STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 26, 2018

p. 1

The Honorable Mark Nye
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: SJR 104 – Our File No. 18-60646

Dear Senator Nye:

You requested that the Attorney General review SJR 104, the proposed amendment to art. I, sec. 6, of the Idaho Constitution. This letter will provide that review, focusing on a number of issues raised at the print hearing for SJR 104 before the Senate Judiciary and Rules Committee on February 9, 2018. Based on your discussion with Paul Panther earlier this week, I understand you have no objection to sharing this letter with members of the Senate State Affairs Committee, as SJR 104 has been referred to that committee. Accordingly, members of that committee may be provided a copy of this letter.

Throughout this letter, I will refer to the new process which SJR 104 would allow, that is, the detaining of certain defendants prior to trial without bail, as "preventive detention."

QUESTIONS PRESENTED

I. Does a criminal defendant have a right to bail under the United States Constitution?

II. Do the amendments proposed in SJR 104 violate the United States Constitution or deprive a defendant of his constitutional rights?

III. SJR 104 provides that the Legislature may determine what constitutes a "dangerous crime" for purposes of preventive detention. Would such legislation be proper? Would the legislature, rather than the Constitution or Courts, be determining what the Idaho Constitution means?

IV. If SJR 104 is adopted, what would happen if the Legislature did not define what a "dangerous crime" is for purposes of preventive detention?

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

V. If the preventive detention process set forth in SJR 104 is to be used under limited circumstances, what are those circumstances?

VI. What impact might an evidentiary hearing regarding preventive detention have at a later state on a criminal proceeding, in terms of testimony, witnesses and evidence presented?

BRIEF ANSWERS

I. No. A criminal defendant does not have a right to bail under the United States Constitution.

II. The amendments proposed in SJR 104 will not violate the United States Constitution or deprive a defendant of his constitutional rights if they are accompanied by appropriate procedural safeguards set forth in statute and court rule.

III. The legislature may, in keeping with the Idaho Constitution, define what constitutes a "dangerous crime" for purposes of preventive detention.

IV. If SJR 104's amendments are enacted, and the legislature did not define what constitutes a "dangerous crime," defendants would continue to have a right to bail in all but capital proceedings where the proof is evident or the presumption great, as currently set forth in art. I, sec. 6 of the Idaho Constitution.

V. Preventive detention would be used only where the defendant has committed a crime defined as a "dangerous crime" by the legislature. This category of crimes must be defined by the legislature, and may be as broad or narrow as the legislature determines. Further, it would apply only where a judge finds by clear and convincing evidence—the highest standard of proof other than the "beyond a reasonable doubt" standard for criminal trials—that no amount of bail nor any conditions of release, or combination thereof, will reasonably assure the safety of any person or the community or reasonably assure that the defendant will appear at trial.

VI. Preventive detention will likely not prove to be an undue burden to courts, defense counsel, prosecutors and law enforcement, if the process is used infrequently, as it should be, and if courts and legislature provide appropriate safeguards. The high standard of proof required to impose preventive detention should discourage its use where supporting evidence is less than clear and convincing. Additionally, prosecutors and defense counsel are already required to submit some of the same factors to the court by way of oral argument.

ANALYSIS

I. Does a criminal defendant have a right to bail under the United States Constitution?

No. As the United States Supreme Court has held, a criminal defendant does not have a right to bail under the United States Constitution. In Unites States v. Salerno, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the U.S. Supreme Court reviewed a challenge to the Bail Reform Act of 1984, in which Congress authorized pretrial detention without bail if, at an adversarial hearing, the government demonstrated by clear and convincing evidence that no release conditions would "reasonably assure…the safety of any other person and the community." United States v. Salerno, 107 S.Ct. 2095, 2097, 95 L.Ed.2d 697, 739 (1987), quoting 18 U.S.C. § 3142(e). The Court found that Congress intended the Act to be regulatory rather than penal, in nature, and thus denial of bail did not constitute pretrial punishment. Salerno, 107 S.Ct. at 2101, 95 L.Ed.2d at 747.

