after February 28, 1972, but before July 1, 1986. There was concern about the persons sentenced prior to February 28, 1972, and members felt the languauge should be changed to grandfather the rights of "any inmate sentenced for a crime committed before July 1, 1986."

There is language that "...the director of the department of correction shall review the performance record of the inmate and shall grant, consistent with the provisions of this section and other applicable law, an earned time deduction from the sentence imposed. ...The earned time deduction authorized under this subsection shall vest upon being granted and may be withdrawn once it is granted pursuant to rules of the board of correction." This gives the Department of Correction a management tool over those inmates sentenced prior to July 1, 1986.

Council staff was instructed to contact Al Murphy, Director, Department of Corrections, to determine if the proposed language would create a management problem for him because it would create two classes of inmates, one that receives automatic good time and one that would be eligible only for meritorious conduct reduction. Staff also is to contact the Attorney General's office for their opinion on the ex post facto question of the new language.

Myrna Stahman, Attorney General's Office, explained proposed legislation defining different sentences that could be handed down by Idaho judges. Proposed language is:

1. Indeterminate sentence - Service of confinement in the custody of the state board of correction for a specified indeterminate period of time up to the maximum specified by law for the crime for which judgment was entered. The sentencing court shall specify the maximum sentence which may be required before release from incarceration. The convict may be considered for parole, in accordance with the rules and regulations promulgated by the commission of pardons and parole, at any time during the service of an indeterminate sentence.

2. Fixed sentence - Service of confinement in the custody of the state board of correction for a fixed period of time up to the maximum specified by law for the crime for which judgment was entered. During the term of a fixed sentence the inmate is not eligible for release on parole.

3. Mixed sentence - Service of confinement in the custody of the state board of correction for a fixed period of time followed by a specified indeterminate period of time, the aggregate of which cannot exceed the maximum specified by law for the crime for which judgment was entered. During the term of the fixed portion of a mixed sentence the inmate is not eligible for release on parole. The convict may be considered for parole, in accordance with the rules and regulations promulgated by the commission of pardons and parole, at any time during the service of the indeterminate period of the sentence.

Senator Bray noted that Judge Burnett had indicated that judges should deal with the retribution and deterrence aspect of sentencing and protection of society and rehabilitation should be judged by officials of the Department of Corrections and the Parole Commission. She felt it should be added after each definition that the indeterminate sentence shall be addressing the goals of rehabilitation and protection of society and the fixed sentence should address deterrence and retribution.

It was the consensus of the members that this proposed legislation should be distributed to district judges and prosecuting attorneys for their review and comments.

Myrna Stahman reviewed proposed legislation which was drafted in response to concerns regarding consecutive sentences. It had been reported that when a defendant receives a sentence for a crime, and then an enhancement sentence, for example if he used a firearm in the commission of that crime, then the Parole Board would discharge him from the longer sentence to the enhancement sentence, and the inmate would then be paroled in a relatively short period of time on the enhancement sentence.

Ms. Stahman explained that enhancements are written two different ways in the present statutes. Persistent violators (convicted of three felonies) can be sentenced to either an indeterminate or fixed life term. This sentence is not a consecutive sentence. Persistent violator enhancements remove the cap from the maximum prison term that can be levied.

Ms. Stahman continued that presently an enhancement for a crime is added as a consecutive sentence. New legislation proposed would not add a consecutive sentence, but would extend the original sentence up to 15 years and parole would be considered on the one sentence.

Ms. Stahman then explained proposed legislation dealing with multiple sentences of incarceration. At the present time if a person has multiple sentences, for example two consecutive sentences, that person has to be discharged from the first sentence before he can begin serving the second sentence. Then parole is considered on the second sentence. The proposed language enables that person to be paroled, not discharged, on the first sentence after he has served one-third of the sentence. He has parole time left that he will serve while still in the institution serving the consecutive sentence. Once he is paroled on the consecutive sentence, he would still have parole time left on the first sentence.

The working group directed Ms. Stahman to work with Legislative Council staff in the editing of the suggested language for this type of legislation.

Senator Fairchild asked Tony Skoro if he still had problems with the word "discharge" being in the proposed language for the amendment to the constitution regarding commutation powers, etc., being placed in the hands of the governor. Mr. Skoro replied that if the proposed legislation that Ms. Stahman presented is approved, he would have no problem with it. If the legislation is not approved, he would still be concerned about the word "discharge" being included in that proposed legislation.

At this time the working group session dissolved and the entire Criminal Sentencing Committee was called to order by Senator Fairchild.

Senator Fairchild reported the working group on pardons and parole is proposing several pieces of legislation:

1. Parole Commission being appointed by the Governor instead of the Board of Correction.
2. Joint resolution that will require the Governor to approve any sentence that is commuted, reduced, altered, etc.
3. Good time being abolished with the exception of very meritorious service.
4. Enhancements and how they affect the sentence.
5. Creation of a mixed sentence in addition to indeterminate and fixed sentences.

Representative Harris reported that the code revision working group had acted on motions for the classification of crimes, the abolishment of enhancements, that every felony carry a fine in addition to penal incarceration, and the elimination of mandatory minimum sentences. These ideas were incorporated into proposed legislation presented to the working group.

Representative Montgomery indicated it was the consensus of the code revision working group that we attempt to put together a classification system by designating several degrees of felonies and misdemeanors under which we then would classify the various crimes, using that as a mechanism to compare the penalties to remove inequities. It is the feeling of the working group that in attempting a classification system, we should not attempt to redefine crimes at this point in time nor should we attempt to place any minimums on the penalty provisions.

Representative Speck stated that perhaps the committee should look into the possibility of having persons sentenced to the county jail instead of the penitentiary. He felt this might possibly relieve some of the overcrowding at the penitentiary. Now all sentences for misdemeanors are served at the county jail, but perhaps a judge could sentence a person to two or three years in jail instead of the state prison.

Senator Fairchild told the committee members to be prepared to bring any new ideas they might have to the next meeting. All proposed legislation from the working groups will be distributed to the committee at the next meeting for discussion.

The next committee meeting was scheduled for October 22, 1985.

The meeting adjourned at 3:45 p.m.

APPENDIX I

Legislative Council
Criminal Sentencing Committee
House Caucus Room
Statehouse
Boise, Idaho
October 22, 1985

MINUTES

The meeting was called to order at 9 a.m. by Co-Chairman Senator Fairchild. Other members present were Senators Bray, Darrington, Reed, and Rydalch; and Co-Chairman Representative Harris, and Representatives Bayer, Crane, Sorensen, and Speck. Representatives Herndon, Keeton, McDermott, Montgomery, and Stoker were formally excused by the Co-Chairmen. Senator Rakozy was not in attendance. Staff present were Hodge, Nugent, Clarkson, and Wood.

Others in attendance were Pam Walton, House Judiciary Committee; Myrna Stahman and Pat Kole, Attorney General's Office; Olivia Craven, Commission on Pardons and Parole; Ray Stark, Legislative Fiscal Office; Al Murphy and Ron Martin, Department of Corrections; Representatives Field and Fry; and Carl Bianchi, Administrative Director of the Courts.

Representative Harris made a motion to approve the minutes of the last meeting, seconded by Senator Darrington. The motion carried.

Mr. Nugent presented to the committee RS 11688C2 which relates to the appointment and composition of the Commission on Pardons and Parole. Carl Bianchi suggested changing Line 41 on Page 1 to read "four objectives of criminal sentencing" instead of "criminal punishment". The members of the committee had no objection to this change. (RS 11688C2 is attached as Exhibit A.)

There was discussion whether there is really a need for a separate Board of Correction and a Commission on Pardons and Parole. Al Murphy, Director, Department of Corrections, stated he feels there would be a conflict of interest having the Board of Correction being responsible for the duties of pardons and parole. He said possibly one member of the Board of Correction should be a member of the Parole Commission but he would not recommend combining the two entities.

Representative Sorensen made a motion that Lines 15 and 16, Page 2, which reads "The commission shall also act as the advisory commission to the board on matters of adult probation and parole" be changed to read as follows: "The commission and the board shall meet as necessary to exchange such information to enable each to effectively carry out their respective duties." Representative Speck seconded the motion and it carried unanimously.

Myrna Stahman recommended that if legislation is enacted to have the Commission of Pardons and Parole appointed by the Governor instead of the Board of Correction, that the section of the Code relating to the Commission of Pardons and Parole be removed from the chapter of the Idaho Code dealing with the Board of Correction and place it in another chapter of the Idaho Code. Staff was instructed to research this and make the necessary changes.

Senator Darrington made a motion, seconded by Representative Sorensen, that staff make the above changes in RS 11688C2 and that the proposed legislation be made a part of the final report of the committee. The motion carried.

Mr. Nugent explained RS 11689C1 to the committee. This proposed legislation provides for the following change to the Idaho Constitution: "... no commutation or pardon, reduction, alteration, discharge, or any other mitigation of the sentence granted by the board shall be effective until approved by the governor in a manner to be provided by law. (RS 11689C1 is attached as Exhibit B.)

There was discussion regarding whether or not the words "in a manner to be provided by law" should be a part of this proposed legislation. Carl Bianchi stated this language is commonly used in constitutional provisions so that constitutional language is not cluttered with wordiness. If this language were not in the constitutional provision, the powers of the governor would be unanswerable to the legislature.

There was discussion as to whether or not language in the Constitution should be changed to make it consistent with what is presently in the statutes on the title of the Board of Pardons. It is now known as the Commission of Pardons and Parole. There was also discussion whether or not the Commission of Pardons and Parole should be changed to the "Board of Pardons and Parole" if legislation is enacted to have it appointed by the governor instead of the Board of Correction. It would then become an entity equal to the Board of Correction. Staff was instructed to research this and prepare proposed legislation.

Representative Sorensen made a motion to accept RS 11689C1 and have it included in the final report of the committee. Senator Rydalch seconded the motion.

Representative Harris made a substitute motion to defer action on RS 11689C1 until the committee investigates further the administrative problems that will be brought about if each pardon and commutation has to be approved by the governor. Senator Reed seconded the substitute motion.

Discussion continued on the proposed language which reads: "... no commutation or pardon, reduction, alteration, discharge, or any other mitigation of the sentence..." It was the consensus of the committee that there should be no commuting or pardoning, or other mitigation of a sentence unless it was approved by the governor, but that this should not include parole. Carl Bianchi pointed out that only pardons and commutations are referenced in the Constitution and that other mitigation of a sentence could be handled through a change in the statutes. Staff was instructed to research and determine what portions could be taken care of constitutionally and what portions could be taken care of statutorily. These proposals are to be distributed to committee members before the next meeting of the committee.

Mr. Nugent explained RS 11722C1 to the committee which amends statutes pertaining to goodtime and also establishes meritorious reduction of a sentence. This proposed legislation amends current goodtime statutes by adding the words "sentenced prior to May 1, 1986, for such offense. There was discussion whether the effective date should be July 1, 1986, instead of May 1, 1986, and whether or not it should be based on the date of the commission of the crime or the date the person was sentenced. (RS 11722C1 is attached as Exhibit C.)

Al Murphy said if the committee decides the enactment date should be based on the date of the commission of the crime, the Department of Correction is going to be tied up in litigation forever. He said the reason is that everyone that is sentenced to prison under the new goodtime statutes will file lawsuits making the Department prove exactly when the commission of the crime was.

Senator Bray stated prisoners weren't eligible for goodtime until they have been convicted and sentenced, so she doesn't feel the date of the commission of the crime need be considered.

Senator Darrington felt there might be more ligitation if the date of sentencing were used because of the fact that sentencing dates are often delayed by attorneys and judges.

Senator Fairchild stated he felt that the proposed legislation should not contain an emergency clause because prisoners will file lawsuits on the question of whether or not there really was an emergency and whether or not the legislature has the constitutional authority to set an emergency clause.

The Attorney General's office will research the matter of whether or not the date of the commission of the crime or the date of sentencing should be used, and will submit their findings at the next meeting.

The committee discussed RS 11765 which amends current law pertaining to goodtime. This proposed legislation provides that a prisoner "who performs in a faithful, diligent, industrious, orderly and peaceable manner the work, duties and tasks assigned to him to the satisfaction of the director of the department of correction, may be allowed a time credit reduction maximum of up to two months for each year of the person's sentence..." Mr. Murphy expressed concern regarding this type of goodtime allowance because many prisoners would be eligible for parole sooner than they could have their sentence reduced by goodtime. (RS 11765 is attached as Exhibit D.)

Representative Sorensen indicated he liked the provisions of RS 11722C1 better than RS 11765 and made a motion, seconded by Senator Rydalch, that RS 11722C1 be included in the final report of the committee after the above questions have been researched and answered. The motion carried.

Mr. Nugent presented RS 11748C1 to the committee. This proposed legislation amends the current statute pertaining to enhanced sentences for using a firearm or deadly weapon in the commission of a crime. The proposed legislation states that any person convicted of a crime who used a firearm or other deadly weapon in the commission of that crime "shall be sentenced to an extended term of imprisonment. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by fifteen years. This proposed language would eliminate the Parole Commission from discharging a person from an enhanced sentence in order to be able to place that person on parole. (RS 11748C1 is attached as Exhibit E.)

Myrna Stahman explained that RS 11748C1 also eliminates the definition of a firearm because it has been difficult to prove in court that a weapon is capable of ejecting a bullet and therefore prove that that person used a firearm.

Ms. Stahman also explained that the proposed language eliminates the following from the statute: "provided, however, that the prosecutor shall give notice to the defendant of intent to seek an enhanced penalty at or before the preliminary hearing or before a waiver of the preliminary hearing, if any.

Carl Bianchi stated this language had been originally placed in the statutes because when enhanced sentences were first written into the Code, a person would plead guilty to the original crime and by the time they got to the sentenceing process the judge

would have before him a plea to the original crime and couldn't sentence him on the enhanced penalty. So this provision was put in all through the Code to say that the prosecutor has to notify the defendant his intent to seek an enhanced penalty in the original information.

Mr. Bianchi indicated he feels this would still hold true on the new language regarding an extended term. The prosecutor will have to indicate that he's going to seek an extended term. He feels this should be researched before it is eliminated.

Representative Harris stated that the code revision working group is recommending legislation to set up a classification of crimes and he felt discussion on RS 11748C1 should be held until such time as the classification legislation is presented.

At this time the committee recessed for lunch and reconvened at 1:45 p.m.

Mr. Nugent presented RS 11749C1 to the committee pertaining to service of multiple terms of imprisonment. (RS 11749C1 is attached as Exhibit F.) Representative Sorensen said the need for this particular legislation would be eliminated when legislation that deals with discharging of sentences is developed. Al Murphy also expressed his concern regarding this proposed legislation.

