

## ATTORNEY GENERAL OPINION NO. 92-1

TO: Olivia Craven West  
Executive Director  
Commission for Pardons and Parole  
280 N. 8th St., Suite 140  
Boise, ID 83720

Per Request for Attorney General's Opinion

### QUESTION PRESENTED

When a person is sentenced to consecutive sentences for multiple criminal offenses, with a fixed and indeterminate term provided for in each sentence, how are the fixed and indeterminate portions of the sentences to be calculated for purposes of determining parole eligibility?

### CONCLUSION

The fixed term of each sentence must be served consecutively before the person is eligible for parole consideration. Once all of the fixed terms have been completed, the person's indeterminate terms are added to determine the maximum time the person may serve. The person is eligible for parole at all times during the pendency of the indeterminate sentences.

### ANALYSIS

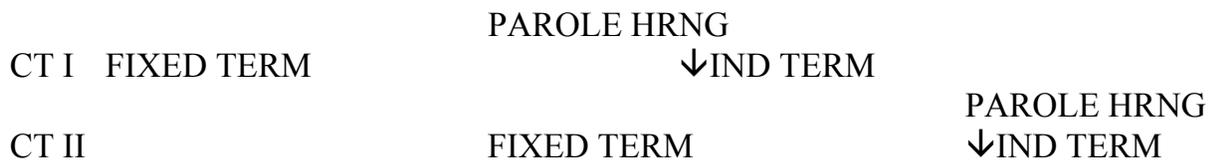
You have requested an opinion regarding Idaho's Unified Sentencing Act. Specifically, you have asked for an interpretation of the following language in Idaho Code § 19-2513 pertaining to consecutive sentences:

[I]f consecutive sentences are imposed for multiple offenses, the court shall, if required by statute, direct that . . . each consecutive sentence contain a minimum period of confinement; in such event, all minimum terms of confinement shall be served before any indeterminate periods commence to run.

You have asked how the fixed and indeterminate portions of consecutive sentences are to be juxtaposed by the Department of Correction and the Parole Board in the determination of the date the prisoner becomes eligible for parole.

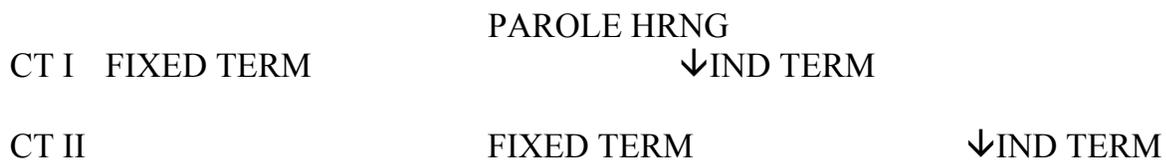
By way of illustration, you have posed a hypothetical situation in which a person is sentenced to a minimum period of confinement of two years followed by an indeterminate period of one year, which is followed by a consecutive sentence of a minimum period of one year followed by an indeterminate term of three years. When does such a person become parole eligible? Is it after two years (the period of time after the first fixed term), three years (the period of time after both fixed terms are added together), or four years (the period of time after both fixed terms and the first indeterminate term)? Of course, the scenario becomes even more complicated when three or more sentences are ordered to be served consecutively.

Several mutually exclusive theoretical models have been proposed for the interpretation of this section. The first is alluded to in your letter. Under this model, the prisoner will first serve a period of years equivalent to the full amount of all consecutive fixed terms. Then, he will be required to serve each indeterminate term consecutively, with separate determinations regarding parole for each count.