The Court also considered whether the Act was facially unconstitutional as violative of the Due Process Clause and/or the Eighth Amendment. Generally, the Court held that the Constitution's due process clause does not "categorically prohibit pretrial detention." Salerno, 107 S.Ct. at 2102, 95 L.Ed.2d at 748. First, as to substantive due process, the Court found that the Act was constitutional, as it did not improperly impose punishment, was related to the legitimate regulatory goal of protecting society, and carefully limited the circumstances under which pretrial detention would be permissible. *Id.*, 107 S.Ct. at 2101, 95 L.Ed.2d at 747. Turning to procedural due process, the Court focused on the government's compelling interest, the narrow situations to which the Act applied, and the safeguards afforded to a defendant. *Id.*, 107 S.Ct. at 2103, 95 L.Ed.2d at 750. Specifically, the Court noted with approval that the defendant would be afforded numerous procedural rights at a speedy detention hearing, to include the right to counsel, the right to testify, the right to present witnesses and proffer evidence, and the right to cross-examine the government's witnesses. *Id.*, 107 S.Ct. at 2097, 95 L.Ed.2d at 739. The trial court would also be required to provide written findings of fact and statements of reasons for pretrial detention, and the trial court's decision would be immediately reviewable.

Finally, the Court considered whether the Act violated the Eighth Amendment prohibition against "excessive bail." The Court held that the U.S. Constitution does not grant an absolute right to bail, but rather prevents the imposition of excessive bail in cases where bail appears appropriate. Salerno, 107 S.Ct. at 2105, 95 L.Ed.2d at 754. When considering whether bail is excessive, the Court notes the bail must be compared to the government's interest. The government's interest in protecting society is compelling, and can therefore outweigh an individual's liberty interest. *Id.*

The United States Constitution does not provide an absolute right to bail. Denial of bail on the grounds of protecting society has been upheld by the United States Supreme Court as constitutional and not violative of the Eighth Amendment or Due Process Clause. However, a defendant must be afforded a detention hearing, and this hearing must include the procedural safeguards detailed by the U.S. Supreme Court in Salerno. While SJR 104 does not provide these safeguards, neither does the Eighth Amendment. In the case of the latter, these safeguards are provided by statute.

Here, adoption of SJR's amendments would require provision of similar safeguards by statute or court rule.

II. Do the amendments in SJR 104 violate the United States Constitution or deprive a defendant of his or her constitutional rights?

No. As previously established in Salerno, the denial of bail to a defendant following a hearing, showing by clear and convincing evidence that no bail or conditions could reasonably protect the safety of any other person or the community, is permissible under both the Due Process Clause and the Eighth Amendment of the United States Constitution. The Idaho Constitution has similar constitutional provisions in art. I, sec. 6, and art. I, sec. 13. The federal and state constitutional provisions would likely be interpreted similarly, and the proposed amendments would not violate these provisions.

The proposed constitutional amendment is designed to clarify that the prohibition against "excessive bail" will include the circumstances in which "no bail" is reasonable, and therefore not "excessive." The amendment intends to provide this general clarification, and is not designed to discuss the specifics of necessary due process protections which can be provided by legislation and court rules. Likely among necessary steps following adoption of SJR 104 would be some amendment to the Idaho Bail Act, Idaho Code title 19, chapter 29, to provide for circumstances in which pretrial detention would be available, including the definition of dangerous crimes, and to provide for appeals. As will be discussed later, the Idaho legislature has authority to enact such legislation.

Also, some addition to or amendment of Idaho Court Rules would likely be necessary. This might include amendments or additions to the rules governing bail proceedings, including Idaho Court Rule 46. The Idaho Supreme Court has inherent authority to promulgate rules governing procedure of the lower courts of this state. Idaho Constitution, Art. V, Sec. 2; State v. Griffith, 97 Idaho 52, 58, 539 P.2d 604, 610 (1975). Additionally, the legislature has provided that the Supreme Court shall proscribe general rules of procedure for all courts in Idaho. Idaho Code § 1-213. Thus, the Supreme Court would have the authority to adopt rules governing preventive detention proceedings.

Whether the additional procedural safeguards furnished by court rules or legislation will be deemed constitutional will depend upon their content. The federal Bail Reform Act of 1984 that was subject to challenge in Salerno specifically defined the types of offenses eligible for pretrial detention, described the nature of the required hearing and the rights of the defendant at that hearing, and proscribed the time in which that hearing was to occur. Future legislation and court rules governing the preventive detention procedure should incorporate the procedural safeguards deemed necessary by the United States Supreme Court in Salerno. If these safeguards are incorporated, the preventive detention procedure should pass constitutional muster.