Mr. Nugent explained RS 11750C1 which provides for sentencing alternatives. It provides for indeterminate sentences and fixed sentences as they are basically now in the Code, and adds a new sentencing alternative, a mixed sentence. This would put the various sentencing alternatives in one section of the Code. Ms. Stahman stated she would also like to have added to this section suspension of sentences and withholding of judgment. This would eliminate the need for judges, prosecutors, etc., to go back and forth through different sections of the Code to find sentencing alternatives. (RS 11750C1 is attached as Exhibit G.) Ms. Stahman stated she would research the possibility of putting all sentencing alternatives together.

It was decided to hold this legislation until discussion is held on proposed legislation regarding classification of crimes.

The committee briefly discussed RS 11760 which adds an alternative mixed term sentence to the Code. (RS 11760 is attached as Exhibit H.)

Ms. Stahman stated that during the lunch hour she had researched the question of whether or not the enactment date of this proposed legislation should be based on the date of the commission of the crime or the date the person is sentenced. She said her research indicated the enactment date should be the date the crime is committed.

Mr. Hodge presented RS 11717C3 to the committee. This proposed legislation pertains to classification of crimes, both felonies and misdemeanors. (RS 11717C3 is attached as Exhibit I.)

During discussion of the section pertaining to fines, Senator Darrington inquired if restitution should be an appropriate part of the criminal code. Ms. Stahman responded that restitution should be part of the sentencing alternatives, along with house arrest and other possible alternatives.

Discussion continued on RS 11717C3 as whether or not it would be presented to the Legislature during the 1986 session. It was the consensus that this proposed legislation should be distributed during the session and that it be made known right on the

statement of purpose that this is the framework for and the beginning of a complete recodification of Titles 18 and 19. The committee felt that the interim committee should continue next year and that support groups be added to recodify Titles 18 and 19.

Mr. Hodge explained RS 11743 to the committee which pertains to punishment for perjury. This changes the length of a possible sentence for perjury in a proceeding relating to a misdemeanor criminal offense. (RS 11743 is attached as Exhibit J.) Senator Darrington made a motion, seconded by Senator Fairchild, that RS 11743 be included in the final report of the committee. Motion carried.

Ms. Stahman stated she feels the penalty for perjury should be the same regardless of whether it is relating to a felony offense or a misdemeanor criminal offense. Other members of the committee felt the same way; a lie is a lie. This legislation had been suggested by the judiciary to alleviate inconsistencies in sentencing as they pertain to perjury and the seriousness of the crime.

In view of the above discussion, Representative Sorensen made a motion to rescind the vote on RS 11743, seconded by Representative Speck. Less than two-thirds having voted in the affirmative, the motion lost.

Mr. Hodge presented RS 11744 relating to aircraft and air navigation facilities to the committee. (RS 11744 is attached as Exhibit K.) After discussion, it was the consensus that RS 11744 be held for further study.

Mr. Hodge explained RS 11745 to the committee members. This proposed legislation pertains to legislators receiving bribes and changes the current statutes by adding the words "and forfeits his or her office." Staff was instructed to research the definition of a bribe and work with the Attorney General's office for an opinion on proper language. (RS 11745 is attached as Exhibit L.) The committee will pursue the concept of this legislation.

Mr. Hodge presented RS 11746 relating to burglary to the committee members. (RS 11746 is attached as Exhibit M.) There was much discussion by the committee as to the differentiation between daytime and nighttime burglaries. Some members felt there should be no difference in the penalty because the place of dwelling could be occupied either day or night. There was also discussion whether or not a garage attached to a house is included as part of the house. It was the consensus that a garage attached to a house is considered as part of the house and would be considered as first degree burglary. Burglary of an unattached garage would be considered as second degree burglary.

This proposed legislation was originally intended to get at the problem of having a person that steals a tape out of a parked car at night being charged with the same severity as having a person commit burglary of a house during the night.

It was the consensus of the committee that this proposed legislation be held for further study.

A short discussion was held regarding recommendations to the full committee by the code revision working group. (Recommendations attached as Exhibit N.) It was noted that action had already been taken on Recommendation No. 5. Senator Rydalch, Senator Smyser, and Representative Sorensen were appointed to analyze the financial workings of budgeting for a maximum security unit.

Representative Sorensen made a motion, seconded by Senator Darrington, that the remaining recommendations of the code revision work group be adopted. The motion carried.

Additional discussion was held on RS 11750C1 and it was the consensus of the committee that all sentencing alternatives should be in one section of the Code. A motion was made by Senator Darrington, seconded by Senator Bray, that all sentencing alternatives be put in one section of the Code, to include indeterminate sentences, fixed sentences, mixed sentences, withheld judgments, suspended sentences, community service, fines, restitution, etc. The concept of house arrest is to be pursued as a possible sentencing alternative. The Attorney General's office is to work with staff to research the technical workings of this motion.

There was discussion as to whether or not the sentencing alternative for mixed sentences as set out in RS 11750C1 would be in conflict with the proposed legislation regarding the classification of crimes which sets out a certain percentage of a sentence that must be served before a prisoner is eligible for parole.

Staff was instructed to work with Olivia Craven, Parole Commission, to estimate what effect these two pieces of legislation (RS 11750C1 and RS 11717C3) will have on the prison population. No further action was taken on these until the next meeting of the committee.

The next meeting of the committee had been scheduled previously for November 18. Senator Bray inquired if the meeting date could be changed until November 20. She explained that a speaker she wished to address the committee would be in Boise on November 20 and would be available to speak to the committee in the afternoon. Senator Reed made a motion that the next meeting date be changed to November 20, seconded by Senator Darrington. The motion carried.

The meeting adjourned at 4 p.m.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 20-201, Idaho Code, be, and the same is hereby amended to read as follows:

20-201. BOARD CREATED -- APPOINTMENT -- NONPARTISAN -- TERMS -- VACANCIES -- DELEGATION OF AUTHORITY. (1) There is hereby created a nonpartisan board of three (3) members to be known as the state board of correction, referred to in this chapter as the board, appointed by the governor to exercise the duties imposed by law. Not more than two (2) members shall belong to the same political party. The terms of the first members shall expire as follows: one (1) member on January 1, 1971; one (1) member on January 1, 1973; one (1) member on January 1, 1975. Thereafter any person appointed a member of the board shall hold office for six (6) years. Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made.

(2) The board shall be the constitutional board of correction prescribed by section 5, article X, of the constitution of the state of Idaho.

(3) The board shall exercise its constitutional and statutory authority and functions through the instrumentality of a department of correction, which is hereby created, and which shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of the state government.

(4) The board may delegate to ~~the commission and~~ the director any and all authority and power as it deems necessary to fulfill the duties, responsibilities and intent of this chapter and the other duties imposed upon it by law.

SECTION 2. That Section 20-210, Idaho Code, be, and the same is hereby amended to read as follows:

20-210. COMMISSION OF PARDONS AND PAROLE -- APPOINTMENT ~~--Qualifications~~ -- Terms -- Salary -- Staff. The board governor shall appoint a state commission of pardons and parole, each member of which shall be subject to the advice and consent of the senate, in this chapter referred to as the commission, which shall succeed to and have all rights, powers and authority of said board of pardons as are granted and provided by the provisions of the constitution of the state of Idaho.

The commission shall be composed of five (5) members~~, with due regard for their experience, knowledge and interest in sociology, psychology, rehabilitative services and similar pertinent disciplines~~. The members shall serve at the pleasure of the board governor and not more than three (3) members shall be from any one (1) political party. In carrying out their duties, the members shall be cognizant that the four (4) objectives of criminal punishment are as

follows:

(1) Protection of society;

(2) Deterrence of the individual and the public generally;

(3) Punishment or retribution for wrongdoing;

(4) Rehabilitation.

The members of the commission, each year, shall select a chairman and vice-chairman.

The members of the commission shall be appointed for the purposes of organization as follows: One (1) member is to be appointed for one (1) year, one (1) for two (2) years, one (1) for three (3) years, one (1) for four (4) years and one (1) for five (5) years, with each succeeding vacancy to be filled by the board for terms of five (5) years; vacancies in the commission for unexpired terms shall be by appointment by the board for the remainder of the term and all appointees may be reappointed.

The commission shall also act as the advisory commission to the board on matters of adult probation and parole ~~and may exercise such powers and duties in this respect as are delegated to it by the board~~.

The commission shall meet at such times and places as a majority of the members request, or at the call of the chairman and in any event no less than quarterly.

The members shall be compensated as provided by section 59-509(h), Idaho Code.

They may hire such staff and employees as are approved by the board governor and in addition the ~~board will liberally~~ governor shall allow the reasonable payment for services of such technical and professional advice and consultation as the commission may require.

SECTION 3. That Section 59-904, Idaho Code, be, and the same is hereby amended to read as follows:

59-904. STATE OFFICES -- VACANCIES, HOW FILLED AND CONFIRMED. (a) All vacancies in any state office, and in the supreme and district courts, unless otherwise provided for by law, shall be filled by appointment by the governor. Appointments to fill vacancies pursuant to this section shall be made as provided in subsections (b), (c), (d), (e), and (f) of this section, subject to the limitations prescribed in those subsections.

(b) Nominations and appointments to fill vacancies occurring in the office of lieutenant governor, state auditor, state treasurer, superintendent of public instruction, attorney general and secretary of state shall be made by the governor, subject to the advice and consent of the senate, for the balance of the term of office to which the predecessor of the person appointed was elected.

(c) Nominations and appointments to and vacancies in the following listed offices shall be made or filled by the governor subject to the advice and consent of the senate for the terms prescribed by law, or in case such terms are not prescribed by law, then to serve at the pleasure of the governor:

Director of the department of administration,

Director of the department of finance,

Director of the department of insurance,

Director, department of agriculture,

Director of the department of employment,

Director of the department of water resources,

Director of the department of law enforcement,
Director, department of labor and industrial services,
Director of the department of commerce,
Manager of the state insurance fund,
Member of the state tax commission,
Members of the board of regents of the university of Idaho and the state board of education,
Members of the Idaho water resources board,
Members of the state fish and game commission,
Members of the Idaho transportation board,
Members of the state board of health and welfare,
Members of the board of directors of state parks and recreation,
Members of the board of correction,
Members of the industrial commission,
Members of the Idaho public utilities commission,
Members of the Idaho personnel commission,
Members of the board of directors of the Idaho state retirement system,
Members of the state commission of pardons and parole.

(d) Appointments made by the state board of land commissioners to the office of director, department of lands, and appointments to fill vacancies occurring in those offices shall be submitted by the president of the state board of land commissioners to the senate for the advice and consent of the senate in accordance with the procedure prescribed in this section.

(e) Appointments made pursuant to this section while the senate is in session shall be submitted to the senate forthwith for the advice and consent of that body. The appointment so made and submitted shall not be effective until the approval of the senate has been recorded in the journal of the senate. Appointments made pursuant to this section while the senate is not in session shall be effective until the appointment has been submitted to the senate for the advice and consent of the senate. Should the senate adjourn without granting its consent to such an interim appointment the appointment shall thereupon become void and a vacancy in the office to which the appointment was made shall exist.

All appointments made pursuant to subsection (c) of this section, except those appointments for which a term of office is fixed by law, shall terminate at the expiration of any gubernatorial term. Appointments to fill the vacancies thus created by the expiration of the term of office of the governor shall be forthwith submitted to the senate for the advice and consent of that body, and when so submitted shall be as expeditiously considered as possible.

Upon receipt of an appointment in the senate for the purpose of securing the advice and consent of the senate, the appointment shall be referred by the presiding officer to the appropriate committee of the senate for consideration and report prior to action thereon by the full senate.

(f) It is the intent of the legislature that the provisions of this section as amended by this act shall not apply to appointments which have been made prior to the effective date of this act. It is the further intent of the legislature that the provisions of this section shall apply to the offices listed in this section and to any office created by law or executive order which succeeds to the powers, duties, responsibilities and authorities of any of the offices listed in subsections (c) and (d) of this section.

October - 60
RS11689C1

EXHIBIT B

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, PARDON OR OTHER MITIGATION OF SENTENCE 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, reduction, alteration, discharge, or any other mitigation of the sentence 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, reduction, alteration, discharge or any other mitigation of a sentence 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.

October - 62
RS11722C1

EXHIBIT C

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 20-101A, Idaho Code, be, and the same is hereby amended to read as follows:

20-101A. GOOD CONDUCT REDUCTION OF SENTENCES. Each person convicted of an offense against the state, sentenced prior to May 1, 1986, for such offense and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, is entitled to a deduction from the term of his sentence issued prior to May 1, 1986, beginning with the day on which the sentence starts to run as follows:

(1) Five (5) days for each month, if the sentence is not less than six (6) months and not more than one (1) year.

(2) Six (6) days for each month, if the sentence is more than one (1) year and less than three (3) years.

(3) Seven (7) days for each month, if the sentence is not less than three (3) years and less than five (5) years.

(4) Eight (8) days for each month if the sentence is not less than five (5) years and less than ten (10) years.

(5) Ten (10) days for each month, if the sentence is ten (10) years or more.

When two (2) or more consecutive sentences are served, the basis upon which the deduction is computed is the aggregate of several sentences.

In addition, those inmates doing an outstanding job, may be awarded industrial or meritorious goodtime under rules adopted by the state board of correction, not to exceed five (5) days per month.

Inmates performing exceptionally meritorious or outstanding services under rules adopted by the state board of correction may be awarded a lump sum of goodtime. The number of days awarded may not exceed the regulatory maximum.

SECTION 2. That Chapter 1, Title 20, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 20-101D, Idaho Code, and to read as follows:

20-101D. MERITORIOUS REDUCTION OF SENTENCE. (1) Each person convicted of an offense against the state, sentenced on or after May 1, 1986, and confined in a state correctional facility for any term other than life, may be awarded a meritorious conduct reduction of their sentence by the director of the department of correction. Meritorious conduct reduction of the sentence may be awarded when an inmate completes an extraordinary act of heroism at the risk of his own life or for outstanding service to the state of Idaho which results in the saving of lives, prevention of destruction or major property loss

during a riot, or the prevention of an escape from a correctional facility. The award of a meritorious conduct reduction may be given under rules adopted by the Idaho board of correction. The number of days awarded may not exceed fifteen (15) days for each month sentenced.

(2) For each inmate sentenced for a crime on or after May 1, 1986, the director of the department of correction may withdraw a meritorious conduct reduction awarded pursuant to subsection (1) of this section according to rules of the board of correction.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after May 1, 1986.

