

## ATTORNEY GENERAL OPINION NO. 94-3

To: Olivia Craven, Executive Director  
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Per Request for Attorney General's Opinion

### QUESTION PRESENTED

May the Idaho Commission for Pardons and Parole commute a sentence during a fixed term under the Unified Sentencing Act?

### CONCLUSION

The commission does have the power to commute a sentence during a fixed term.

### ANALYSIS

In 1984, the attorney general issued an opinion stating that the Idaho Commission for Pardons and Parole had the power to commute fixed sentences under then existing law. 1984 Idaho Att'y Gen. Ann. Rpt. 75. The opinion was based in part on State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979), which held that then existing Idaho Code § 19-2513A (creating a fixed sentence structure) was intended solely to limit the commission's power of parole and did not restrict either the power of pardon or of commutation. This was so because the parole power is a creature of statute, whereas the power to pardon or commute was found in the Idaho Constitution as it then existed:

[The commission], or a majority thereof, shall have power to grant commutations and pardons after conviction of a judgment, either absolutely or upon such conditions as they may impose in all cases against the state except treason or conviction on impeachment.

Art. 4, § 7 (1947). The statutory implementation of this section was Idaho Code § 20-213, which set up procedures for notification if applications for commutation were scheduled to be heard by the board.

In 1986, the legislature passed the Unified Sentencing Act. Idaho Code § 19-2513. In so doing, the legislature created a sentencing system whereby each convicted felon would be sentenced to a fixed term to be followed by an optional indeterminate

term. This system was created in large part because of the legislature's sense that there was little certainty in Idaho's sentencing and release process:

There are two major policy justifications for this proposal. First, by making the minimum period fixed and not subject to reduction, greater truth in sentencing is achieved. At the time of sentencing everyone knows the minimum period which must be served. Second, greater sentencing flexibility is achieved. . . . The court can impart the specific amount of punishment it feels to be just and still impose an indeterminate period to be used by the Commission for Pardons and Parole for rehabilitation and parole purposes.

Statement of Purpose, H.B. 524 (1986).

Consonant with this intent, the legislature appears to have attempted to affect not only parole during the fixed term, but other methods whereby a felon could have his or her incarceration time reduced. Idaho Code § 19-2513 states in pertinent part:

During a minimum term of confinement, the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct except for meritorious service.

The 1986 legislature also passed Senate Joint Resolution No. 107. That Resolution proposed a constitutional amendment to art. 4, § 7. The resolution provided in pertinent part that the board's power to pardon and commute would only be "as provided by statute." The Statement of Purpose to the resolution stated in its entirety:

This legislation proposed [*sic*] to amend the Constitution of the State of Idaho by removing outdated language and provides that the power of the Board of Pardons to grant commutations and pardons after conviction and judgment shall be only as provided by statute.

The people of the state ratified the amendment in the election of November 1986. The Statement of Meaning and Purpose on the ballot forms from that election gives significant guidance as to the intent of the amendment:

Meaning and Purpose. The purpose of this proposed amendment . . . is to remove from constitutional status the powers of commutation and pardon, which are held by the Board of Pardons, and to make the powers of commutation and pardon subject to amendment by statute by the Legislature.

Effect of Adoption. Presently, the Board of Pardons has the constitutional powers of commutation and pardon. Because these powers are constitutional, they cannot be amended or changed by statutory enactment and are not subject to review. If SJR 107 is adopted, the commutation and pardon power will no longer have a constitutional status; they will be subject to amendment by statutory enactment. The Legislature would have the authority to set policies and procedures for commutations and pardons and could also review Board commutation and pardon decisions.

Assuming that the amendment transmuted the commission's power to commute from constitutional to statutory power, two questions remain: (1) Has the legislature passed any statute designed to regulate the previously unlimited power of the commission to commute any and all sentences? (2) Can the Unified Sentencing Act be interpreted to mean that the power to commute only exists for indeterminate sentences?

Idaho Code § 20-213, which merely sets up time and notification procedures for the commission regarding pardon or commutation proceedings, has remained unchanged. In 1988, the legislature passed a significant amendment to Idaho Code § 20-240. This section had previously dealt with respites, reprieves and pardons by the governor. The legislature added a section to the statute dealing with commutation:

The commission shall have full and final authority to grant commutations and pardons except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances. The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons and commutations. With respect to commutations and pardons for the offenses named above, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor. No commutation or pardon for such named offenses shall be effective until presented to and approved by the governor. Any commutation or pardon recommendation not so approved within thirty (30) days of the commission's recommendation shall be deemed denied.