III. SJR 104 provides that the Legislature may determine what constitutes a "dangerous crime" for purposes of preventive detention. Would such legislation be proper? Would the legislature, rather than the Constitution or Courts, be determining what the Idaho Constitution means?

Such legislation would be proper and would not violate Idaho's constitutional separation of powers, or delegate to the legislature the power to interpret the Constitution. The Idaho legislature has plenary authority to legislate in all matters except those matters prohibited or limited by the Idaho Constitution. Flores v. State, 109 Idaho 182, 183, 706 P.2d 71, 72 (Ct. App. 1985). Thus, the Idaho legislature has absolute authority to legislate on any subject, unless prohibited by the State or Federal Constitution. *Id.*, citing Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778 (1975).

As otherwise stated,

> Unlike the federal constitution, the state constitution is a limitation, not a grant, of power. We look to the state constitution not to determine what the legislature may do, but to determine what it may not do. If an act of the legislature is not forbidden by the state or federal constitutions, it must be held valid. Eberle v. Neilson, 78 Idaho 572, 306 P.2d 1083 (1957); Idaho Telephone Company v. Baird, 91 Idaho 425, 423 P.2d 337 (1967).

Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2 542, 552 (1969). Therefore, the legislature can enact laws consistent with the amendments proposed in SJR 104.

Additionally, the Idaho Supreme Court has routinely held that there is a strong presumption in favor of the constitutionality of a statute, and a person challenging a statute's constitutionality must clearly show that act's invalidity. A court will uphold the enactment of the legislature unless it clearly violates the Constitution, and "every reasonable presumption must be indulged in favor of the constitutionality of the enactment." Flores v. State, 109 Idaho 182, 183, 706 P.2d 71, 72 (Ct. App. 1985), citing School Dist. #25 v. State Tax Comm'n, 101 Idaho 283, 612 P.2d 126 (1980).

Here, the proposed constitutional amendment would not only remove the prohibiting language, but provide an affirmative, explicit grant of authority to the legislature to enact legislation that further defines terms and provides guidelines for granting or denying bail. It is worth noting that the proposed language of the amendment actually goes farther than necessary, since the Salerno Court upheld the Bail Reform Act of 1984 under the much less explicit language of the Eighth Amendment to the United States Constitution. That language is identical to the second primary clause of art. I, sec. 6, of the Idaho Constitution. The proposed language will provide the

legislature with an affirmative grant of authority, and will certainly not prohibit legislation further defining situations in which bail may be denied.[1]

IV. If SJR 104 is adopted, what would happen if the Legislature did not define what a "dangerous crime" is for purposes of preventive detention?

The Legislature would be required to define "dangerous crime" for the enactment and application of this amendment. If the Legislature does not define "dangerous crime," then, this amendment cannot be applied to authorize preventative detention. The amendment provides that "a court may deny bail pending trial for a defendant charged with a dangerous crime as defined by the legislature." If the Legislature does not define "dangerous crime," then the defendant cannot be considered "charged with a dangerous crime" for purposes of a preventive detention hearing If a prosecutor or court attempted to hold a preventive detention hearing without the legislature having defined a "dangerous crime," any resulting order would be open to a challenge by the defense on grounds that it violated the defendant's right to bail under art. I, sec. 6.

V. If preventive detention is to be used under limited circumstances, what are those circumstances?

The proposed amendment specifies that preventive detention may be used only when the underlying criminal offense is a "dangerous crimes, as defined by the legislature." It would be up to the legislature to decide which crimes qualify as "dangerous crimes." In making that determination, the legislature has complete discretion, although it may wish to consider input from the courts, law enforcement, prosecutors, the criminal defense bar, victims' organizations and others. Additionally, the legislature is not bound to have any specified number of dangerous crimes. Over the course of time, it could add to or subtract from any list of dangerous crimes it might adopt, as it deems necessary.