October - 64
RS11765

EXHIBIT D

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 20-101A, Idaho Code, be, and the same is hereby amended to read as follows:

20-101A. GOOD CONDUCT REDUCTION OF SENTENCES. Each person convicted of an offense against the state, sentenced prior to May 1, 1986, for such offense and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, is entitled to a deduction from the term of his sentence issued prior to May 1, 1986, beginning with the day on which the sentence starts to run as follows:

(1) Five (5) days for each month, if the sentence is not less than six (6) months and not more than one (1) year.

(2) Six (6) days for each month, if the sentence is more than one (1) year and less than three (3) years.

(3) Seven (7) days for each month, if the sentence is not less than three (3) years and less than five (5) years.

(4) Eight (8) days for each month if the sentence is not less than five (5) years and less than ten (10) years.

(5) Ten (10) days for each month, if the sentence is ten (10) years or more.

When two (2) or more consecutive sentences are served, the basis upon which the deduction is computed is the aggregate of several sentences.

In addition, those inmates doing an outstanding job, may be awarded industrial or meritorious goodtime under rules adopted by the state board of correction, not to exceed five (5) days per month.

Inmates performing exceptionally meritorious or outstanding services under rules adopted by the state board of correction may be awarded a lump sum of goodtime. The number of days awarded may not exceed the regulatory maximum.

SECTION 2. That Chapter 1, Title 20, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 20-101D, Idaho Code, and to read as follows:

20-101D. GOODTIME CREDIT ALLOWABLE -- SENTENCES ON AND AFTER MAY 1, 1986. Every person convicted of an offense against the state, sentenced on or after May 1, 1986, and confined in a penal or correctional institution for a definite term other than for life and who has committed no infraction of the rules or regulations of the department or board of correction or the laws of the state and who performs in a faithful, diligent, industrious, orderly and peaceable manner the work, duties and tasks assigned to him to the satisfaction of the director of the department of correction, may be allowed a time

credit reduction maximum of up to two (2) months for each year of the person's sentence if the director approved the reduction in writing and files the reduction with the commission of pardons and parole. The time credit reduction authorized in this section shall not vest upon being granted and may be withdrawn pursuant to rules of the board of correction.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after May 1, 1986.

October - 66
RS11748C1

EXHIBIT E

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 19-2520, Idaho Code, be, and the same is hereby amended to read as follows:

19-2520. SENTENCE FOR USE OF FIREARM OR DEADLY WEAPON. Any person convicted of a violation of sections 18-905 (aggravated assault defined), 18-907 (aggravated battery defined), 18-909 (assault with intent to commit a serious felony defined), 18-911 (battery with intent to commit a serious felony defined), 18-1401 (burglary defined), 18-2501 (rescuing prisoners), 18-2505 (escape by one charged with or convicted of a felony), 18-2506 (escape by one charged with or convicted of a misdemeanor), ~~18-2703-(resisting-officers),~~ 18-4003 (degrees of murder), 18-4006 (manslaughter), 18-4015 (assault with intent to murder), 18-4501 (kidnapping defined), ~~18-4604--(grand-larceny defined),~~ 18-5001 (mayhem defined), 18-6101 (rape defined), or 18-6501 (robbery defined), Idaho Code, who displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime~~,-shall,--in addition--to--the-sentence-imposed-for-the-commission-of-the-crime,-be-imprisoned-in-the-state-prison-for-not-less-than-three-(3)--nor--more--than--fifteen-(15)--years.---Such--additional--sentence-shall-run-consecutively-to-any-other-sentence-imposed-for-the-above-cited-crimes~~ shall be sentenced to an extended term of imprisonment. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by fifteen (15) years.

~~For--the-purposes-of-this-section,-"firearm"-means-any-deadly-weapon-capable-of-ejecting-or-propelling-one-or-more-projectiles-by--the--action--of--any-explosive--or-combustible-propellant,-and-includes-unloaded-firearms-and-firearms-which-are-inoperable-but-which-can-readily-be-rendered-operable.~~

The additional terms provided in this section shall not be imposed unless the fact of displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing the crime is separately charged in the information or indictment and admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime~~;--provided,--however,-that--the--prosecutor--shall-give-notice-to-the-defendant-of-intent-to-seek-an-enhanced-penalty-at-or-before-the-preliminary-hearing-or-before--a--waiver--of-the-preliminary-hearing,-if-any.~~

This section shall apply even in those cases where the use of a firearm is an element of the offense.

EXHIBIT F

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY _____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Chapter 3, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-308A, Idaho Code, and to read as follows:

18-308A. SERVICE OF MULTIPLE TERMS OF IMPRISONMENT. A person sentenced to two or more terms of imprisonment, whether concurrent or consecutive sentences, may be paroled on one sentence, with a part or all of the term of parole served while the person is incarcerated on the remaining sentence or sentences of imprisonment. A person shall not be discharged from one sentence of imprisonment, without serving a term of parole, solely for the purpose of beginning the service of a consecutive sentence.

October - 68
RS11750C1

EXHIBIT G

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Sections 19-2513 and 19-2513A, Idaho Code, be, and the same are hereby repealed.

SECTION 2. That Chapter 25, Title 19, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 19-2513, Idaho Code, and to read as follows:

19-2513. SENTENCING ALTERNATIVES. When a person has been convicted of having committed a felony, the court shall, unless it shall commute the sentence, suspend or withhold judgment and sentence, or grant probation as provided in chapter 26, title 19, Idaho Code, or unless it shall impose the death sentence as provided by law, utilize one of the following sentencing alternatives:

(1) Indeterminate sentence. The person may be sentenced to the custody of the state board of correction for a specified indeterminate period of time up to the maximum specified by law for the crime for which judgment was entered. The sentencing court shall specify the maximum sentence which may be required before release from imprisonment. The person may be considered for parole, in accordance with rules and regulations of the commission of pardons and parole, at any time during the service of an indeterminate sentence.

(2) Fixed sentence. The person may be sentenced to the custody of the state board of correction for a fixed period of time up to the maximum specified by law for the crime for which judgment was entered. During the term of a fixed sentence the person is not eligible for release on parole.

(3) Mixed sentence. The person may be sentenced to the custody of the state board of correction for a fixed period of time followed by a specified indeterminate period of time, the aggregate of which shsll not exceed the maximum specified by law for the crime for which the judgment was entered. During the term of the fixed portion of a mixed sentence the person shall not be eligible for release on parole. The person may be considered for parole in accordance with rules and regulations promulgated by the commission of pardons and parole at any time during the service of the indeterminate period of the sentence.

SECTION 3. This act shall be in full force and effect on and after July 1, 1986, and shall apply to all persons sentenced by a court on and after July 1, 1986.

EXHIBIT H

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Chapter 25, Title 19, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 19-2513B, Idaho Code, and to read as follows:

19-2513B. ALTERNATIVE MIXED TERM SENTENCE. As an alternative to an indeterminate sentence or a fixed term sentence for any person convicted of a felony, the court, in its discretion, may sentence the person to the custody of the state board of correction for a fixed period of time followed by a specified indeterminate period of time, the aggregate of which shall not exceed the maximum specified by law for the crime for which the judgment was entered. During the term of the fixed portion of the mixed sentence the person shall not be eligible for release on parole. The person may be considered for parole in accordance with rules and regulations promulgated by the commission of pardons and parole, at any time during the service of the indeterminate period of the sentence.

SECTION 2. This act shall be in full force and effect on and after July 1, 1986, and may apply to all persons sentenced by a court on and after July 1, 1986.

October - 70
RS11717C3

EXHIBIT I

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. DEGREES OF FELONIES. (1) Felonies are classified into five (5) categories as follows:

(a) Capital felonies;
(b) Felonies of the first degree;
(c) Felonies of the second degree;
(d) Felonies of the third degree;
(e) Felonies of the fourth degree.

(2) An offense designated as a felony without specification as to punishment or degree is a felony of the fourth degree.

SECTION 2. DEGREES OF MISDEMEANORS. (1) Misdemeanors are classified into three (3) categories as follows:

(a) Class A misdemeanors;
(b) Class B misdemeanors;
(c) Class C misdemeanors.

(2) An offense designated a misdemeanor without specification as to punishment or category is a class B misdemeanor.

SECTION 3. SENTENCE OF IMPRISONMENT FOR FELONY -- ORDINARY TERMS. A person who has been convicted of a felony may be sentenced to imprisonment as follows:

(1) A person who has been convicted of a capital felony shall be sentenced to death or to determinant or to indeterminant life imprisonment in accordance with sections 18-4004, 18-4504, 18-4505, and 19-2515, Idaho Code, or for a determinant term of not less than thirty (30) years;

(2) For a felony of the first degree, for a term up to life imprisonment;

(3) For a felony of the second degree, for a term not to exceed twenty-five (25) years;

(4) For a felony of the third degree, for a term not to exceed fifteen (15) years;

(5) For a felony of the fourth degree, for a term not to exceed five (5) years.

SECTION 4. EXTENDED TERM SENTENCE OF IMPRISONMENT FOR FELONY -- CRITERIA FOR IMPOSING AN EXTENDED TERM SENTENCE -- EXTENDED TERMS. (1) The court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this section and shall state such findings on the record:

(a) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public. Any person convicted for the third time of the commission of a felony, whether the pre-

vious convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent offender. The prior commission of crime shall be separately charged in the information or indictment, and either admitted by the accused or found to be true by the trier of fact after a verdict or finding of guilty on the substantive crime.

(b) The defendant is convicted of a violation of of any of the following sections: 18-905 (aggravated assault defined), 18-907 (aggravated battery defined), 18-909 (assault with intent to commit a serious felony defined), 18-911 (battery with intent to commit a serious felony defined), 18-1401 (burglary defined), 18-2501 (rescuing prisoners), 18-2505 (escape by one charged with or convicted of a felony), 18-2506 (escape by one charged with or convicted of a misdemeanor), 18-4003 (degrees of murder), 18-4006 (manslaughter), 18-4015 (assault with intent to murder), 18-4501 (kidnapping defined), 18-5001 (mayhem defined), 18-6101 (rape defined), or 18-6501 (robbery defined), Idaho Code, and was found by the trier of fact to have displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime. The fact of displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing the crime shall be separately charged in the information or indictment, and either admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime. The prosecutor shall give notice to the defendant of intent to seek an extended period of imprisonment at or before the preliminary hearing or before a waiver of the preliminary hearing, if any.

The provisions of this subsection shall apply even in those cases where the use of a firearm is an element of the offense.

(2) A person who has been found to be a persistent violator as defined in this section may be sentenced for an extended term of up to life imprisonment. A person who has been convicted of a felony enumerated in subsection (1)(b) of this section and who was found by the trier of fact to have displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime, may be sentenced to an extended term of imprisonment, as follows:

(a) In the case of a felony of the second degree, for a term not to exceed life imprisonment;

(b) In the case of a felony of the third degree, for a term not to exceed thirty (30) years;

(c) In the case of a felony of the fourth degree, for a term not to exceed ten (10) years.

SECTION 5. SENTENCE OF IMPRISONMENT FOR MISDEMEANORS. A person who has been convicted of a misdemeanor may be sentenced to imprisonment in the county jail as follows:

(1) In the case of a class A misdemeanor, for a term not exceeding one (1) year;

(2) In the case of a class B misdemeanor, for a term not exceeding six (6) months;

(3) In the case of a class C misdemeanor, for a term not exceeding ninety (90) days.

SECTION 6. FINES. (1) A person who has been convicted of an offense may

be sentenced to pay a fine not exceeding:

(a) Twenty-five thousand dollars ($25,000) when the conviction is of a felony of the first or second degree;

(b) Fifteen thousand dollars ($15,000) when the conviction is of a felony of the third degree;

(c) Five thousand dollars ($5,000) when the conviction is of a felony of the fourth degree;

(d) One thousand dollars ($1,000) when the conviction is of a class A misdemeanor;

(e) Five hundred dollars ($500) when the conviction is of a class B or C misdemeanor;

(f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender;

(g) Any higher amount specifically authorized by statute.

(2) Fines authorized in this section may be imposed in conjunction with a term of imprisonment or the court may, in its discretion, impose a fine only.

SECTION 7. That Sections 18-111A, 18-111B, 18-112 and 18-113, Idaho Code, be, and the same are hereby repealed.

SECTION 8. That Section 18-303, Idaho Code, be, and the same is hereby amended to read as follows:

18-303. COMMON LAW OFFENSES -- PUNISHMENT -- IMPRISONMENT FOR NONPAYMENT OF FINE. All offenses recognized by the common law as crimes and not herein enumerated are punishable, in case of felony, ~~by--imprisonment--in--the--state prison-for-a-term-not-less-than-one-(1)-year-nor-more-than-five-(5)-years~~ as a felony of the fourth degree; and in case of misdemeanors, ~~by-imprisonment-in the-county-jail-for-a-term-not-exceeding-six-(6)-months-or-less-than--one--(1) month;--or-by-fine-not-exceeding-$500;-or-both-such-fine-and-imprisonment~~ as a class B misdemeanor. And whenever any fine is imposed for any felony or misdemeanor, whether such be by statute or at common law and the party upon whom the fine is imposed has the ability to pay said fine, the party upon whom the fine is imposed shall be committed to the county jail, when not sentenced to the state prison, until the fine is paid.

SECTION 9. That Section 18-304, Idaho Code, be, and the same is hereby repealed.

SECTION 10. That Section 18-306, Idaho Code, be, and the same is hereby amended to read as follows:

18-306. PUNISHMENT FOR ATTEMPTS. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts~~;-as-follows:~~

~~1.--If-the-offense-so-attempted-is-punishable-by-imprisonment-in-the-state prison--for-more-than-five-(5)-years-or-more;-or-by-imprisonment-in-the-county jail;-the-person-guilty-of-such-attempt-is-punishable-by-imprisonment--in--the state--prison;--or--in--the--county--jail;--as-the-case-may-be;~~ for a term not exceeding one-half (1/2) the longest term of imprisonment prescribed upon a

conviction of the offense so attempted.

~~2.--If-the-offense-so-attempted-is-punishable-by-imprisonment-in-the-state prison--for--any--term--less--than--five--(5)-years,-the-person-guilty-of-such attempt-is-punishable-by-imprisonment-in-the-county-jail-for-not-more-than-one (1)-year.~~

~~3.--If-the-offense-so-attempted-is-punishable-by-a-fine,-the-offender-convicted-of-such-attempt-is-punishable-by-a-fine-not--exceeding--one-half--(1/2) the--largest--fine--which--may--be-imposed-upon-a-conviction-of-the-offense-so attempted.~~

4. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half (1/2) the longest term of imprisonment and one-half (1/2) the largest fine which may be imposed upon a conviction for the offense so attempted.

