

## MEMORANDUM

TO: Molly J. Huskey, State Appellate Public Defender  
FROM: Sara B. Thomas, Chief, Appellate Unit  
DATE: August 15, 2011

RE: Constitutional Limits On County Supervision Of Adults On Misdemeanor Probation

### I. Relevant History of Idaho's Adult Probation Supervision Laws

In 1942, Idaho Constitution Article X, §5, was amended to read, in relevant part: "The state Legislature shall establish a nonpartisan board to be known as the state board of correction,.... This board shall have the control, direction and management of ... adult probation and parole, with such compensation, powers, and duties as may be prescribed by law."

Prior to 1993, the Legislature prescribed the duties of the Board to include the duty of supervising all persons placed on probation. See I.C. § 20-219 (1992). In 1993, the Department of Corrections informed the Legislature of the need to reduce its probation supervision caseload and supported a bill to limit its duty to supervise probationers to only those convicted of a felony. (House Judiciary, Rules and Administration Committee minutes, February 17, 1993.) In addition, the Department informed the Legislature that the courts would then have responsibility for supervising probationers convicted of misdemeanors. (House Judiciary, Rules and Administration Committee minutes, January 29, 1993.) As a result, the Legislature amended section 20-219 to limit the Board's duty to only those on probation after being convicted of a felony. I.C. § 20-219 (1993).

At some point after the law was changed, counties assumed the duty of supervising adult probationers that had been convicted only of misdemeanors. (See Fiscal Note, 2008 Idaho Laws Ch. 88 (H.B. 408)(stating "While this bill states that counties have the responsibility of providing misdemeanor probation services, almost all counties are already providing such services.").)

In 2008, the Legislature adopted two statutes which purported to officially place authority to supervise adult misdemeanor probationers in the hands of

misdemeanor probation services provided by the counties, with the functions of the probation services group to be prescribed by the judiciary. Idaho Code section 19–3947 instructed, “Misdemeanor probation office services shall be as provided in section 31–878, Idaho Code.” Section § 31-878, stated, in relevant part, “The county commissioners shall provide for misdemeanor probation services to supervise misdemeanor offenders, in those cases where such probation supervision has been ordered by the sentencing court, and perform such functions as prescribed by the administrative district judge in each judicial district.”

Currently, adult probationers that have only been convicted of misdemeanor offenses are supervised by county entities, whether by a county office or by private companies that contract with the county for supervision services.

II. Because The Constitution Grants Only The Board Of Corrections The Authority To Supervise Adult Probationers, The Idaho Legislature Cannot Delegate This Authority To The Counties Or The Judiciary

Despite the fact that the counties assumed the duty to supervise adult probationers convicted of misdemeanors, and the fact that the Legislature has now passed legislation to make that assumption of power supported by law, the counties do not have legal authority to supervise adult probationers. This is true for two reasons: first, the Idaho Constitution grants the Board of Correction, a member of the executive branch of government, the exclusive control over adult probation and parole in those situations where the Legislature has provided by law that either is available; second, the Legislature cannot delegate authority assigned by the constitution to a member of the executive branch of government to either the counties or the judiciary, as the Legislature cannot delegate what it does not have and cannot violate the constitution’s separation of powers provision.

A. The Idaho Constitution Grants The Board Of Correction, The Exclusive Control Over Adult Probation And Parole In Those Situations Where The Legislature Has Provided By Law That Either Is Available

The Idaho Constitution creates the Board of Correction and states, "This board shall have the control, direction and management of ... adult probation and parole, with such compensation, powers, and duties as may be prescribed by law." ID. CONST. Art. X, § 5. In interpreting this section, the Idaho Supreme Court has found that, although the Legislature may define the circumstances under which the Board may exercise its authority, the Board continues to have exclusive control over adult probation once those circumstances arise. "The circumstances under which the functions are to be exercised by the state Board of corrections are to be prescribed by the laws enacted by the Legislature." *State v. Rawson*, 100 Idaho 308, 313 (1979). The Board, thus, does not have unfettered control, direction and management of adult probation, but is "charged with the power to implement those laws enacted by the Legislature regarding those functions." *Id.* Despite this one limitation, "The board of correction continues to have exclusive control over adult probation and parole in those situations where the legislature has provided by law that [probation] is available...." *Id.*

