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July 15, 1991

Mr. Hank Boomer
Prosecuting Attorney
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Voter qualifications, Rockland School District Bond Election (withheld judgments)

Dear Hank:

You have requested a legal opinion from the Attorney General's Office concerning the qualifications of Mr. J. Smith to vote in the Rockland School District bond election on July 17, 1991. Based upon the information supplied by your letter, it is our understanding that Mr. Smith pled guilty to the felony crime of burglary. Mr. Smith was granted a withheld judgment by the district court and is currently on probation for that particular crime. It is our understanding that Mr. Smith intends to vote in the upcoming Rockland School District bond election. Furthermore, prior to July 17, 1991, you do not anticipate Mr. Smith will be either discharged from his probation nor will his criminal case be dismissed.

The question you have presented is whether a person having pled guilty to a felony crime and thereafter granted a withheld judgment is considered "convicted of a felony" under the provisions of art. 6, § 3, of the Idaho Constitution and therefore prohibited from voting.

CONCLUSION

It is our opinion that a person that has been found guilty of a felony or has pled guilty to a felony, and had that plea accepted by the court, is considered to be "convicted of a felony" under art. 6, § 3, of the Idaho Constitution. The language "convicted of a felony" under art. 6, § 3, includes a person granted a withheld judgment, unless and until his or her civil rights have been restored.

ANALYSIS

In 1986 the Attorney General's Office issued a formal opinion related to the question you have presented. Attorney General Opinion No. 86-16. The question presented in the 1986 opinion was slightly different, *i.e.*, whether a person granted a withheld judgment and placed on probation was a convicted felon under the Federal Gun Control Act of 1968. The 1986 Opinion analyzed the issue of whether a person is a "convicted" felon under Idaho law during the period of probation pursuant to a withheld judgment. The conclusion of the opinion was that once a person pleads guilty or is found guilty of a felony, that individual is a "de facto felon" and therefore a convicted felon under Idaho law, unless and until the case is dismissed by the court following the successful completion of probation.

The legal analysis in the 1986 Opinion is directly related to the question you have raised whether a person granted a withheld judgment and placed on probation is a convicted felon for the purpose of art. 6, § 3, of the Idaho Constitution. The current language of art. 6, § 3, states:

§ 3. Disqualification of certain persons. — No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, or who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.

For your information and review, I am attaching a copy of Attorney General Opinion 86-16. I will not reanalyze all of the cases and statutes set forth in that opinion.

The leading Idaho appellate case discussed in Attorney General Opinion 86-16 was *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978). It contains the most detailed discussion of this issue by an Idaho appellate court. I was not able to locate any later Idaho appellate decisions that overturned or substantially modified the *Wagenius* holding, which stated that "a conviction occurs when a verdict or plea of guilty is accepted by the court." *Id.* at 278. The *Wagenius* holding that a verdict or plea of guilty is a de facto conviction, even in the context of a withheld judgment, had been previously expressed by Judge Blaine Anderson in *United States v. Locke*, 49 F.Supp. 600 (D.C. Idaho 1976). Once again, my research could not locate any later federal court decision that overturned or substantially modified Judge Anderson's ruling on this particular issue.

The only Idaho appellate decision to significantly revisit *Wagenius* was *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (App. 1986). In *Brandt* the prosecutor charged the defendant as a persistent violator under Idaho Code § 19-2514. Idaho Code § 19-2514 applies to "any person *convicted* for the third time of the commission of a felony, . . ." (Emphasis added.) At the time of trial as a persistent violator, the defendant had not been sentenced and no judgment had been entered on the three prior felony "convictions," so the issue facing the court was whether the defendant, by his plea of guilty to the three prior felony offenses, had at least two prior felony convictions under Idaho's persistent violator statute. The Court of

Appeals, by unanimous opinion, cited *Wagenius* with approval and specifically held that a felony conviction under the Idaho persistent violator statute "arises upon a determination of guilt, whether it be by a defendant's own admission or as a result of a jury verdict." *Id.* at 345. Therefore, the only Idaho appellate case to substantially discuss the *Wagenius* "de facto conviction" holding since the issuance of Attorney General Opinion 86-16 supports the legal conclusion that a "de facto conviction" exists based upon a verdict of guilty or plea of guilty accepted by the court to a felony crime, including a defendant granted a withheld judgment and placed on probation for a felony crime.

Although, the Ninth Circuit in *United States v. Gomez*, 911 F.2d 219 (9th Cir. 1990), did limit the continued effectiveness of Attorney General Opinion 86-16 concerning restoration of the civil right of a felon to carry a firearm pursuant to Idaho Code § 18-310 (Imprisonment-Effect on Civil Rights and Offices), it is important to note that it did not address the previous holdings of *Locke*, *Wagenius* or *Brandt* that a plea of guilty or a verdict of guilty is equivalent to a "de facto" felony conviction.