SECTION 11. That Section 18-317, Idaho Code, be, and the same is hereby amended to read as follows:

18-317. PUNISHMENT OF OFFENSES FOR WHICH NO PENALTY IS FIXED. When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a <u>class B</u> misdemeanor.

SECTION 12. That Sections 19-2514, 19-2520, 19-2520A, 19-2520B, 19-2520C, 19-2520D and 19-2520E, Idaho Code, be, and the same are hereby repealed.

SECTION 13. EFFECTIVE DATE. (1) Except as provided in subsection (2) of this section, this act does not apply to offenses committed prior to its effective date and prosecutions and sentencing for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this act were not in force. For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

(2) In any case pending on or after the effective date of this act involving an offense committed prior to such date the court, with the consent of the defendant and the prosecuting attorney, may impose sentence under the provisions of this act applicable to the offense and the offender.

October - 74
RS11743

EXHIBIT J

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT

RELATING TO PERJURY; AMENDING SECTION 18-5409, IDAHO CODE, TO PROVIDE A PENALTY FOR PERJURY IN PROCEEDINGS RELATING TO MISDEMEANOR CRIMINAL OFFENSES.

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

SECTION 1. That Section 18-5409, Idaho Code, be, and the same is hereby amended to read as follows:

18-5409. PUNISHMENT FOR PERJURY. Perjury is punishable by imprisonment in the state prison for not ~~less than one (1) or~~ more than fourteen (14) years; provided, that if the perjury occurred during a proceeding relating to a misdemeanor criminal offense, the perjury is punishable by imprisonment in the state prison for not more than five (5) years.

EXHIBIT K

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO AIRCRAFT AND AIR NAVIGATION FACILITIES; AMENDING SECTION 21-702, IDAHO CODE, TO PROVIDE A PENALTY FOR DESTRUCTION OR DAMAGE OF AIRCRAFT OR FOR THROWING OBJECTS AT AIRCRAFT, AND TO PROVIDE A PENALTY FOR SHOOTING AT AIRCRAFT.

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

SECTION 1. That Section 21-702, Idaho Code, be, and the same is hereby amended to read as follows:

21-702. STEALING FROM, INTERFERING WITH, OR DESTRUCTION OF AIRCRAFT OR AIR NAVIGATION FACILITIES. (1) Any person who intentionally or with reckless disregard for the safety of human life:

(a) damages, destroys, disables, sets fire to, tampers with, or wrecks any aircraft, aircraft navigation facility, or aircraft engine, propeller, radio, antenna or spare part, or cuts any wire or removes, damages, or tampers with any functional part of any aircraft or air navigation facility, or,

(b) places or causes to be placed any destructive substance in, upon, or in proximity to, any such aircraft or any aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid or other material used or intended to be used in connection with the operation of any such aircraft or any cargo carried or intended to be carried on any such aircraft or otherwise makes or causes to be made any such aircraft, engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid or other material unworkable or unusable or hazardous to work or use, or

(c) removes, steals, takes or carries away any part of an aircraft, aircraft engine, propeller, radio, air navigation facility or appliance used in connection with an aircraft, or

(d) throws an object at, or drops an object upon, a moving aircraft, such object having the apparent capability to do harm, or

shall be guilty of a felony and shall be punished by a fine of not more than five thousand dollars ($5,000) or imprisonment for not more than ten (10) years or by both such fine and imprisonment.

(e2) Any person who intentionally or with reckless disregard for the safety of human life discharges an arrow, gun, airgun or firearm at or toward an aircraft, shall be guilty of a felony and shall be punished by a fine of not more than ten thousand dollars ($10,000) or imprisonment for not more than twenty (20) years, or by both such fine and imprisonment.

October - 76
RS11745

EXHIBIT L

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT

RELATING TO LEGISLATORS RECEIVING BRIBES; AMENDING SECTION 18-4704, IDAHO CODE, TO REQUIRE FORFEITURE OF OFFICE BY A LEGISLATOR IF THE LEGISLATOR ACCEPTS A BRIBE.

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

SECTION 1. That Section 18-4704, Idaho Code, be, and the same is hereby amended to read as follows:

18-4704. LEGISLATORS RECEIVING BRIBES. Every member of either of the houses composing the legislature of this state who asks, receives or agrees to receive, any bribe, upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give, any official vote in consideration that another member of the legislature shall give any such vote either upon the same or another question, is guilty of a felony and forfeits his or her office.

RS11746 EXHIBIT M October - 77

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO BURGLARY; AMENDING SECTION 18-1402, IDAHO CODE, TO PROVIDE PENALTIES FOR BURGLARY OF VEHICLES AND RESIDENTIAL BUILDINGS.

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

SECTION 1. That Section 18-1402, Idaho Code, be, and the same is hereby amended to read as follows:

18-1402. DEGREES OF BURGLARY. (1) Except as provided in subsection (2) of this section eEvery burglary committed in the night time is burglary of the first degree, and every burglary committed in the day time is burglary in the second degree.

(2) Any burglary of a house, room, apartment, tenement, tent, trailer, or any other building or vehicle adapted for overnight accommodation of persons is burglary in the first degree. Any burglary of a vehicle not adapted for overnight accommodation of persons is burglary in the second degree.

October - 78

EXHIBIT N

RECOMMENDATIONS TO THE FULL COMMITTEE BY THE CODE REVISION WORKING GROUP

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."

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.

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.

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.

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.

APPENDIX J

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 A

IN THE _____
_____BILL NO._____
BY_____

AN ACT

RELATING TO

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. That . . . .

[Stahman note: These materials which do not have section numbers should be contained in Title 19, Chapter 26 and the chapter should be entitled "Sentencing." The present Chapter 26 should be revised.]

SENTENCING

19- : PURPOSES OF SENTENCING. -- The purposes of sentencing are to:

(1) punish a criminal defendant by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;

(2) assure the fair treatment of all defendants by establishing fair procedures for the imposition of sentencings; and

(3) prevent crime and promote respect for law by:

(i) providing an effective deterrent to others likely to commit similar offenses;

(ii) restraining defendants with a long history of criminal conduct; and

(iii) promoting correctional programs that elicit the voluntary cooperation and participation of offenders.

[Stahman note: The following section is the present Idaho Code 19-2521, retitled and with the present (3) amended out.]

19- . PRINCIPLES OF SENTENCING. -- To implement the purposes of sentencing the following principles apply:

-- (1) The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

(2) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of avoiding a sentence of imprisonment:

(a) The defendant's criminal conduct neither caused nor threatened harm;

(b) The defendant did not contemplate that his criminal conduct would cause or threaten harm;

(c) The defendant acted under a strong provocation;

(d) There were substantial ground tending to excuse or justify the defendant's criminal conduct, through failing to establish a defense;

(e) The victim of the defendant's criminal conduct induced or facilitated it's commission;

(f) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained; provided, however, nothing in this section shall prevent the appropriate use of imprisonment and restitution in combination;

(g) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for substantial period of time before the commission of the present crime;

(h) The defendant criminal conduct was the result of circumstances unlikely to recur;

(i) The character and attitudes of the defendant indicate that the commission of another crime is unlikely.

~~(3) When a person who has been convicted of a crime is not sentenced to imprisonment, the court may place the defendant on probation if the supervision, guidance, assistance or direction is needed that the probation service can provide.~~

[Stahman note: The following section should clearly set forth each and every sentencing alternative which is available to a sentencing judge. The one which I have not yet incorporated is the withheld judgment with individual placed on probation. There may be other sentencing alternatives which should also be considered.]

<u>19- : SENTENCING ALTERNATIVES. - The following sentencing alternatives are authorized:</u>

(1) Imposition of a sentence to death where specifically authorized by law.

(2) Service of a term of continuous confinement.

(3) Service of a term of confinement, with the execution of judgment suspended for one hundred twenty (120) days, during which time the court shall retain jurisdiction over the defendant.

(4) Service of a term of confinement followed by a term of probation. [Stahman's note: The Uniform Law refers to community servision as opposed to probation. Because Idaho presently has probation I have used the term "probation" rather than the phrase "community supervision"].

(5) Service of a term of periodic confinement. [Stahman note: I believe this would be similar to the present work release program. An example of the application of this is it would permit a sentence to be served only on weekends, permitting the individual to hold a job during the week.]

(6) Service of a term of probation.

(7) Payment of restitution either alone or in addition to any other sentence authorized by this section.

(8) Payment of a fine either alone or in addition to any other sentence authorized by this section.

[Stahman note: The following section would replace the present two sentencing alternatives - indeterminate and fixed sentences - Idaho Code sections 19-2513 and 19-2513A. This section provides for a required court imposed mandatory minimum sentence, which must be served prior to parole eligibility, and a mandatory maximum.]

19- : SENTENCE TO A TERM OF CONFINEMENT. -- Whenever any person is convicted of having committed a felony and the court determines confinement is appropriate, the offender shall be sentenced to the custody of the state board of corrections. The court shall establish, and clearly explain at the sentencing hearing, both the minimum period of confinement the offender shall serve and the maximum period of confinement the offender may serve if not granted parole. The person shall not be eligible for release on parole until after the expiration of the minimum period of confinement established by the sentencing court.

[Stahman note: The present Idaho Code Section 18-308 addresses consecutive sentencing. No present code section addresses parole eligibility and how it applies when consecutive sentences are imposed. This section should clarify for the parole commission the parole eligibility of an individual serving consecutive sentences.]

19- : CONCURRENT AND CONSECUTIVE SENTENCES. -- (1) If multiple sentences are imposed on an offender, or if a sentence is imposed on an offender already subject to an undischarged sentence, the sentencing court must specify whether the sentences shall run consecutively or concurrently.

(2) If sentences are to run consecutively, the offender may, at the discretion of the parole authorities, begin service of a consecutive sentence while serving that portion of the sentence on a preceding offense in excess of the court imposed minimum. In all cases the offender must serve the court imposed minimum on each sentence.

[Stahman note: The following section is a clarification of the present 120 day retained jurisdiction program which presently is contained, along with numerous other provisions, in Idaho Code section 19-2601.]

19- : SERVICE OF A SENTENCE OF CONFINEMENT WITH JUDGMENT SUSPENDED FOR ONE HUNDRED TWENTY (120) DAYS. -- (1) Whenever a court sentences an offender to a sentence of confinement and suspends judgment for one hundred twenty (120) days the court shall impose a minimum and maximum sentence, in accordance with Idaho Code § 19- . The court may extend the period under which it retains jurisdiction of the offender an additional sixty (60) days.

(2) At the expiration of the period of retained jurisdiction the court shall either (a) relinquish jurisdiction or (b) place the offender on probation.

(3) If jurisdiction is relinquished the offender shall be confined pursuant to the terms of the original sentence.

(4) If the offender is placed on probation the court shall specify the terms of probation as set for in Idaho Code § 19- .

19- : SENTENCE TO A TERM OF PERIODIC CONFINEMENT. -- (1) Under a sentence to a term of periodic confinement the offender serves the sentence of confinement on specified days or during specified parts of days, or both, in a correctional facility with the remainder of the time to be spent at liberty in the community subject to the conditions imposed by the sentencing court.

(2) When the court sentences an offender to a term of periodic confinement it may attach one or more of the conditions authorized for a sentence to probation and shall specify (a) the term of periodic confinement, which may not exceed the maximum sentence prescribed for the offense, and (b) the days or parts of days the offender is to be confined.

[Stahman note: A provision needs to be drafted which would deal with violation of conditions of periodic confinement.]

[Stahman note: This provision more clearly spells out what probation is.]

19- : PROBATION. -- (1) A sentence to probation requires the offender to reside in the community subject to the supervision of the department of probation and parole [is the the correct title?] pursuant to conditions imposed by the sentencing court in accordance with this chapter.

(2) Whenever a court sentences an offender to probation, the court shall specify the term of the probation and may require the offender to comply with one or more of the following conditions:

(a) meet his family responsibilities;

(b) devote himself to a specific employment or occupation;

(c) perform, without compensation, services in the community for charitable or governmental agencies;

(d) undergo available medical or psychiatric treatment, and enter and remain in a specified institution whenever required for that purpose;

(e) pursue a prescribed secular course of study or vocational training;

(f) retain from possessing a firearm or other dangerous weapon unless granted written permission;

(g) remain within prescribed geographical boundaries and notify the court or the probation officer of any change in his address or employment;

(h) report as directed to the court or a probation officer; and

(i) satisfy any other conditions reasonably related to the purpose of his sentence.

(3) During the term of probation, the sentencing court, on its own motion, or on application of the probation authorities or the offender, may:

(a) modify any condition;

(b) remove a condition; or

(c) discharge the offender from further supervision.

(4) The court shall discharge the offender from supervision when the term of probation has expired.

[Stahman note: A well written section dealing with probation violation proceedures needs to be inserted.]

19- : RESTITUTION. -- [Stahman note: We need to incorporate the present restitution provisions or improve on them. I have not had time to work on this section.]

[Stahman note: Idaho Code sections 19-2517 and 19-2518 presently provide for imprisonment upon failure to pay a fine and for a judgment lien for a fine imposed. There is no statutory provision which clearly sets forth procedures dealing with imposition, collection, and nonpayment of fines.]

19- : FINES. -- (1) The court shall specify the time for payment of a fine and may permit payment in installments. The court may not establish a payment schedule extending beyond the statutory maximum term of confinement that could have been imposed for the offense.

(2) In determining the amount and method of payment of a fine, the court shall consider the financial resources and future ability of the offender to pay the fine and the likely adverse effect a fine will have on his ability to make

restitution and on dependents of the offender. The court may not impose a fine that will prevent the defendant from making court-ordered restitution.

(3) An offender at any time may petition the sentencing court to adjust or otherwise waive payment of any fine imposed or any unpaid portion thereof. If the court finds that the circumstances upon which it based the imposition or amount and method of payment of the fine no longer exist or that it otherwise would be unjust to require payment of the fine as imposed, the court may adjust or waive payment of the unpaid portion thereof or modify the time or method of payment. The court may extend the payment schedule, but a payment schedule may not require a payment on a date beyond the statutory maximum term of confinement.

[Stahman note: A well written section dealing with nonpayment of fine needs to be included. See §3-404 of Uniform Act.

[Stahman note: Sections clearly setting forth the provisions relating to withheld judgments must be included.]]