Under this distribution of power, 1) the Legislature can properly limit the Board's exercise of its duties to only adults convicted of a felony, as it did in 1993; 2) the Board maintains exclusive control, direction and management of adult probation where supervision is authorized; and 3) the Legislature does not have authority to control, direct, or manage adult probation when supervision is authorized.

B. The Legislature Cannot Delegate Authority It Does Not Have And Cannot Delegate Authority In Violation Of The Constitution's Separation Of Powers Provision

The Idaho Constitution grants the Legislature broad authority to legislate. However, the Legislature cannot delegate to counties or the judiciary the

authority to control, direct, or manage adult probation for two reasons. First, the constitution places the authority to control, direct, and manage the supervision of adult probation exclusively with the Board of Corrections, such that the Legislature cannot delegate authority which it does not have. Second, because the Board is a member of the executive branch of government, the Legislature cannot delegate authority belonging to the Board to another branch of government. However, by placing the authority to control, direct, and manage supervision of adult probation in the Board of Correction, the Idaho Constitution limits the authority of the Idaho Legislature to delegate that authority. The Idaho Constitution does grant the Legislature "plenary authority to legislate in all matters except those matters prohibited or limited by the Idaho Constitution." *Flores v. State*, 109 Idaho 182, 183 (1985). Thus, "the Legislature may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (citation omitted).

By assigning the authority over control, direction, and management of adult probation to the Board, the constitution has expressly forbid the Legislature from delegating that authority to any other government entity. The Legislature may not delegate the authority to supervise adult probationers to the counties or the courts as "the Legislature may not delegate what it does not have...." *Suppiger v. Enking*, 60 Idaho 292, 91 P.2d 362, 366 (1939). Rather, the Board itself holds the power to delegate its authority to supervise adult probationers, and may delegate that authority to the Commission of Pardons and Paroles. See I.C. §20- 201A(2) (granting the Board the authority to transfer to the Commission "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."); see also *Carman v. State*, 119 Idaho 642 (1991) (finding, under previous statute, that when the Commission of Pardons and Parole acts on parole matters it is exercising authority delegated to it by the Board). Because the Idaho Constitution grants the Board specific authority over adult probation, the Legislature does not have that authority and, thus, cannot assign it to another.

Furthermore, Idaho Constitution Article 2, § 1, commonly known as the separation of powers provision, also limits the Legislature's power to delegate authority over adult probation because the constitution has assigned that power to the executive department such that it cannot be exercised by another department of government. Article 2, § 1 divides the state government into three "distinct departments, the legislative, executive and judicial," and prohibits the exercise of powers properly belonging to one department by any another department. The Board of Correction, with its constitutionally anchored control over adult probation, is recognized as an agency of the executive branch. See *Spanton v. Clapp*, 78 Idaho 234, 299 P.2d 1103 (1956); I.C. § 20-201. Thus, the Legislature cannot delegate the authority specifically assigned to the executive branch to another department of government, such as the judicial department. Thus, that portion of I.C. § 31-878 which purports to grant the administrative district judge in each judicial district the authority to prescribe the functions performed by county probation services is also unconstitutional.

In light of the unconstitutionality of the statute which purports to place the authority to supervise adult misdemeanor probation within the purview of any entity but the Board of Corrections, that statute is null, void and unenforceable. See *State v. McCoy*, 94 Idaho 236, 241(1971) (finding statute in which legislature purported to exercise authority which constitutionally belonged to the judiciary was null, void and unenforceable).