Additionally, the proposed amendments would allow a court to impose preventive detention only where it finds, by "clear and convincing evidence," that there is no other means of reasonably protecting public safety or assuring the defendant's appearance. Clear and convincing evidence "is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain." Idaho Dept. of Health and Welfare v. Doe, 152 Idaho 263, 267, 270 P.3d 1048, 1052 (2012). This is a higher standard of proof than the "preponderance of evidence" standard applicable in civil trials, which requires only that the party bearing the burden of proof as to a particular thing must prove only that it is "more probable than not." It is, in fact, the same standard of proof applicable in parent rights termination proceedings, which involve termination of the parent's fundamental liberty interest in maintaining the parent-child relationship. Idaho Dept. of Health & Welfare v. Doe, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

[1] Currently, art. I, sec. 6, of the Idaho Constitution prohibits the Legislature from enacting legislation that would permit the denial of bail to individuals accused of crimes other than capital offenses. The Legislature has, however, enacted, Idaho Code § 19-2919, which allows for the revocation of bail when a defendant violates a condition of release, and the court finds the existence of certain other circumstances that threaten the integrity of the judicial system. This statute legalizes a form of preventive detention, where there is evidence that the defendant will not abide by the terms of his release.

In other words, instead of finding that it is more likely than not that the defendant presents a danger or will not appear for trial, the court must find, based on the actual evidence before it, that it is highly probable or reasonably certain that the defendant presents a danger or will not appear.[2] Thus, a limitation on the number of crimes to which preventive detention would apply, along with the high standard of proof required to impose it, should narrow the circumstances in which it will be used.

VI. What impact might an evidentiary hearing regarding preventive detention have at a later state in a criminal proceeding, in terms of testimony, witnesses and evidence presented?

A. Evidence and Testimony

At a preventive detention hearing, the single issue the court must determine is whether any bail, conditions of release, or both will reasonably assure the safety of a person or the community, or that the defendant will appear at trial. A preventive detention hearing should not become a mini-trial in itself. Currently at bail hearings, the court considers only the argument of counsel in light of the factors set forth in Idaho Criminal Rule 46(c). These factors include (1) the defendant's employment status and history and financial condition; (2) the nature and extent of defendant's family relationships; (3) the defendant's past and present residences; (4) the defendant's character and reputation; (5) the persons who agree to assist the defendant in attending court at the proper time; (6) the nature of the charged crime and mitigating or aggravating factors that bear on the likelihood of conviction and punishment; (7) the defendant's prior criminal record and whether he appeared as required in previous proceedings; (8) any facts indicating the possibility of violations of the law if the defendant is released without restrictions; (9) any other facts indicating the defendant has strong ties to the community and is not likely to flee; and (10) what reasonable restrictions or conditions should be placed on the defendant while released. These factors, now presented to the court via argument, would be submitted in the form of evidence. In keeping with Salerno, the defendant would be entitled to counsel. Witnesses would testify under oath and be subject to cross-examination. A defendant's testimony could not be compelled, but if he did testify, his testimony should not be admissible as to the issue guilt at subsequent proceedings, although it could be used for impeachment purposes.

B. Judicial Impartiality

---

[2] A judge may set very high bail where he or she believes a defendant should not be released at all, in hopes that the defendant will be unable to come up with sufficient funds to make bail. Depending on the facts of the case, the constitutionality of this practice may be questionable. *See*, Stack v. Boyle, 342 U.S. 1, 4, 72 S.Ct. 1, 4 (1951) (setting of extraordinarily high bail without evidence and based solely in indictment is arbitrary and unconstitutional). On the other hand, the setting of very high bail is no guarantee that the defendant will be unable to post bail. *See*, http://www.latimes.com/local/lanow/la-me-ln-70-million-bail-tiffany-li-20170405-story.html ("Bay Area murder suspect could be released on bail after offering $70 million in property and cash"). The defendant's actual financial obligation is not set by the court, however, but rather by the bail bonds company in an off-the-record transaction to which the court is not privy.

Judges are generally presumed "capable of disregarding that which should be disregarded." State v. Gibbs, 162 Idaho 782, 405 P.3d 567, 572. "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that would make fair judgment impossible." *Id.*, quoting State v. Dunlap, 155 Idaho 345, 391, 313 P.3d 1, 47 (2013). The standard for recusal of a judge, based simply on information learned in course of judicial proceedings, is extremely high. State v. Gibbs, 162 Idaho 782, 405 P.3d 567, 572, citing Bach v. Bagley, 148 Idaho 784, 792, 229 P.3d 1146 (2010). Additionally, decisions on whether a trial judge should disqualify himself is left to the sound discretion of the judge. State v. Brown, 121 Idaho 385, 392, 825 P.2d 482, 489 (1992).