Section 2. That Section 20-223, Idaho Code be, and the same is hereby amended to read as follows:

20-223. PAROLE, RULES AND REGULATIONS GOVERNING -- RESTRICTIONS -- PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION [Effective October 1, 1985]. -- (a) The commission shall have the power to establish rules, regulations, policies or procedures in compliance with chapter 52, title 67, Idaho Code, under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the commission; provided, however, that no ~~person serving a life sentence or serving a term of thirty (30) or more years shall be eligible for release on parole until he has served at least ten (10) years and no person serving a lesser sentence for any of the following crimes, homicide in any degree, treason, rape by force or threat of bodily harm, incest, crime against nature, committing a lewd act upon a child, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, or with an attempt or assault with intent to commit any of said crimes, or as an habitual offender, shall be eligible for release on parole until said person has served a period of five (5) years or one-third (1/3) of the sentence, whichever is the lesser. The provisions of this section shall affect only those persons who are sentenced on or after the first day of July, 1980, and are not intended to repeal or amend sections 19-2513A, 19-2520 or 19-2520A, Idaho Code~~ offender may be considered for parole until he has served his entire court imposed minimum sentence. [Stahman note: This section needs to be more artfully drafted so that for all individuals who are

presently serving sentence the old parole eligibility rules apply, but for individuals sentenced for crimes committed after the effective date of this ammendment they must serve the court imposed mandatory minimum before parole eligibility.]

(b) No person serving a sentence for rape, incest, committing a lewd act upon a child, crime against nature, or with an intent or an assault with intent to commit any of the said crimes or whose history and conduct indicate to the commission that he is a sexually dangerous person, shall be released on parole except upon the examination and evaluation of one or more psychiatrists or psychologists to be selected by the commission in making its such evaluation shall be duly considered by the commission in making its parole determination. The commission may, in its discretion, likewise require a similar examination and evaluation for persons serving sentences for crimes other than those above enumerated. No psychiatrist or psychologist making such evaluation shall be held financially responsible to any person for denial of parole by the commission or for the results of the future acts of such person if he is granted parole.

(c) Before considering the parole of any prisoner, the commission shall afford the prisoner the opportunity to be interviewed. A parole shall be ordered only for the best interests of society, not as a reward of clemency and it shall not be considered to be a reduction of sentence or a pardon. A prisoner shall be placed on parole only when arrangements have been made for his employment or maintenance and care, and when the commission believes the prisoner is able and willing to fulfill the obligations of a law-abiding citizen. The commission may also by its rules, regulations, policies or procedures fix the times and conditions under which any application denied may be reconsidered.

(d) In making any parole or commutation decision with respect to a prisoner, the commission shall consider the compliance of the prisoner with any order of restitution which may have been entered according to section 19-5304, Idaho Code. The commission may make compliance with such an order of restitution a condition of parole.

Section 3. That Chapter 25, Title 19, Idaho Code be, and the same is hereby amended to read as follows:

[Stahman note: The following is an attempt to update and clarify the present chapter 25. More work needs to be done.]

19-2501. TIME FOR JUDGMENT. -- After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two (2) days after the verdict/. ⌇⌇ ⌇⌇⌀ ⌀⌀⌇⌇ ⌇⌇⌇⌀⌀⌀ ⌇⌀ ⌇⌀⌀⌀⌇⌇ ⌇⌇ ⌀⌀⌀⌀⌇⌀⌇ ⌀⌀ ⌇⌀⌀⌀/ ⌇⌇⌇ ⌇⌇ ⌀⌀⌇/ ⌇⌇⌀⌀ ⌀⌇ ⌀⌀ ⌇⌀⌀⌀⌇⌀ ⌀ ⌇⌇⌀⌀ ⌀⌀ ⌀⌀⌀ ⌇⌀⌀⌀⌀⌀⌀⌇⌇ ⌇⌀ ⌀⌇⌇⌀⌀⌀⌀/

[Stahman note: Is 19-2502 a section which no longer has a need to exist?]

19-2502. DETERMINATION OF DEGREE OF CRIME. -- Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.

19-2503. PRESENCE OF DEFENDANT. -- For the purpose of judgment, if the conviction is for a felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence.

19-2504. DEFENDANT TO BE BROUGHT BEFORE COURT/ APPEARANCE FOR IMPOSITION OF JUDGMENT AND SENTENCE. -- (a) When the defendant is in custody the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so.

19-2505/ BENCH WARRANT TO ENFORCE ATTENDANCE/ ++

(b) If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

19-2506/ CLERK TO ISSUE WARRANT/ ++

(c) The clerk, on the application of the prosecuting attorney, may, at any time after the order, whether the court be sitting or not, issue a bench warrant into one or more counties.

19-2507/ FORM OF WARRANT/ ++

(d) The bench warrant must be substantially in the following form:

County of _____.

The state of Idaho, to any sheriff, constable, marshal or policeman in this state:

A.B., having been on the _____day of _____, 19 duly convicted in the district court of the _____ judicial district of the state of Idaho, in and for the county of _____, of the crime of (designating it generally), you are therefore commanded forthwith to arrest the above named A.B. and bring him before that court for judgment; or if the court has adjourned for the term, that you deliver him into custody of the sheriff of the county of _____.

Given under my hand, with the seal of said court affixed, this _____day of _____, 19__.

By order of the court.
(seal)

~~19-2508. SERVICE OF WARRANT. --~~

(e) The bench warrant may be served in any county in the same manner as a warrant of arrest, and when served in another county it need not be endorsed by a magistrate of that county.

~~19-2509. ARREST OF DEFENDANT. --~~

(f) Whether the bench warrant is served in the county in which it was issued or in another county, the officer must arrest the defendant and bring him before the court or commit him to the officer mentioned in the warrant, according to the command thereof.

19-2510. ARRAIGNMENT FOR SENTENCE. -- (a) When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the indictment and of his plea, and the verdict if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

~~19-2511. GROUNDS FOR WITHHOLDING JUDGMENT. --~~

(b) He may show, for cause against the judgment that he has good cause to offer, either in arrest of judgment or for a new trial, in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

~~19-2512. PRONOUNCEMENT OF JUDGMENT. --~~

(c) If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered.

~~19-2513. INDETERMINATE SENTENCE. -- The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed a felony, the court shall, unless it shall commute the sentence, suspend or withhold judgment and sentence or grant probation, as provided by chapter 26 of title 19, Idaho Code, or unless it shall impose the death sentence a provided by law, sentence such offender to the custody of the state board of correction for an indeterminate period of time, but stating and fixing in such judgment and sentence a maximum term which term shall be for a period of not less than two (2) years nor exceeding that provided by law therefor, and judgment and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence, provided, however, that the enactment of this act shall not affect the indictment, information, prosecution, trial, verdict, judgment or punishment of any felonies heretofore committed, but all laws now and hitherto in effect relating thereto are continued in full force and effect as to such crimes heretofore committed.~~

~~19-2513A. ALTERNATIVE FIXED TERM SENTENCE. -- As an alternative to an indeterminate sentence for any person convicted of a felony, the court in its discretion, may sentence the offender to the custody of the state board of correction for a fixed period of time of not less than two (2) years and not more than the maximum provided by law for said felony.~~

[Stahman note: This section, 19-2514, needs to be moved to a proper place in the rewrite of chapter 26. It belongs there rather than in chapter 25.]

19-2514. PERSISTENT VIOLATOR -- SENTENCE ON THIRD CONVICTION FOR FELONY. -- Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third convictions hall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life.

[Stahman note: It probably would be good to make changes to 19-2515 this because as it presently exists it is subject to confusion. There should be a completely separate section on death penalty cases; with a completely separate section on other cases. I have not had time to make any recommendations as to changes.]

19-2515. INQUIRY INTO MITIGATING OR AGGRAVATING CIRCUMSTANCES -- SENTENCE IN CAPITAL CASES -- STATUTORY AGGRAVATING CIRCUMSTANCES -- JUDICIAL FINDINGS. -- (a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

(b) Where a person is sentenced to serve a term in the penitentiary, after the conviction of a crime which falls within the provisions of section 20-223, Idaho Code, except in cases where the court retains jurisdiction, the comments and arguments of the counsel for the state and the defendant relative to the sentencing and the comments of the judge relative to the sentencing shall be recorded. If the comments are recorded electronically, they need not be transcribed. Otherwise, they shall be transcribed by the court reporter.

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may

be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to a complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written finds setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed to remuneration or the promise or remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

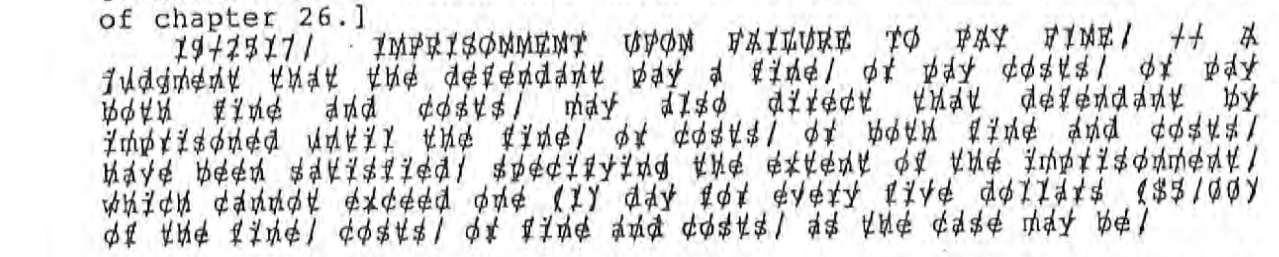
(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

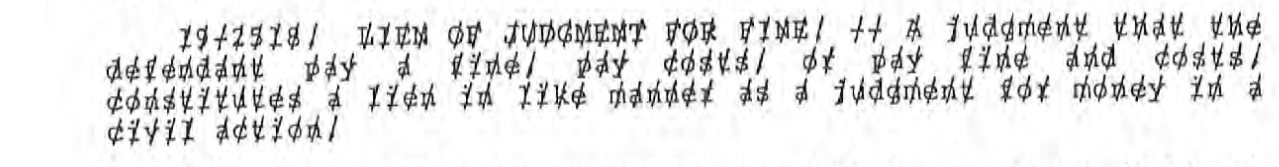
(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.
(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer prosecuting attorney because of the exercise of official duty.
(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

[Stahman note: This section, 19-2516, needs revision. It is presently inconsistent with court rules. It is also the subject of at least one case presently on appeal to the Idaho Court of Appeals.]

19-2516. INQUIRY INTO CIRCUMSTANCES -- EXAMINATION OF WITNESS. -- The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation or the punishment, except as provided in this and the preceding section.

[Stahman Note: Fines are covered in the recommended rewriate of chapter 26.]





19-2519. ENTRY OF JUDGMENT -- RECORD. -- When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction was had and must without unnecessary delay annex together and file the following papers, which constitute a record of action:

1. A copy of the minutes of a challenge interposed by the defendant to the panel of a grand jury, or to an individual grand juror, and the proceedings and the decisions thereon.

2. The indictment and copy of the minutes of the plea or demurrer.

3. A copy of the minutes of a challenge interposed to the panel of the trial jury or to an individual juror, and the proceedings and decision thereon.

4. A copy of the minutes of the trial.

5. A copy of the minutes of the judgment.

6. Any bill or bills of exceptions.

7. The written charges asked of the court, and refused with the court's endorsement thereon.

8. A copy of all requested instruction showing those given and those refused with the court's endorsement thereon, together with a copy of all instructions given on the court's own motion.

[Stahman note: The present 19-2520 should be moved, to be a part of chapter 26. This is similar to the move of 19-2514, persistent violator section.]

19-2520. SENTENCE FOR USE OF FIREARM OR DEADLY WEAPON. -- Any person convicted of a violation of . . . sections 18-905 (aggravated assault defined), 18-907 (aggravated battery defined), 19-909 (assault with intent to commit a serious felony defined), 18-1401 (burglary defined), 18-2501 rescuing prisoners), 18-2505 (escape by one charged with or convicted of a felony), 18-2506 (escape by one charged with or convicted of a misdemeanor), 18-2703 (resisting officers), 18-4003 (degrees of murder), 18-4006 (manslaughter), 18-4015 (assault with intent to murder), 18-4501 (kidnapping defined), 18-4604 (grand larceny defined), 18-5001 (mayhem defined), 18-6101 (rape defined), or 18-6501 (robbery defined), Idaho Code, who displayed, used threatened, or attempted to use a firearm or other deadly weapon while committing the crime, shall be sentenced to an extended term of imprisonment. The term of imprisonment authorized pursuant to this section shall be computed by increasing by fifteen years the maximum sentence authorized for the crime for which the person was convicted. /

[illegible]

The additional terms provided in this section shall not be imposed unless the fact of displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing the crime is separately charged in he information or indictment and admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime/.

~~provided, however, that the prosecutor shall give notice to the defendant of intent to seek an enhanced penalty at or before the preliminary hearing or before a waiver of the preliminary hearing, if any.~~

~~This section shall apply even in those cases where the use of a firearm is an element of the offense.~~

[Stahman note: Deletion of 19-2520A through 19-2520E apply the committee's recommendations regarding abolishing all enhancements except for persistent violator and use of a firearm.]

~~19-2520A. MANDATORY MINIMUM SENTENCES. -- Every person convicted of any felon enumerated in section 19-2520, Idaho Code, and who used, threatened or attempted to use a firearm or other deadly weapon or instrument while committing the felony, and who has been convicted of a previous felony in another state or if within Idaho previous felony as enumerated in section 19-2520, Idaho Code, within a ten (10) year period prior to the commission of the subsequent felony, in substitute for the penalty prescribed in section 19-2520, Idaho Code, shall be imprisoned in the state penitentiary for a mandatory minimum period of not less than three (3) years or for such greater period as the court may impose up to a maximum of fifteen (15) years. This additional sentence shall run consecutively to any other sentence imposed for the enumerated felony or felonies. The mandatory minimum period of three (3) years incarceration shall be served without eligibility for parole less any allowance for goodtime.~~

~~The additional terms provided in this section shall not be imposed unless the fact of displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing the crime is separately charged in the information or indictment and admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime; provided, however, that the prosecutor shall give notice to the defendant of intent to seek an enhanced penalty at or before the preliminary hearing or before a waiver of the preliminary hearing, if any.~~

[Stahman note: 19-2520B and C should also be shown being repealed.]
[Stahman note: Is there a need for 19-2520D dealing with prior foreign convictions.? It maybe should be kept.]

