

August 17, 1993

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

Dear Hank:

By letter dated June 14, 1993, you requested an opinion of the Office of the Attorney General regarding bond settings during stays of execution of sentence in misdemeanor cases pending appeal, and whether they are controlled by the provisions of Idaho Code § 19-3941. This question is answered by Idaho Criminal Rule 54.5, which states that a stay of execution shall occur upon a defendant's compliance with Idaho Code § 19-3941.

**DISCUSSION**

In 1941, the legislature recognized the rule-making power of the Supreme Court of Idaho by enacting Idaho Code § 1-212. This statute reads: "The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed." The Supreme Court of Idaho, in Sherwood and Roberts v. Riplinger, stated that "the courts have inherent power to establish reasonable rules to manage their own affairs and achieve the orderly and expeditious disposition of cases." 103 Idaho 535, 540, 650 P.2d 677, 682 (1982).

At first blush it would seem that this matter would be governed by the Misdemeanor Criminal Rules since driving without privileges is a misdemeanor. However, M.C.R. 17 states that "an appeal to the district court from a judgment of conviction . . . for a criminal offense may be taken within the time and processed in the manner prescribed for appeal from the magistrate division to the District Court by the Idaho Criminal Rules." This matter is, therefore, controlled by the Idaho Criminal Rules.

Idaho Criminal Rule 54.5 establishes the powers of magistrates to stay execution of the sentence pending appeal. It reads in part:

- (a) Stay in Criminal Appeal. Execution of the sentence, if any, imposed by the trial court, shall be stayed upon compliance with the

provisions of section 19-3941, Idaho Code, or when ordered by the magistrate or by the district as provided in Rule 46 and this rule.

(Emphasis added.)

The Idaho Supreme Court applied the rules of statutory construction to the Idaho Rules of Civil Procedure in Davison's Air Service v. Montierth, 119 Idaho 991, 812 P.2d 298 (1991). There are also numerous cases in other jurisdictions which expressly hold that the rules of statutory construction apply to rules of procedure promulgated by the courts.<sup>1</sup>

A fundamental rule of construction is that a statute or rule will be given its plain and ordinary meaning unless it is ambiguous. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). The plain meaning of the language of I.C.R. 54.5 states that a stay of execution of sentence "shall" occur on the happening of either of two events: the defendant's compliance with Idaho Code § 19-3941 or by court order pursuant to I.C.R. 46. Idaho Code § 19-3941 reads in pertinent part:

The party appealing may, at any time thereafter, if he desires to be released from custody during the pendency of the appeal, or desires a stay of proceedings under the judgment until the appeal be disposed of, enter into a recognizance, with two (2) sufficient sureties to be approved by the judge or justice, in an amount to be fixed by the judge or justice, but not exceeding one thousand dollars (\$1,000) in any case, for the payment of any judgment, fine and costs that may be awarded against him on the appeal . . . .

The statute limits the magistrate's discretion to set bail not to exceed \$1,000 even if the judge has reason to believe that this amount will not be adequate to secure the defendant's appearance. While the Idaho Supreme Court has held that it controls court procedures, in I.C.R. 54.5 it has, nonetheless, incorporated by reference the more inhibiting legislative standards imposed by Idaho Code § 19-3941.

I.C.R. 54.5 also allows a stay of sentence in a criminal appeal when ordered by the judge pursuant to I.C.R. 46. Subsection (b) of I.C.R. 46 reads in part: "A defendant may be admitted to bail or released on his own recognizance by the court in which he was convicted pending an appeal upon consideration of factors set forth in subsection (a) of this rule . . . ." Subsection (a) of I.C.R. 46 reads in pertinent part:

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<sup>1</sup> Barassi v. Matison, 636 P.2d 1200 (Ariz. 1981); International Satellite Communications v. Kelley Services, 749 P.2d 488 (Colo. App. 1987); Morgan v. State, 675 P.2d 473 (Okla. 1984); State of Washington v. McIntyre, 600 P.2d 1009 (Wash. 1979).

(a) The determination of whether a person should be released upon his own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, can be made after considering any of the following factors:

- (1) His employment status and history and his financial condition;
- (2) The nature and extent of his family relationships.
- (3) His past and present residences;
- (4) His character and reputation;
- (5) The persons who agree to assist him in attending court at the proper time;
- (6) The nature of the current charge and any mitigating or aggravating factors that may bear on . . . possible penalty;
- (7) His prior criminal record, if any, and, if he had previously been released pending a trial or hearing, whether he appeared as required;
- (8) Any facts indicating the possibility of violation of law if he is released without restriction;
- (9) Any other facts tending to indicate that he has strong ties to the community and is not likely to flee the jurisdiction; and
- (10) What reasonable restrictions, conditions and prohibitions should be placed upon his activities, movements, associations and residences.

Consideration of the factors set forth in I.C.R. 46 would allow a judge to set a bond amount in excess of \$1,000. However, I.C.R. 54.5 first states that a stay shall occur upon compliance by the defendant with Idaho Code § 19-3941. This statute gives the party appealing the ability to effect a stay by posting a small bond with two sufficient sureties. It is, therefore, clear that if a defendant complies with the provisions of this statute, the judge must grant a stay of execution of sentence or release the defendant from custody pending appeal.

## CONCLUSION

Applying the plain meaning of I.C.R. 54.5 requires the magistrate or district judge to release the defendant from custody or stay the proceedings if the defendant complies with the provisions of Idaho Code § 19-3941.

If you have further questions on this, please call me.

Very truly yours,

STEVE TOBIASON  
Chief, Legislative &  
Public Affairs Division