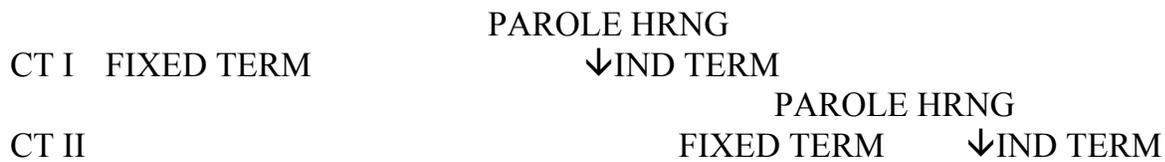


Under this model, the first indeterminate term would be treated by the commission in virtually the same manner as a fixed term, because the parole commission will not release the prisoner when he has yet to serve another indeterminate term.

A second model would add together all the indeterminate terms once the combined total of fixed terms has been served. This model would call for a single parole determination, which would apply to all consecutive indeterminate sentences.



Yet a third model was implied in dicta in the recent decision of the Idaho Court of Appeals in State v. Alberts, — Idaho —, 824 P.2d 135 (Ct. App. 1991). The court seemed to suggest that a prisoner must serve both the fixed and indeterminate portions of the first count before becoming eligible for parole upon completion of the consecutive fixed term. Under this approach, only in those cases where a person has had his indeterminate sentence formally commuted under art. 4, § 7, of the Idaho Constitution will he be relieved from serving the first sentence in full before beginning the second sentence.



There is a complete lack of firm authority supporting any of these theoretical models. Arguments can be made for each of them. For example, the third model is closest to a true consecutive sentence. And it does seem to have support in Alberts.

On the other hand, either the first or second model seems required by a close reading of the statute: "[A]ll minimum terms . . . shall be served before any indeterminate periods commence . . . ."

Criminal statutes must be strictly construed. State v. Charboneau, 116 Idaho 129, 153, 774 P.2d 299, 322 (1989). Given the clarity of the language mentioned above, it is the opinion of this office that the third theoretical model, implied in Alberts, is contrary to the express terms of Idaho Code § 19-2513. Under the third model, the parole commission would have to engage in the futile exercise of deciding whether to grant parole to a prisoner upon the commencement of the first indeterminate term, while a second fixed term loomed on the horizon. The likely result of the Alberts scheme would be the automatic transmutation of the first indeterminate term into a de facto fixed term, or in the wholesale granting of commutations of the first indeterminate term. Clearly, this would be contrary to the reason the Unified Sentencing Act was adopted in the first place—truth in sentencing.

If all fixed terms are to be served first, what then should be done when a prisoner has served his consecutive fixed terms?

The parole commission has the power to place the prisoner on parole at any time during the pendency of an indeterminate term. Indeed, a prisoner need not spend a single day in prison on an indeterminate sentence. (*See* Att. Gen. Op. No. 91-8.) Such a decision is left entirely in the hands of the commission. Idaho Code § 20-223. This being the case, there is no practical reason why the commission cannot make determinations regarding the parole status of a prisoner immediately upon (or even shortly before) the termination of the fixed portions of the sentences in a single hearing, even in those cases involving consecutive indeterminate terms. In other words, the second theoretical model mentioned above is the most reasonable as it is both practical and in keeping with the statute.

In summary, it is the opinion of this office that when two sentences are ordered to be served consecutively, and when they both contain fixed and indeterminate terms, the

fixed sentences must be served first, one after the other. Then, the parole commission shall determine when and if parole will be granted at any time during the pendency of the consecutive indeterminate terms in a single proceeding.

As a final note, it should be pointed out that indeterminate sentences are not required by Idaho Code § 19-2513. Therefore, the district courts have the power to assure absolute certainty in sentencing by simply ordering fixed terms for those counts that are to be followed by consecutive sentences.

### **AUTHORITIES CONSIDERED**

**1. Idaho Constitution:**

Art. 4, § 7.

**2. State Statutes:**

Idaho Code § 19-2513.

Idaho Code § 20-223.

**3. Idaho Cases:**

State v. Alberts, — Idaho —, 824 P.2d 135 (Ct. App. 1991).

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989).

**4. Other:**

Idaho Att. Gen. Op. No. 91-8, Annual Report (1991)

DATED this 30th day of April, 1992.

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**Analysis by:**

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