19-2520D. PRIOR FOREIGN CONVICTION. -- Every person who has been found guilty in any other state, country or jurisdiction of any offense for which, if committed within this state, such person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if such prior conviction had taken place in court of this state.

~~19-2520E. MULTIPLE ENHANCED PENALTIES PROHIBITED. -- Notwithstanding the enhanced penalty provision in sections 19-2520, 19-2520A, 19-2520B and 19-2520C, Idaho Code, any person convicted of two (2) or more substantive crimes provided for in the above code sections, which crimes arose out of the same indivisible course of conduct, may only be subject to one (1) enhanced penalty.~~

[Stahman note: No changes are be recommended regarding mental condition.]

19-2522. EXAMINATION OF DEFENDANT FOR EVIDENCE OF MENTAL CONDITION -- APPOINTMENT OF PSYCHIATRISTS OR LICENSED PSYCHOLOGISTS -- HOSPITALIZATION -- REPORTS. -- (1) If there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the court shall appoint at least (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant. The cost of examination shall be paid by the defendant if he is financially able. The determination of ability to pay shall be made in accordance with Chapter 8, title 19, Idaho Code. The order appointing or requesting the designation of a psychiatrist or licensed psychologist shall specify the issues to be resolved for which the examiner is appointed or designated.

(2) In making such examination, any method may be employed which is accepted by the examiner's profession for the examination of those alleged to be suffering form mental illness or defect.

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis, evaluation or prognosis of the mental condition of the defendant;

(c) An analysis of the degree of the defendant's illness defect and level of functional impairment;

(d) A consideration of whether treatment is available for the defendant's mental condition;

(e) An analysis of the relative risks and benefits of treatment or nontreatment;

(f) A consideration of the relative risks and benefits of treatment or nontreatment;

(4) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(5) When the defendant wishes to be examined by an expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purpose of examination.

(6) Nothing in this section is intended to limit the consideration of other evidence relevant to the imposition of sentence.

19-2523. CONSIDERATION OF MENTAL ILLNESS SENTENCING. -- (1) Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime. In determining the sentence to be imposed in addition to other criteria provided by law, if the defendant's mental condition is a significant factor, the court shall consider such factors as:

(a) The extent to which the defendant is mentally ill;
(b) The degree of illness or defect and level of functional impairment;
(c) The prognosis for improvement or rehabilitation;
(d) The availability of treatment and level of care required;
(e) Any risk of danger which the defendant may create for the public, if at large, or the absence of such risk;
(f) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged.

(2) The court shall authorize tretment during the period of confinement or probation specified in the sentence if, after the sentencing hearing, it concludes by clear and convincing evidence that:

(a) The defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law;
(b) Without treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant;
(c) Treatment is available for such illness or defect;
(d) The relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment. (of the offense charged.)

(3) In addition to the authorization of treatment, the court shall pronounce sentence as provided by law.

RS11688C3

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 20-201, Idaho Code, be, and the same is hereby amended to read as follows:

20-201. BOARD CREATED -- APPOINTMENT -- NONPARTISAN -- TERMS -- VACANCIES -- DELEGATION OF AUTHORITY. (1) There is hereby created a nonpartisan board of three (3) members to be known as the state board of correction, referred to in this chapter as the board, appointed by the governor to exercise the duties imposed by law. Not more than two (2) members shall belong to the same political party. The terms of the first members shall expire as follows: one (1) member on January 1, 1971; one (1) member on January 1, 1973; one (1) member on January 1, 1975. Thereafter any person appointed a member of the board shall hold office for six (6) years. Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made.

(2) The board shall be the constitutional board of correction prescribed by section 5, article X, of the constitution of the state of Idaho.

(3) The board shall exercise its constitutional and statutory authority and functions through the instrumentality of a department of correction, which is hereby created, and which shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of the state government.

(4) The board may delegate to ~~the commission and~~ the director any and all authority and power as it deems necessary to fulfill the duties, responsibilities and intent of this chapter and the other duties imposed upon it by law.

SECTION 2. That Section 20-210, Idaho Code, be, and the same is hereby amended to read as follows:

20-210. COMMISSION OF PARDONS AND PAROLE -- APPOINTMENT ~~---Qualifications~~ -- Terms -- Salary -- Staff. The ~~board~~ governor shall appoint a state commission of pardons and parole, each member of which shall be subject to the advice and consent of the senate, in this chapter referred to as the commission, which shall succeed to and have all rights, powers and authority of said board of pardons as are granted and provided by the provisions of the constitution of the state of Idaho.

The commission shall be composed of five (5) members~~, with due regard for their experience, knowledge and interest in sociology, psychology, rehabilitative services and similar pertinent disciplines~~. The members shall serve at the pleasure of the ~~board~~ governor and not more than three (3) members shall be from any one (1) political party. In carrying out their duties, the members shall be cognizant that the four (4) objectives of criminal sentencing are as

follows:

(1) Protection of society;

(2) Deterrence of the individual and the public generally;

(3) Punishment or retribution for wrongdoing;

(4) Rehabilitation.

The members of the commission, each year, shall select a chairman and vice-chairman.

The members of the commission shall be appointed for the purposes of organization as follows: One (1) member is to be appointed for one (1) year, one (1) for two (2) years, one (1) for three (3) years, one (1) for four (4) years and one (1) for five (5) years, with each succeeding vacancy to be filled by the board for terms of five (5) years; vacancies in the commission for unexpired terms shall be by appointment by the board for the remainder of the term and all appointees may be reappointed.

~~The commission shall also act as the advisory commission to the board on matters of adult probation and parole and may exercise such powers and duties in this respect as are delegated to it by the board.~~

The commission and the board shall meet as necessary to exchange such information to enable each to effectively carry out their respective duties.

The commission shall meet at such times and places as a majority of the members request, or at the call of the chairman and in any event no less than quarterly.

The members shall be compensated as provided by section 59-509(h), Idaho Code.

They may hire such staff and employees as are approved by the board governor and in addition the ~~board will liberally~~ governor shall allow the reasonable payment for services of such technical and professional advice and consultation as the commission may require.

SECTION 3. That Section 59-904, Idaho Code, be, and the same is hereby amended to read as follows:

59-904. STATE OFFICES -- VACANCIES, HOW FILLED AND CONFIRMED. (a) All vacancies in any state office, and in the supreme and district courts, unless otherwise provided for by law, shall be filled by appointment by the governor. Appointments to fill vacancies pursuant to this section shall be made as provided in subsections (b), (c), (d), (e), and (f) of this section, subject to the limitations prescribed in those subsections.

(b) Nominations and appointments to fill vacancies occurring in the office of lieutenant governor, state auditor, state treasurer, superintendent of public instruction, attorney general and secretary of state shall be made by the governor, subject to the advice and consent of the senate, for the balance of the term of office to which the predecessor of the person appointed was elected.

(c) Nominations and appointments to and vacancies in the following listed offices shall be made or filled by the governor subject to the advice and consent of the senate for the terms prescribed by law, or in case such terms are not prescribed by law, then to serve at the pleasure of the governor:

Director of the department of administration,

Director of the department of finance,

Director of the department of insurance,

Director, department of agriculture,

Director of the department of employment,
Director of the department of water resources,
Director of the department of law enforcement,
Director, department of labor and industrial services,
Director of the department of commerce,
Manager of the state insurance fund,
Member of the state tax commission,
Members of the board of regents of the university of Idaho and the state board of education,
Members of the Idaho water resources board,
Members of the state fish and game commission,
Members of the Idaho transportation board,
Members of the state board of health and welfare,
Members of the board of directors of state parks and recreation,
Members of the board of correction,
Members of the industrial commission,
Members of the Idaho public utilities commission,
Members of the Idaho personnel commission,
Members of the board of directors of the Idaho state retirement system,
Members of the state commission of pardons and parole.

(d) Appointments made by the state board of land commissioners to the office of director, department of lands, and appointments to fill vacancies occurring in those offices shall be submitted by the president of the state board of land commissioners to the senate for the advice and consent of the senate in accordance with the procedure prescribed in this section.

(e) Appointments made pursuant to this section while the senate is in session shall be submitted to the senate forthwith for the advice and consent of that body. The appointment so made and submitted shall not be effective until the approval of the senate has been recorded in the journal of the senate. Appointments made pursuant to this section while the senate is not in session shall be effective until the appointment has been submitted to the senate for the advice and consent of the senate. Should the senate adjourn without granting its consent to such an interim appointment the appointment shall thereupon become void and a vacancy in the office to which the appointment was made shall exist.

All appointments made pursuant to subsection (c) of this section, except those appointments for which a term of office is fixed by law, shall terminate at the expiration of any gubernatorial term. Appointments to fill the vacancies thus created by the expiration of the term of office of the governor shall be forthwith submitted to the senate for the advice and consent of that body, and when so submitted shall be as expeditiously considered as possible.

Upon receipt of an appointment in the senate for the purpose of securing the advice and consent of the senate, the appointment shall be referred by the presiding officer to the appropriate committee of the senate for consideration and report prior to action thereon by the full senate.

(f) It is the intent of the legislature that the provisions of this section as amended by this act shall not apply to appointments which have been made prior to the effective date of this act. It is the further intent of the legislature that the provisions of this section shall apply to the offices listed in this section and to any office created by law or executive order which succeeds to the powers, duties, responsibilities and authorities of any of the offices listed in subsections (c) and (d) of this section.

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.

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.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 20-101A, Idaho Code, be, and the same is hereby amended to read as follows:

20-101A. GOOD CONDUCT REDUCTION OF SENTENCES. Each person convicted of an offense against the state, which was committed prior to July 1, 1986, and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, is entitled to a deduction from the term of his sentence beginning with the day on which the sentence starts to run as follows:

(1) Five (5) days for each month, if the sentence is not less than six (6) months and not more than one (1) year.

(2) Six (6) days for each month, if the sentence is more than one (1) year and less than three (3) years.

(3) Seven (7) days for each month, if the sentence is not less than three (3) years and less than five (5) years.

(4) Eight (8) days for each month if the sentence is not less than five (5) years and less than ten (10) years.

(5) Ten (10) days for each month, if the sentence is ten (10) years or more.

When two (2) or more consecutive sentences are served, the basis upon which the deduction is computed is the aggregate of several sentences.

In addition, those inmates doing an outstanding job, may be awarded industrial or meritorious goodtime under rules adopted by the state board of correction, not to exceed five (5) days per month.

Inmates performing exceptionally meritorious or outstanding services under rules adopted by the state board of correction may be awarded a lump sum of goodtime. The number of days awarded may not exceed the regulatory maximum.

SECTION 2. That Chapter 1, Title 20, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 20-101D, Idaho Code, and to read as follows:

20-101D. MERITORIOUS REDUCTION OF SENTENCE. (1) Each person convicted of an offense against the state committed on or after July 1, 1986, sentenced and confined in a state correctional facility for any term other than life, may be awarded a meritorious conduct reduction of their sentence by the director of the department of correction. Meritorious conduct reduction of the sentence may be awarded when an inmate completes an extraordinary act of heroism at the risk of his own life or for outstanding service to the state of Idaho which results in the saving of lives, prevention of destruction or major property

loss during a riot, or the prevention of an escape from a correctional facility. The award of a meritorious conduct reduction may be given under rules adopted by the Idaho board of correction. The number of days awarded may not exceed fifteen (15) days for each month sentenced.

(2) For each inmate sentenced for a crime committed on or after July 1, 1986, the director of the department of correction may withdraw a meritorious conduct reduction awarded pursuant to subsection (1) of this section according to rules of the board of correction.

RS11748C2

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 19-2520, Idaho Code, be, and the same is hereby amended to read as follows:

19-2520. SENTENCE FOR USE OF FIREARM OR DEADLY WEAPON. Any person convicted of a violation of sections 18-905 (aggravated assault defined), 18-907 (aggravated battery defined), 18-909 (assault with intent to commit a serious felony defined), 18-911 (battery with intent to commit a serious felony defined), 18-1401 (burglary defined), 18-2501 (rescuing prisoners), 18-2505 (escape by one charged with or convicted of a felony), 18-2506 (escape by one charged with or convicted of a misdemeanor), ~~18-2703 (resisting officers),~~ 18-4003 (degrees of murder), 18-4006 (manslaughter), 18-4015 (assault with intent to murder), 18-4501 (kidnapping defined), ~~18-4604 (grand larceny defined),~~ 18-5001 (mayhem defined), 18-6101 (rape defined), or 18-6501 (robbery defined), Idaho Code, who displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime~~, shall, in addition to the sentence imposed for the commission of the crime, be imprisoned in the state prison for not less than three (3) nor more than fifteen (15) years. Such additional sentence shall run consecutively to any other sentence imposed for the above cited crimes~~ shall be sentenced to an extended term of imprisonment. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by fifteen (15) years.

~~For the purposes of this section, "firearm" means any deadly weapon capable of ejecting or propelling one or more projectiles by the action of any explosive or combustible propellant, and includes unloaded firearms and firearms which are inoperable but which can readily be rendered operable.~~

The additional terms provided in this section shall not be imposed unless the fact of displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing the crime is separately charged in the information or indictment and admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime; provided, however, that the prosecutor shall give notice to the defendant of intent to seek an enhanced penalty at or before the preliminary hearing or before a waiver of the preliminary hearing, if any.

This section shall apply even in those cases where the use of a firearm is an element of the offense.

EXHIBIT G

STATE OF IDAHO

BOARD OF CORRECTION
Commission for Pardons and Parole

P.O. BOX 14
BOISE, IDAHO 83707
(208) 336-0740

October 24, 1985

Representative Larry Harris
1925 Montclair Drive
Boise, Idaho 83702

Dear Representative Harris:

This letter is in response to our discussion of the case of Michael Kaiser. I have attached, herewith, a letter to Mrs. Dorcheus for your signature. Please feel free to change this letter if you wish.

I will outline Mr. Kaiser's case for you from his file:

(1) He was sentenced on March 21, 1980 for Murder II, for which he received an Indeterminate Life sentence; and Possession of a Firearm During the Commission of a Crime, for which he was given a 15 year Indeterminate sentence to run consecutively to the first sentence.

(2) The Court granted him jail credit of 212 days.

(3) He was sentenced prior to July 1, 1980 and I.C. Code 20-223, at that time, was interpreted to read that the Subject had to serve a mandatory minimum of five (5) years before becoming parole eligible. His parole eligibility date was determined by the Records Department to be August 21, 1984. Mr. Kaiser was then scheduled for a parole hearing in October 1984.