Two further legal arguments support the "de facto conviction" conclusion of Attorney General Opinion 86-16. First, Idaho Code § 19-2604 addresses the issue of the discharge of the defendant by the court. The language of subsection one clearly applies to a recipient of a withheld judgment. Idaho Code § 19-2604(1). The defendant must make application to the court and provide a satisfactory showing that he or she has complied with the terms and conditions of probation. If the court is so convinced and believes discharge of the defendant and/or dismissal of the case is compatible with the public interest, the court may terminate the sentence or set aside the guilty plea or the conviction of the defendant and finally dismiss the case and discharge the defendant. The final sentence of subsection one states: "The final dismissal of the case as herein provided shall have the effect of restoring the defendant to his civil rights." Idaho Code § 19-2604(1)(emphasis added). Where a statute is plain, clear and unambiguous, it speaks for itself and must be given the interpretation the language clearly implies. *Moon v. Investment Board*, 97 Idaho 595, 548 P.2d 861 (1976). *State v. Jonasson*, 78 Idaho 205, 299 P.2d 755 (1956). The plain meaning of the last sentence of subsection one of Idaho Code § 19-2604 is the defendant's civil rights are not to be restored until application by the defendant, court review of the defendant's performance on probation and consideration of the public's interest affected by the dismissal of the case. The language of subsection one of Idaho Code § 19-2604 does authorize the court to either terminate the sentence, set aside the guilty plea or the conviction, however, the final sentence is specific and mandatory that it is the "final dismissal" of the case that restores the civil rights of the defendant. This interpretation of Idaho Code 19-2604(1) is consistent with the *Locke*, *Wagenius* and *Brandt* decisions which recognize the existence of the defendant's "de facto conviction" upon a finding of guilt or plea of guilty accepted by the court. The effect of the *Wagenius* "de facto conviction" to deprive the defendant of his civil rights is not removed until the court is satisfied that the defendant has complied with his or her probation and the court is satisfied that the discharge of the defendant and dismissal of the case is compatible with the public's interest.

The second argument supporting the "de facto conviction" conclusion of *Locke, Wagenius, Brandt* and Attorney General Opinion 86-16, is the historical record surrounding the adoption of art. 6, § 3, of the Idaho Constitution.

The language specifically relevant to your inquiry ("convicted of a felony") remains substantially unchanged from the time of its adoption by the framers of the Idaho Constitution (the word "treason" and a comma were deleted after the word "of" and the letter "a" was inserted after the word "of" and before the word "felony"). Vol. 2, Idaho Constitutional Convention Proceedings and Debate at 1028, 1150. The present concept of the withheld judgment was not adopted by the legislature until 1915. The 1915 statute limited withheld judgments by age (under 25 years of age) and by crime (not available for treason, murder, robbery, incest, bigamy, abortion, arson, perjury, embezzlement of public funds and rape, except statutory rape). The 1915 version authorized the court to discharge the defendant but did not specifically authorize dismissal of the case. The 1915 version of withheld judgments was amended and modified numerous times and the present language authorizing withheld judgments is found at Idaho Code § 19-2601.

Therefore, it is clear that the sentencing option of a withheld judgment did not exist until years after the Idaho Constitutional Convention had settled on the language to prohibit a convicted felon from voting, serving as a juror or holding any civil office *unless* that person had been restored to the rights of citizenship. It is also worth noting that there was substantial debate recorded in the Idaho Constitutional Convention proceedings concerning the right to suffrage by convicted felons. *Id.* at 918-38. A major focus during the debate over the right to suffrage by convicted felons was whether to include the language "and who has not been restored to the rights of citizenship, . . ." Idaho Const, art. 6, sec. 3. One view espoused was that convicted felons should never be restored to the right to vote. The contrary, and ultimately the prevailing position, was that if a felon had completed his sentence or was improperly convicted (not guilty), he or she ought to be able to vote if the Board of Pardons had either granted the felon a full pardon or by other action restored the felon's rights of citizenship.

The essence of the argument for restoration of the right to vote was either to protect those not guilty but actually convicted or to forgive those who were guilty but had paid their debt to society. From the records of the proceedings and the debates of the delegates to the Idaho Constitutional Convention, it would appear that the members at the convention shared the view later expressed in the *Brandt* decision that a felony conviction "arises upon a determination of guilt, whether it be by a defendant's own admission or as a result of a jury verdict." *Brandt* at 345. The belief of the members voting to adopt art. 6, § 3, -- namely, that the restoration of the right to vote, to serve on a jury, or to hold public office should occur, if at all, after the individual had paid his or her debt to society -- is consistent with the language previously discussed in Idaho Code § 19-2604(1) stating that the *final dismissal* of the case has the effect of restoring the defendant's civil rights.

Therefore, based upon Attorney General Opinion 86-16 and the further legal analysis provided herein, it remains the position of the Attorney General's Office that an individual having been found guilty or having pled guilty to a felony and receiving a withheld judgment

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and serving a probationary term, is considered under Idaho law to have a "de facto conviction." Therefore, such a person has not been restored to the rights of citizenship and does not enjoy his or her civil right to vote, serve as a juror or hold civil office, unless and until the defendant is restored to his or her civil rights pursuant to Idaho Code § 19-2604 or other applicable statute.

If we can be of further assistance in the matter, please contact our office.

Very truly yours,


Steve Tobiason
Deputy Attorney General
Chief, Legislative and
Public Affairs Division