



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

March 23, 1989

Lon F. Davis, Esq.
Staff Attorney
Administrative Office of the Courts
Supreme Court Building
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Death Penalty

Dear Lon:

This is in response to your memorandum of March 17, 1989, addressed to members of the Appellate Rules Advisory Committee.

Your comment relating to death penalty cases that "the Supreme Court [of Idaho] has recently ruled a number of times that the rules regarding stays control over the statute" which limits such stays is a matter of considerable concern to this office.

Notwithstanding the provision of Idaho Code § 19-2715 that once the state appellate process has been completed "no further stays of execution shall be granted to persons sentenced to death," the advisory committee now proposes to recommend to the court, over my objection, an amendment to Rule 13(q) which provides that the supreme court may grant a stay to "any party who has failed to get one from the district court." Although you state that I have not pointed out "exactly" why I believe that there is a conflict, I think it is entirely clear without elaboration that a rule allowing "any party" to obtain a stay

Lon F. Davis
March 23, 1989
Page 2

contradicts a statute (§ 19-2715) which absolutely forbids stays after final decision in death penalty cases.

Permit me to remind you of this historical fact: After I argued in the Creech case that the court should adopt a procedural rule along the lines later embodied in Idaho Code § 19-2715, the court, through you, requested that this office draft and propose legislation designed to prevent stalling in capital cases. The result was Idaho Code § 19-2715. I recognize that the process defined in Idaho Code § 19-2715 is a matter of procedure and is therefore within the scope of the court's rule-making authority (with the exception of matters relating to stays, which are in the nature of remedies rather than modes of procedure). Nonetheless, it was the court that arranged to have this legislation initiated by this office. Why were we asked to sponsor expediting legislation if the court had no intention of following it? If the premise of this question gives you any doubt, the sorry record of compliance with Idaho Code § 19-2715 and related provisions of the act appearing under other section headings speaks for itself. In the five years since this expediting act became law, not one single case has been completed within the time limits specified.

The court's whimsical attitude toward the death penalty statutes and its own rules has become so serious a problem that we need to see attention directed toward solving it rather than exacerbating the difficulty. In State v. Thompson (the pen register case), the court decided the controversy in a manner conflicting with a substantive statute and without any discussion of the statute. In State v. Currington, the court overruled what we believe to be a substantive statute denying bail on appeal to violent criminals because the court had published a rule permitting a court to use its discretion to grant bail pending appeal to any prisoner. In State v. Elisondo, the court decided the case in conflict with one of its own rules, making no mention of the rule. In Holland v. Woodland, the court has used a rule of doubtful validity to interfere with enforcement of the state's death penalty law. The court made no effort whatever to justify its decision by reference to principles of law. Twice, in State v. Fetterly and State v. Beam, the court has granted stays of execution prohibited by Idaho Code § 19-2715, although, now that you have told us, we realize that this was because "the Supreme Court has . . . ruled . . . that the rules regarding stays control over the statute."

Your memorandum seems to imply that all of this is perfectly acceptable. It does not appear so to me. These actions of the court are of no small consequence. A state's systematic refusal to follow its own law has due process implications under the federal Constitution. Rules purporting to authorize the court to cancel statutory procedures which were designed to expedite

Lon F. Davis
March 23, 1989
Page 3

capital cases (which former Justice Powell suggested might be constitutionally necessary) create a considerable risk that our sentencing system may become too arbitrary to pass constitutional scrutiny in the federal courts. If this happens, it will not be the fault of the federal courts.

Because we view the present rule-making and rule-enforcement process as too arbitrary, we believe that the court should no longer be the sole arbiter of which rules and statutes will be enforced and which will not. We are inclined to favor a system like that employed in the United States Supreme Court, whose rule-making is subject to the approval of Congress. It is certain that some reform is needed in this area. We would like to hear your views on this point.

In the meantime, I adhere to my opposition to the proposed amendment to Rule 13(q) and emphasize again that the court's inconsistent application (or disregard of) statutes and rules threatens our position in federal courts.

Very truly yours,

LYNN E. THOMAS
Solicitor General