(4) A parole hearing was held on October 24, 1985. I believe Mrs. Dorcheus also appeared before the Commission on this date but not when Mr. Kaiser was present. I had talked to Mrs. Dorcheus several times before the hearing and advised her to write her thoughts down which she wanted to present to the Commission; she submitted a letter at a later date which has been placed in Mr. Kaiser's file. The Commission denied parole and set the next hearing for April 1987. Setting a

new parole hearing just 2½ years in the future is not unusual. If the Commission sets a hearing for a longer period of time, we must review the Inmate's file at 2½ year intervals anyway. I have enclosed, also, a copy of the parole hearing minutes; these are a summary of the hearing and not a transcription.

(5) Mrs. Dorcheus notified Eugene Larson's office (Deputy Director, Field and Community Services) and my secretary of her present address. She was notified after Mr. Kaiser's last hearing of his next parole hearing date which has not changed. The Victim's Rights law which went into effect October 1, 1985, requires the Commission to notify victim's of pertinent inmate's parole hearings, Commutation hearings, or release dates for criminal complaints filed after October 1, 1985. Mr. Kaiser's case does not fit into this category; however, I have made provision for Mrs. Dorcheus to be notified prior to Mr. Kaiser's hearing if she wishes to give testimony again. I do understand her concern.

(6) Mr. Kaiser appealed the 15 year consecutive sentence which was vacated by the Court of Appeals. However, a decision by the Supreme Court, filed on January 31, 1985, upheld the District Court's sentence and this was reinstated.

I hope this information has been of benefit to you. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Olivia Craven

Olivia Craven
Executive Director

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NAME

NUMBER

KAISER, MICHAEL LEE

17139-

THE FOLLOWING ARE THE RESULTS OF THE OCTOBER 24 84. HEARING OF THE COMMISSION FOR PARDONS AND PAROLES

THE COMMISSION VOTED UNANIMOUSLY.

TO DENY PAROLE:

PAROLE DENIAL BASED ON PAST RECORD.

PAROLE DENIAL BASED ON CRIME COMMITTED.

THE NEXT HEARING IS SCHEDULED FOR 4-87.

DEL RAY HOLM, COMMISSIONER

TONY SKORO, COMMISSIONER

TED CREASON, COMMISSIONER

FABER F. TWAY, COMMISSIONER

MRS. ELLIE KISER, COMMISSIONER

OLIVIA CRAVEN, EXECUTIVE SECRETARY

The Commission notes he has a CS sentence and is not eligible for parole at this time. Prior to the subject's appearance, Linda Dorschous, mother of the victim in this crime, appeared before the Commission. Also with her were her sons, Greg and Chuck. She read a statement prepared for the Commission relating that Kaiser scares her. The wounds run deep in her family and requests that Kaiser not live in the Boise area if ever paroled. The Commission advised her to submit the letter to be placed in the file.

Subject advises he has an appeal pending on Possession of a Firearm During the Commission of a Crime charge. Subject states he always carried a gun because he was a truck driver and with the truck strike going on at the time, he carried it for protection. He had the gun in his car the night of the offense. If he could just replay the incident he would just go home and not return to the Bouquet Bar. His attitude about the guns now is that he does not like them and won't be around them in the future. He has matured since the commission of the crime and if he ever gets out, he wouldn't do anything to jeopardize his freedom. The Commission notes he shot the victim more than once and a prior charge of Possession of a Firearm appears on his record. Due to the crime, the Commission unanimously elected to pass this subject for two and one-half years and sets a new hearing for April, 1987.

STATE OF IDAHO

BOARD OF CORRECTION
Commission for Pardons and Parole

P.O. BOX 14
BOISE, IDAHO 83707
(208) 336-0740

October 24, 1985

Mrs. Zalinda Dorcheus
2910½ Grover
Boise, Idaho 83705

Dear Mrs. Dorcheus:

To provide the correct information from our files, Representativ Larry Harris has referred your letter to me.

On October 24, 1984, Michael Kaiser appeared before the Commission for Pardons and Parole for a parole hearing scheduled after Subject became eligible for parole by State law. I believe you also appeared before the Commission on that date. Mr. Kaiser was denied parole and the next parole hearing was set for April 1987, of which you were notified. I have been advised of your address and have made note to notify you of his next parole hearing by letter.

The Commission appreciates your concerns in this matter and will provide due regard in any proceedings referencing this case. Several members of the House and Senate have reviewed the letters you submitted, and we have all discussed this case.

If I can be of further assistance to you, please feel free to contact me.

Sincerely,

Olivia Craven
Executive Director

Representative Larry Harris
Sentencing Alternatives Commit

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OFFICE OF
THE PROSECUTING ATTORNEY
COUNTY OF ADA
GREG H. BOWER
PROSECUTING ATTORNEY
ADA COUNTY COURTHOUSE, BOISE, IDAHO 83702
CRIMINAL DIV. (208) 383-1237
CIVIL DIV. (208) 383-1246

October 23, 1985

Larry Harris
State Representative
1925 Montelair Dr.
Boise, ID 83702

Dear Representative Harris:

Pursuant to our conversations by phone today I have prepared an outline of the history of the Michael Kaiser case, which is currently before Judge W. E. Smith on a Rule 35 motion to reduce sentence.

The defendant Michael Kaiser as charged with first degree murder and use of a firearm for the August 23, 1979 shooting death of John A. Dorcheus. The jury trial was held during the week of January 29, 1980 and the defendant was found guilty of second degree murder and use of a firearm during the commission of the felony. The defendant was sentenced on March 21, 1980 by Judge W. E. Smith to an indeterminate life sentence for the second degree murder and a consecutive three year indeterminate sentence for the use of the firearm.

The defendant appealed the sentence to the Court of Appeals and ultimately the Idaho Supreme Court ruled on the case upholding the conviction and sentence.

Idaho Criminal Rule 35 allows a defendant to ask the sentencing court to reduce the sentence within a 120 days of the sentencing date and within 120 days of when an Appellant Court denies the appeal. Kaiser moved to reduce the sentence within 120 days after the Idaho Supreme Court denied his appeal. That hearing was set for August 7, 1985.

At the hearing to reduce sentence, the defendant's family testified in his behalf and presented information from the penitentiary to the court indicating the defendant had not been in any significant trouble while at the

penitentiary. Later on, the victim John Dorcheus' mother testified and additional information was presented by the State from other correctional officers concerning the defendant's conduct at the penitentiary.

As the case stands now, the rest of the evidence and argument will probably be heard during the week of October 28, 1985 when the Judge will then have all of the evidence and can make a decision.

I might add, that Jim Harris, the Ada County Prosecuging Attorney, tried the case for the State back in 1980. I'm handling the case at this point as Mr. Harris is no longer with the office. The length of time that has elapsed since the crime makes this type of hearing difficult for the State because, of course, the new handling attorney won't have the same feel for the facts that the original handling attorney did. Also, any witnesses that the State might want to call to testify about the facts may no longer be available. In this case, the State is fortunate to have been able to find the victim's mother Mrs. Dorcheus, who has testified.

I have one other case of this type presently pending after the denial of an appeal and I have done at least one other one this year on a murder case, that I can think of.

If I can provide you with any more information about this case or other cases of this type, I'll be happy to do so. Feel free to give me a call. Thank you.

Sincerely,

GREG H. BOWER
Ada County Prosecutor

BY: Roger Bourne
Roger Bourne
Chief Deputy

RB:jd

September 18, 1985

Representative Larry Harris
Chairman, Interim Committee
on Sentencing Reform
Statehouse Mail
Boise, Idaho 83720

Mr. Harris,

I am writing this as a representative of the Dorcheus family, the Mother of John A. Dorcheus, a victim, and as someone who deeply cares. It saddens me to think we had to become victims to become of aware and to pay attention to what was going on with the "system" but that is the way it has happened.

My son, John A. Dorcheus, was murdered on August 23, 1979, by Michael Kaiser, who is now in the Idaho State Penitentiary. Because of this I can write with 6 years of experience.

At the time of Michael Kaiser's sentencing, after the trial in January 1980, he was sentenced to life plus 15 years. My feelings then were O. K., now he has had his day in court and has been sentenced, we need to put this experience in it's proper place in our life's and go on. When your dealing with "one day at a time" it is really hard to think to far into the future. I have five other sons, who are all young adults and they needed strength and an example to follow as to how "to go on with our life"was to be accomplished. Down deep in my soul I always knew Kaiser would never serve life but I had to deal with first things first. The ways this tragedy has touched ALL our life's would take pages and pages to explain.

Last fall-after 5 years- I called the penitentiary to ask the status of Kaiser. That's how I found out he was up for review. FIVE YEARS AFTER A LIFE SENTENCE. The Parole Board told me it was O.K. for me to come out and talk to them at his review, I did and was told it would not be until April of 1987, before he would be reviewed again. Once again-after reliving the experience again in order to ask the Board to consider what it was doing I had to go thru the process of putting it in it's proper place and go on.

Now here we are not even one year later going thru it once more. Kaiser is asking his sentence be reduced and has appeared in court with his request. The parole board and prosecuting attorneys office don't have very good communication and I was not told of his appearance in court until after the fact. When I was contacted I requested time to express my concerns and did so on Monday, Sept. 16, 1985.

If I were not so dogmatic about this situation I would be told nothing..... and I want to know. In calling the penitentiary to give my current address and phone number for the victims rights changes that are to take effect October 1, 1985, I was told to call again around the 1st of the year-they can't do it now because they do not have the funds.

Six years after my son was murdered my family and I still have to deal, in one degree or another, almost daily with it and I don't like it.

Kaiser was sentenced to life for 2nd degree murder and after 5 years he has started the process of trying to get out.

I do not like it, it is not fair, it is not justice, it is frustrating, it is not punishment enough and it is time we try to do something about it.

At this point I do not know what I can do but I need to do something and I need to try.

Parole procedures need to be changed and there definitely needs to be truth in sentencing.

With all my heart I hope some one reads and really hears what I am saying.....

Mr. Harris, you have my permission to allow whoever you feel would be interested in reading this letter and if there is anyway I can help please let me know.

I am also attaching a letter my son, Greg, wrote to the Judge representing all of his brothers.

Thank you.

Zalinda Dorcheus

Zalinda Dorcheus
Mother of John A. Dorcheus

August 1985

I am writing this letter representing the family and friends of the victim in this crime. I hope with this letter to show you some of the cares and concerns of these people, and to share with you the feelings of one victims family. I sincerely hope this letter and information gathered by your own investigators will help you to decide to make the parole of Michael Kaiser impossible at this time.

As a young man, John Dorcheus was a talented and creative person. He had abilities many people admired. John could fix things other people could not fix, and build things others could not build. He had his bad times as well as his good but John had a unique capability of finding good in an otherwise bad situation. He had a large family and many friends. He enjoyed spending time with people. John also enjoyed being outdoors, camping, fishing, and just seeing the country. He was a bright eyed good looking kid with a world ahead of him. John enjoyed life, and had many hopes and dreams for the future.

On August 23, 1979, in the early hours of the morning, John Dorcheus lay dead on the floor of his home. At age twenty his life taken from him by a bullet in the right side of his head. John's love for his family and friends, his dreams of someday having a family of his own, his laughs and his cries, good times and bad gone -in the time it takes to fire a shot.

For the past six years I have watched my Mother deal with the loss of her son, as I have dealt with the loss of a brother. I have seen my family go through changes no family should go through. Gentle warm hearted people growing bitter and cold. Brothers growing more and more distant as a result of a fear I can't even explain. I see all these things and it is hard to understand that one man's vendictive attitude could cause so much pain for so many others. Can it be that one man's pride is worth another man's life?

Yes, this is a matter of pride and a revenge seeking man. Michael Kaiser was assaulted that night by several people, but John was not one of these people. In fact, I was not even a witness to this act. This is because at that time John was unconscious as a result of an unwarrented attack by Michael Kaiser. Kaiser was arrested as a result of the incident and that made him mad. He went to my brothers home and shot him four times. I remember the trial and Kaiser's testimony when he told the Judge he had taken his pistol for protection. I also, remember thinking to myself, protection from what? Protection from a man who lodged no attack against Kaiser, a man who simply asked him to leave the bar, and a man who kept no weapons in his home.

Michael Kaiser entered John's home that night with a loaded gun and a hot temper. He was mad and he got even.

Because of this fact I feel there is more to be considered in this case than just the crime itself. I wonder if six years in the State prison corrects this serious attitude problem, or if it serves only to escalate it. Consider the safety of the many people directly involved in the trial and conviction of this man. The many of John's friends who became witnesses and testified against Kaiser. The Judge and jury that convicted and sentenced him. Consider the people that are now working to keep him in prison. Consider the next person that makes him mad and hurts his pride.

(page 2)

In conclusion to this letter, I can only ask that you remember all these things, and that you keep in mind the nature of this crime and its far reaching effects. My questions are simple-Can justice be served to the victim?--to the public?--or to the many people involved by granting at this time the parole Michael Kaiser so desperatly seeks. I understand that Kaiser is currently being forced to live his life in a place no one wants to be, and that he will of course, try everything in his power to change that situation.

I also, understand however, the cold reality of all this is that my brother is dead and no matter what anyone does we can not change that.

Greg Darkens
Shane Darkens
Todd Darkens
Richard D. Darkens
Mark G Darkens

EXHIBIT H

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session - 1986

IN THE _____

_____ BILL NO._____

BY_____

AN ACT
(TITLE TO BE WRITTEN)

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

SECTION 1. That Section 20-201, Idaho Code, be, and the same is hereby amended to read as follows:

20-201. BOARD CREATED -- APPOINTMENT -- NONPARTISAN -- TERMS -- VACANCIES -- DELEGATION OF AUTHORITY. (1) There is hereby created a nonpartisan board of three (3) members to be known as the state board of correction, referred to in this chapter as the board, appointed by the governor to exercise the duties imposed by law. Not more than two (2) members shall belong to the same political party. The terms of the first members shall expire as follows: one (1) member on January 1, 1971; one (1) member on January 1, 1973; one (1) member on January 1, 1975. Thereafter any person appointed a member of the board shall hold office for six (6) years. Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made.

(2) The board shall be the constitutional board of correction prescribed by section 5, article X, of the constitution of the state of Idaho.

(3) The board shall exercise its constitutional and statutory authority and functions through the instrumentality of a department of correction, which is hereby created, and which shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of the state government.

(4) The board may delegate to ~~the commission and~~ the director any and all authority and power as it deems necessary to fulfill the duties, responsibilities and intent of this chapter and the other duties imposed upon it by law.