A preventive detention hearing could provide a judge with extensive information about the defendant, his history, relationships, and other matters. While this may raise some concerns regarding the judge's ability to reach an impartial decision in subsequent proceedings, judges in other contexts receive extensive and often extraneous information about a defendant, yet are not required to recuse themselves from handling a case. For example, in juvenile waiver cases judges are expected to conduct a full investigation into the juvenile's circumstances. If the juvenile is not transferred to adult court, this judge then continues to impartially adjudicate the juvenile's case. Also, post-conviction proceedings are often presided over by the same judge that heard the case in earlier proceedings. Further, much of the information that would be provided to judges at a detention hearing, including criminal history, family ties, the seriousness of the alleged offense, and the strength of the state's evidence, is already presented to judges during bail arguments.

C. Sixth Amendment Right to Counsel

The right to counsel is guaranteed to defendants through the Sixth Amendment of the U.S. Constitution and art. I, sec. 13 of the Idaho Constitution. This requires meaningful representation at all essential stages of a proceeding. The U.S. Supreme Court has held that "inmates must have a reasonable opportunity to seek and receive the assistance of attorneys" and that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Procunier v. Martinez, 416 U.S. 396, 419, 94 S.Ct. 1800 (1974). Procunier considered the right to counsel of individuals who were already inmates serving a sentence, but the Court extended this analysis to pretrial detention in other cases. In Maine v. Moulton, the U.S. Supreme Court acknowledged that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." 474 U.S. 159, 170, 106 S.Ct. 477 (1985). The right to counsel means, at the very least, that events or procedures do not act in a manner that circumvents or dilutes the right of a person to communicate with counsel. *Id.* At 171, 484. However, these, and other cases, continued to recognize that jail and prison facilities must often impose restrictions on detainees when necessary for the orderly and secure administration of the facility. Limitations on mailings, visitation, and telephone calls are deemed permissible as long as those restrictions do not prevent a defendant from adequately communicating with counsel and assisting in his defense.

Denial of bail for certain individuals will not, in itself, infringe upon the right to counsel as long as the defendant is still given a meaningful opportunity to consult with his attorney at all stages of

the proceeding. Idaho already permits the pretrial detention of juveniles, and the continued detention of convicted individuals prior to sentencing or appeal. Juveniles and convicted individuals awaiting sentencing or appeal also enjoy the right to counsel. Mere detention of these individuals has not been deemed to infringe upon the right to counsel. Nor is it likely to result in undue delay in proceedings.

D. Potential for Delays

Procedures adopted subsequent to the adoption of SJR 104 should provide that a preventive detention be held expeditiously, likely before a preliminary hearing. If SJR 104 is adopted, a subsequent statute should provide for a right to an expedited appeal. However, this need not provide for a stay of proceedings while that appeal is taken. Thus, a case could progress normally while a preventive detention hearing is held and while the defendant pursues an appeal.

E. Burden on the Courts, Prosecutors and Law Enforcement

If prosecutors follow the admonishment in Salerno that preventive detention should be reserved for rare cases, and if the focus of the hearing remains limited as it should, the added burden on prosecutors, courts and defense counsel should be minimal. Additionally, there would seem to be a self-regulating mechanism that would likely prevent overuse of this process by prosecutors – the fact that it places a greater burden on them than on any other party to the process, including the burden of proof by clear and convincing evidence.

As to law enforcement agencies, there may be cases where an officer is called as a witness at a preventive detention hearing. The burden of this would need to be measured against the potential burden of tasking multiple officers with the potentially very dangerous chore of recapturing a defendant who was released on bail and subsequently committed one or more serious crimes.

CONCLUSION

SJR 104 may appropriately be viewed, if enacted, as the first step in a process that will be completed by the legislature and courts. SJR 104 is not unconstitutional under the United States Constitution. Like the Eighth Amendment to the United States Constitution, however, it requires additional elaboration through statutes and court rules so the process of preventive detention meets constitutional requirements. The Salerno case provides a roadmap to that goal, and could serve as a model for further steps by the legislature and courts.

Thank you for your inquiry. If you have any additional questions, please contact our office.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK/tjn