Plainly, the commission's power to commute is left unfettered in all except six classes of cases. Even as to those types of cases, no attempt has been made to limit the commission's discretion beyond the requirement for gubernatorial approval.

Can Idaho Code § 19-2513's prohibition against credit, discharge or reduction for good conduct be interpreted as such a limitation? Applying general rules of statutory construction, there are several reasons why this question must be answered in the negative. First, the statute doesn't mention commutation or pardon. Nor was commutation or pardon addressed in the act's statement of purpose. Generally, where a statute specifies certain things, the designation of such things excludes all others. Peck v. State, 63 Idaho 375, 120 P.2d 820 (1942).

In addition, when the legislature first passed Idaho Code § 19-2513, it had no power to affect commutations. That power would not come until the ratification of the amendment to art. 4, § 7. The legislature is presumed to have full knowledge of existing law when it enacts or amends a statute. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

Finally, the legislature gave full discretion over commutations to the commission two years after the passage of the Unified Sentencing Act. To the extent that the Sentencing Act can be argued to conflict with the unlimited power of the commission found in Idaho Code § 20-240, the later expression of legislative intent will control over the earlier. Union Pacific R. Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982).

Given all the above, the informal letter sent to the commission in 1992, which was based solely on an interpretation of the Unified Sentencing Act without regard to other statutory provisions, must be retracted. Because there are no legislative enactments that limit the power to commute, the commission may commute fixed term sentences in its discretion.

It has been suggested that an opinion regarding the power to commute as being unaffected by the Unified Sentencing Act would "open the floodgates" to scores of applications from prisoners serving fixed terms who would seek commutations as a substitute for parole hearings. In order to address this concern, it is necessary to begin with an understanding of the commutation power itself and compare it to the power to parole:

Parole and commutation are mutually exclusive powers.

The Constitution speaks only of commutations or pardons. These differ from paroles. A pardon does away with both the punishment and the effects of a finding of guilt. A commutation diminishes the severity of a sentence, e.g. shortens the term of punishment. A parole does neither of these things. A parole merely allows a convicted party to serve part of his

sentence under conditions other than those of the penitentiary. The party is not "pardoned" of his guilt, nor is a portion of his sentence "commuted."

Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975). The Idaho statute on parole makes it explicit that parole shall not be granted "as a reward of clemency and it shall not be considered to be a reduction of sentence or pardon." Idaho Code § 20-223(c).

Parole in Idaho has been described as a "mere possibility" which is not protected by due process rights. Vittone v. State, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988). This is so because no substantive limitations are placed upon the commission's decision-making regarding parole by either the constitution or by statute. Similarly, the same description must apply to commutations.

There is no explicit right to or liberty interest in clemency created either by art. 4, § 7, or Idaho Code §§ 20-213 or 20-233.

This being so, the next step is to look to the implementing legislation to see if the state has somehow created a liberty interest through "substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747, 75 L. Ed. 2d 813 (1983). "The search is for *relevant* mandatory language that expressly requires the decision-maker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 464, n.4, 109 S. Ct. 1904, 1910, n.4, 104 L. Ed. 2d 506 (1989).

Reviewing the Idaho Constitution and Idaho Code § 20-213, as well as section 50.08 of the Policy and Procedures of the Idaho Commission for Pardons and Parole, one finds nothing that "expressly" requires anything of the commission that could be considered a limitation on its discretion. Indeed, no limitations are even implied. In truth, Idaho law only creates a "unilateral hope," which affords no due process protection. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S. Ct. 2460, 2465, 69 L. Ed. 2d 158 (1981) (the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or entitlement).

Hence, the commission need not fear that it would be hamstrung by commutation applications. The commission has the ability to be selective about which applications it hears and, indeed, may summarily refuse to hear applications that, in its discretion, are determined to be unworthy of review.

#### **AUTHORITIES CONSIDERED**

**1. Constitutions:**

Idaho Constitution, art. 4, § 7 (1947).

**2. Idaho Code:**

§ 19-2513.

§ 20-213.

§ 20-223.

§ 20-240.

**3. Idaho Cases:**

Peck v. State, 63 Idaho 375, 120 P.2d 820 (1942).

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

State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979).

Union Pacific R. Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982).

Vittone v. State, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

**4. Other Cases:**

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

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

**5. Other Authorities:**

1984 Idaho Att'y Gen. Ann. Rpt. 75.

Idaho Commission for Pardons and Parole Policy and Procedures § 50.08.

Senate Joint Resolution No. 107.

Statement of Purpose, H.B. 524 (1986).

DATED this 6th day of July, 1994.

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**Analysis by:**

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