SECTION 2. That Sections 20-210, 20-213, 20-216, 20-223, 20-227, 20-228, 20-229, 20-230, 20-231, 20-232, 20-233, 20-234 and 20-240, Idaho Code, be, and the same are hereby repealed.

SECTION 3. That Title 20, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 8, Title 20, Idaho Code, and to read as follows:

CHAPTER 8
COMMISSION OF PARDONS AND PAROLE

20-801. COMMISSION OF PARDONS AND PAROLE -- APPOINTMENT -- TERMS -- SALARY -- STAFF. The governor shall appoint a state commission of pardons and parole, each member of which shall be subject to the advice and consent of the senate, in this chapter referred to as the commission, which shall succeed to and have all rights, powers and authority of said board of pardons as are

granted and provided by the provisions of the constitution of the state of Idaho.

The commission shall be composed of five (5) members. The members shall serve at the pleasure of the governor and not more than three (3) members shall be from any one (1) political party. In carrying out their duties, the members shall be cognizant that the four (4) objectives of criminal sentencing are as follows:

(1) Protection of society;

(2) Deterrence of the individual and the public generally;

(3) Punishment or retribution for wrongdoing;

(4) Rehabilitation.

The members of the commission, each year, shall select a chairman and vice-chairman.

The members of the commission shall be appointed for the purposes of organization as follows: One (1) member is to be appointed for one (1) year, one (1) for two (2) years, one (1) for three (3) years, one (1) for four (4) years and one (1) for five (5) years, with each succeeding vacancy to be filled by the board for terms of five (5) years; vacancies in the commission for unexpired terms shall be by appointment by the board for the remainder of the term and all appointees may be reappointed.

The commission and the board shall meet as necessary to exchange such information to enable each to effectively carry out their respective duties.

The commission shall meet at such times and places as a majority of the members request, or at the call of the chairman and in any event no less than quarterly.

The members shall be compensated as provided by section 59-509(h), Idaho Code.

They may hire such staff and employees as are approved by the governor and in addition the governor shall allow the reasonable payment for services of such technical and professional advice and consultation as the commission may require.

20-802. MEETINGS AS STATE COMMISSION OF PARDONS AND PAROLES -- NOTICE, PUBLICATION, CONTENTS. The commission shall meet at such times and places as it may prescribe, but not less than quarterly. If applications for pardon or commutation are scheduled to be considered at such meeting, notice shall be published in some newspaper of general circulation at Boise, Idaho, at least once a week for four (4) consecutive weeks, immediately prior thereto. Such notices shall list the names of all persons making application for pardon or commutation and a copy of such notice shall immediately, upon the first publication thereof, be mailed to each prosecuting attorney of any county from which any such person was committed to the penitentiary, and provided further that the commission may in its discretion consider but one (1) application for pardon or commutation from any one (1) person in any twelve (12) month period.

20-803. BOARD -- POWERS AND DUTIES -- RECORDS, REPORTS AND STATISTICS. The board shall keep a record of and require reports from all persons on parole or probation and enforce observance of rules and regulations for parole or probation established by the commission or the courts. It shall prepare and publish reports and statistics relating to probation and parole and it shall submit to the governor, at such times as the governor may direct, but at least annually, a full and complete report of the board and its agents, showing the

disposition of all cases coming before the board or the commission and such additional information relating thereto as the governor may request.

20-804. PAROLE, RULES AND REGULATIONS GOVERNING -- RESTRICTIONS -- PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION. (1) The commission shall have the power to establish rules, regulations, policies or procedures in compliance with chapter 52, title 67, Idaho Code, under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the commission; provided, however, that no person serving a life sentence or serving a term of thirty (30) or more years shall be eligible for release on parole until he has served at least ten (10) years and no person serving a lesser sentence for any of the following crimes; homicide in any degree, treason, rape by force or threat of bodily harm, incest, crime against nature, committing a lewd act upon a child, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, or with an attempt or assault with intent to commit any of said crimes, or as an habitual offender, shall be eligible for release on parole until said person has served a period of five (5) years or one-third (1/3) of the sentence, whichever is the least. The provisions of this section shall affect only those persons who are sentenced on or after the first day of July, 1980, and are not intended to repeal or amend sections 19-2513A, 19-2520 or 19-2520A, Idaho Code.

(2) No person serving a sentence for rape, incest, committing a lewd act upon a child, crime against nature, or with an intent or an assault with intent to commit any of the said crimes or whose history and conduct indicate to the commission that he is a sexually dangerous person, shall be released on parole except upon the examination and evaluation of one or more psychiatrists or psychologists to be selected by the commission and such evaluation shall be duly considered by the commission in making its parole determination. The commission may, in its discretion, likewise require a similar examination and evaluation for persons serving sentences for crimes other than those above enumerated. No psychiatrist or psychologist making such evaluation shall be held financially responsible to any person for denial of parole by the commission or for the results of the future acts of such person if he be granted parole.

(3) Before considering the parole of any prisoner, the commission shall afford the prisoner the opportunity to be interviewed. A parole shall be ordered only for the best interests of society, not as a reward of clemency and it shall not be considered to be a reduction of sentence or a pardon. A prisoner shall be placed on parole only when arrangements have been made for his employment or maintenance and care, and when the commission believes the prisoner is able and willing to fulfill the obligations of a law-abiding citizen. The commission may also by its rules, regulations, policies or procedures fix the times and conditions under which any application denied may be reconsidered.

(4) In making any parole or commutation decision with respect to a prisoner, the commission shall consider the compliance of the prisoner with any order of restitution which may have been entered according to section 19-5304, Idaho Code. The commission may make compliance with such an order of restitution a condition of parole.

20-805. CONDITIONS OF PAROLE TO BE SPECIFIED IN WRITING -- WARRANT FOR ARREST OF SUSPECTED VIOLATORS -- EFFECT OF SUSPENSION AND ARREST. The commission for pardons and parole, in releasing a person on parole, shall specify in writing the conditions of his parole, and a copy of such conditions shall be given to the person paroled. Whenever the commission finds that a prisoner may have violated the conditions of his parole, the written order of the commission, signed by a member or members of the commission, shall be sufficient warrant for any law enforcement officer to take into custody such person, and it is hereby made the duty of all sheriffs, police, constables, parole and probation officers, prison officials and other peace officers, to execute such order. Such warrant shall serve to suspend the person's parole until a determination on the merits of the allegations of the violation has been made after hearing. From and after the issuance of the warrant and suspension of the parole of any convicted person and until his arrest, he shall be considered a fugitive from justice. Such person so recommitted must serve out his sentence, and the time during which such prisoner was out on parole shall not be deemed a part thereof, but nothing herein contained shall prevent the commission from again paroling such prisoners at its discretion.

20-806. PAROLE REVOCATION HEARING. Whenever a paroled prisoner is accused of a violation of his parole, other than by absconding supervision or the commission of, and conviction for, a felony or misdemeanor under the laws of this state, or any other state, or any federal laws, he shall be entitled to a fair and impartial hearing of such charges within thirty (30) days from the time that he is served with charges of the violation of conditions of his parole after his arrest and detention. The hearing shall be held before one or more members of the commission for pardons and parole, or before an impartial hearings officer selected by a majority of the commission, at a place or places, within this state, reasonably near the site of the alleged violation or violations of parole.

20-806A. NOTICE -- SERVICE -- WAIVER. Within fifteen (15) calendar days following arrest and detention on a warrant issued by the Idaho commission for pardons and parole, the alleged parole violator shall be personally served with a copy of the factual allegations of the violation of the conditions of parole by a state probation and parole officer or a law enforcement official, and, at the same time shall be advised of his right to an on-site parole revocation hearing and of his rights and privileges as provided by this act. The alleged parole violator, after service of the allegation of violations of the conditions of parole and the advice of rights may waive the on-site parole revocation hearing as provided by section 20-806, Idaho Code. If the alleged parole violator shall waive his right to an on-site hearing, he shall, in the alternative, be given the right to have such hearing held at a penitentiary facility. The alleged parole violator may waive the right to any hearing, and at that time may admit one or more of the alleged violations of the conditions of parole. If the commission for pardons and parole accepts the waiver it shall, (1) reinstate the parolee under the same or modified conditions, or (2) revoke the parole of the parolee and enter an order of parole revocation and return to state custody.

If all waivers made by the parolee are rejected by the commission, it shall hold a parole revocation hearing either on-site or at a penitentiary facility.

20-806B. COMMISSION RULINGS. After a parole revocation hearing has been concluded, the member or members of the commission for pardons and parole having heard the matter shall enter their decision within twenty (20) days. If the member or members, having heard the matter, should conclude that the allegations of violation of the conditions of parole have not been proven by a preponderance of the evidence, or those which have been proven by a preponderance of the evidence are not sufficient cause for the revocation of parole, then the parolee shall be reinstated on parole on the same or modified conditions of parole. If the member or members having heard the matter should conclude that the allegations of violation of the conditions of parole have been proven by a preponderance of the evidence and constitute sufficient cause for the revocation of parole, then such member or members shall enter an order of parole revocation and return the parole violator to state custody.

20-807. APPLICATION TO CONVICTIONS PRIOR TO ACT. Provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the state penitentiary to the end that at all times the same provisions relating to sentences, imprisonment, and paroles of prisoners shall apply to the inmate thereof.

20-808. IMMUNITY FROM PAROLE OR RELEASE OF A PRISONER. Neither a public entity nor a public employee or servant shall be financially responsible or liable for any injury resulting from determining whether to parole or release a prisoner or from determining the terms or conditions of his parole or release or from determining whether to revoke his parole or release.

20-809. REMISSION OF FINE OR PENALTY CERTIFIED TO COURT. Upon the remission of a fine or penalty by the commission, it shall be the duty of the commission forthwith to certify the same to the clerk of the court, where said fine or forfeiture was adjudged, who shall file the same in his office, and said proceedings shall constitute a satisfaction of the judgment.

20-810. FINAL DISCHARGE OF PAROLEE -- MINIMUM TERM. When any paroled prisoner has performed the obligations of his parole for such time as shall satisfy the commission that his final release is not incompatible with his welfare and that of society, the commission may make the final order of discharge and issue to the paroled prisoner a certificate of discharge; but no such order of discharge shall be made in any case within a period of less than one (1) year after the date of release on parole, except that when the period of the maximum sentence provided by law shall expire at an earlier date, then a final order of discharge must be made and a certificate of discharge issued to the paroled prisoner not later than the date of expiration of said maximum sentence.

20-811. PAROLE INFORMATION TO BE TRANSMITTED TO THE SHERIFF AND COUNTY PROSECUTOR. Whenever any person committed to the custody of the state board of correction shall have been granted a parole by the commission, it shall be the duty of the commission to transmit to the sheriff and the prosecuting attorney of the county within which said prisoner shall be paroled, a copy of the parole agreement, and information as to the place of residence of said prisoner within said county and the sheriff shall notify local law enforcement and

other pertinent agencies.

20-812. RESPITES, REPRIEVES AND PARDONS -- TREASON OR IMPEACHMENT. The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or imprisonment on impeachment, but such respites or reprieves shall not extend beyond the next session of the commission; and such commission shall at such session continue or determine such respite or reprieve, or may commute or pardon the offense as herein provided. In cases of conviction of treason, the governor shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature at its next regular session, when the legislature shall either pardon or commute the sentence, direct its execution or grant a further reprieve.

SECTION 4. That Section 59-904, Idaho Code, be, and the same is hereby amended to read as follows:

59-904. STATE OFFICES -- VACANCIES, HOW FILLED AND CONFIRMED. (a) All vacancies in any state office, and in the supreme and district courts, unless otherwise provided for by law, shall be filled by appointment by the governor. Appointments to fill vacancies pursuant to this section shall be made as provided in subsections (b), (c), (d), (e), and (f) of this section, subject to the limitations prescribed in those subsections.

(b) Nominations and appointments to fill vacancies occurring in the office of lieutenant governor, state auditor, state treasurer, superintendent of public instruction, attorney general and secretary of state shall be made by the governor, subject to the advice and consent of the senate, for the balance of the term of office to which the predecessor of the person appointed was elected.

(c) Nominations and appointments to and vacancies in the following listed offices shall be made or filled by the governor subject to the advice and consent of the senate for the terms prescribed by law, or in case such terms are not prescribed by law, then to serve at the pleasure of the governor:

Director of the department of administration,
Director of the department of finance,
Director of the department of insurance,
Director, department of agriculture,
Director of the department of employment,
Director of the department of water resources,
Director of the department of law enforcement,
Director, department of labor and industrial services,
Director of the department of commerce,
Manager of the state insurance fund,
Member of the state tax commission,
Members of the board of regents of the university of Idaho and the state board of education,
Members of the Idaho water resources board,
Members of the state fish and game commission,
Members of the Idaho transportation board,
Members of the state board of health and welfare,
Members of the board of directors of state parks and recreation,
Members of the board of correction,

Members of the industrial commission,
Members of the Idaho public utilities commission,
Members of the Idaho personnel commission,
Members of the board of directors of the Idaho state retirement system.
Members of the state commission of pardons and parole.

(d) Appointments made by the state board of land commissioners to the office of director, department of lands, and appointments to fill vacancies occurring in those offices shall be submitted by the president of the state board of land commissioners to the senate for the advice and consent of the senate in accordance with the procedure prescribed in this section.

(e) Appointments made pursuant to this section while the senate is in session shall be submitted to the senate forthwith for the advice and consent of that body. The appointment so made and submitted shall not be effective until the approval of the senate has been recorded in the journal of the senate. Appointments made pursuant to this section while the senate is not in session shall be effective until the appointment has been submitted to the senate for the advice and consent of the senate. Should the senate adjourn without granting its consent to such an interim appointment the appointment shall thereupon become void and a vacancy in the office to which the appointment was made shall exist.

All appointments made pursuant to subsection (c) of this section, except those appointments for which a term of office is fixed by law, shall terminate at the expiration of any gubernatorial term. Appointments to fill the vacancies thus created by the expiration of the term of office of the governor shall be forthwith submitted to the senate for the advice and consent of that body, and when so submitted shall be as expeditiously considered as possible.

Upon receipt of an appointment in the senate for the purpose of securing the advice and consent of the senate, the appointment shall be referred by the presiding officer to the appropriate committee of the senate for consideration and report prior to action thereon by the full senate.

(f) It is the intent of the legislature that the provisions of this section as amended by this act shall not apply to appointments which have been made prior to the effective date of this act. It is the further intent of the legislature that the provisions of this section shall apply to the offices listed in this section and to any office created by law or executive order which succeeds to the powers, duties, responsibilities and authorities of any of the offices listed in subsections (c) and (d) of this section.

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