

ATTORNEY GENERAL OPINION NO. 93-3

To: Olivia Craven, Executive Director
Idaho Commission of Pardons and Parole
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Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the Commission of Pardons and Parole commute an indeterminate sentence to a lesser fixed term for purposes of the Prisoner Transfer Treaty between the United States and Mexico?

CONCLUSION

The Commission may indeed commute an indeterminate sentence to a lesser fixed term for the purposes of complying with the Prisoner Transfer Treaty.

ANALYSIS

You have asked whether the Commission of Pardons and Parole has the power to commute an indeterminate sentence to a lesser fixed sentence. The inquiry stems from the special conditions imposed by the Prisoner Transfer Treaty between the United States and Mexico. The treaty allows for the transfer of a prisoner of Mexican nationality serving time in the United States to Mexico, in order to serve out the remaining sentence in his or her home country. Because Mexico does not have a parole system, the Mexican authorities cannot accept a prisoner unless sentenced to a time certain.

Apparently, thirteen Mexican nationals serving time in Idaho prisons have requested that they be returned to Mexico under the terms of the treaty. All of these individuals are currently serving indeterminate sentences. In order to facilitate the transfer of these prisoners, the Commission wishes to commute each of the indeterminate sentences to lesser fixed terms.

It is beyond argument that the power to grant a commutation is vested in the commission. Idaho Constitution art. 4, sec. 7; State v. Beason, 119 Idaho 103, 803 P.2d 1009 (Ct. App. 1991). A commutation "diminishes the severity of a sentence, *e.g.*,

shortens the term of punishment." Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778 (1975).

The question that remains is whether a sentence that is changed from an indeterminate term to a shorter fixed term can be considered to be diminished. This issue was answered by the Attorney General in 1984:

Of particular concern is the possibility that the commission, by commuting an indeterminate sentence to a fixed term sentence, can deprive the inmate of a parole date arising earlier than the date of expiration of the fixed term. Would such a commutation actually increase the severity of the adjudged sentence? Under the indeterminate sentence statute, Idaho Code § 19-2513, an offender is theoretically eligible for parole the day of being sentenced to the custody of the state board of correction. Idaho Code § 20-223 requires certain other offenders to serve one third or five years of their sentence before being eligible for parole. An offender serving a fixed term sentence under Idaho Code § 19-2513A, however, is not eligible for parole. *See* Attorney General Opinion 82-9. The commutation of a 15-year indeterminate sentence to, say, a 10-year fixed term sentence could therefore deprive the offender of an early parole date.

Whether such a commutation is constitutionally permissible depends largely on the nature of the interest which an inmate has in commutation and parole. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 228 (1972). The fourteenth amendment protects only against deprivations of life, liberty, or property without due process of law, and a prisoner who alleges violations of the right to due process must first show a protectable "liberty interest." *Paratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 69 L. Ed. 2d 228 (1981). If an inmate's interest in commutation or parole amounts to a right, rather than a mere expectation, then the inmate is entitled to some measure of due process of law before being deprived of that right. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

In Idaho, however, pardon, parole, and commutation are not matters of right or privilege. They are matters of grace or clemency. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952); *Malloroy v. State*, 91 Idaho 914, 435 P.2d 254, 255 (1967). Furthermore, the Idaho Supreme Court has determined that there is no right to parole under Idaho Code § 20-223 and

therefore no right to written reasons for denial of parole. *Izatt v. State*, 104 Idaho 597, 661 P.2d 763 (1983). In *Connecticut Board of Pardons* the court analyzed the Connecticut commutation statute and determined that the mere existence of a power to commute, which imposed no limit on what procedure was to be followed, what evidence was to be considered, or what criteria were to be applied by the board of pardons, created no right or entitlement recognized by the due process clause. An Connecticut felon's expectation that a lawfully imposed sentence would be commuted was nothing more than a mere unilateral hope. *Connecticut Board of Pardons, supra*, at 465. Comparison of Connecticut's commutation statute with Idaho's constitutional grant of authority for commutation reveals that the two are similar and discretionary.

The case law cited above supports the proposition that commutation of a lawfully imposed sentence which effectively deprives an inmate of a parole date is not violative of due process.

Attorney General Opinion 84-8 (1984). The law has not changed in this respect since 1984, and the logic of Attorney General Opinion 84-8 still applies.

Can it be argued that because prisoners serving indeterminate sentences are often paroled upon completion of one-third of their terms, a prisoner may expect to be released upon service of one-third of his or her term? Or, has an expectancy been created because the Idaho appellate courts have traditionally used a rule of thumb in sentence review cases to the effect that one-third of an indeterminate sentence is a likely term of imprisonment? These questions were answered in *State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), *aff'd* 106 Idaho 665, 682 P.2d 618 (1984):

By definition, an indeterminate sentence does not specify the term of confinement. The actual period of confinement is later determined by administrative authority. . . .

[In *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982), it was] held that, unless there is a contrary statute or other indication on the record, we will deem one-third of an indeterminate sentence to be an appropriate measure of the term of confinement. This is a general approximation, intended solely to facilitate judicial review. It does not represent a prediction of the actual length of confinement in a particular case. Neither does it connote any expectation that parole necessarily will be granted when one-third of an indeterminate sentence has been served. Parole may

be granted earlier, later, or not at all. Under Idaho law, parole is merely a possibility, not an expectancy.

105 Idaho at 156-57.

There is yet another way to consider the commutations in question. They are, in effect, "conditional" commutations. In other words, under the unique circumstances of these thirteen cases, a bargain will be struck:

You, the prisoner, have asked that you be sent to Mexico to finish out your term. We, the Commission, agree to that, but in order to do this legally we will attach a condition to the commutation--you must serve a term certain that is less than your indeterminate term.

"The pardoning authority generally has the power to grant a commutation on conditions it deems proper, provided they are not illegal, immoral, forbidden by law, or impossible of performance; and such conditions are binding on the prisoner, at least if he accepts the commutation." 67A C.J.S., Pardon and Parole § 37. *See also In re Prout*, 12 Idaho 494, 86 P. 275 (1906).

For the above stated reasons, it is the opinion of this office that the procedure contemplated by the Commission and the prisoners is a legal and appropriate method of complying with the Prisoner Transfer Treaty.

AUTHORITIES CONSIDERED

1. United States Constitution:

Fourteenth Amendment.

2. Idaho Code:

§ 19-2513.

§ 20-223.

3. U.S. Supreme Court Cases:

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 228 (1972).

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

Paratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 69 L.Ed.2d 228 (1981).

4. Idaho Cases:

In re Prout, 12 Idaho 494, 86 P. 275 (1906).

Izatt v. State, 104 Idaho 597, 661 P.2d 763 (1983).

Malloroy v. State, 91 Idaho 914, 435 P.2d 254 (1967).

Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975).

State v. Beason, 119 Idaho 103, 803 P.2d 1009 (Ct. App. 1991).

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State v. Toohill, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

5. Other Authorities:

67A C.J.S., Pardon and Parole § 37.

Attorney General Opinion 82-9 (1982).

Attorney General Opinion 84-8 (1984).

DATED this 31st day of March, 1993.

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Analysis by:

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