



STATE OF KANSAS

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July 3, 1979

ATTORNEY GENERAL OPINION NO. 79- 131

Carrol Mills, Ph.D.  
Chairperson,  
Kansas Adult Authority  
535 Kansas, 4th Floor  
Topeka, Kansas 66603

Re: Criminal Procedure -- Release Procedures --  
Pardons and Commutations

Synopsis: Pursuant to K.S.A. 22-3701 the Governor may pardon or commute the sentence of a person convicted of a crime within the State of Kansas upon such conditions as he may prescribe provided it is done in compliance with legislative regulations. Further, the condition deferring parole eligibility does not usurp the jurisdiction of the Kansas Adult Authority.

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Dear Ms. Mills:

In your letter you have requested our opinion as to the validity of a condition imposed on a grant of executive clemency. More specifically you have asked whether the condition specifying that an inmate not be released on parole by virtue of the grant of executive clemency prior to November 15, 1980, is a valid exercise of the executive's pardoning power.

The Constitution of the State of Kansas, Article 1, Section 7, vests the pardoning power "in the governor, under regulations and restrictions prescribed by law." K.S.A. 22-3701, which restricts the pardoning power of the governor provides in pertinent part:

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"The governor may pardon, or commute the sentence of, any person convicted of a crime in any court of this state upon such terms and conditions as he may prescribe in the order granting the pardon or commutation."

The Kansas Supreme Court in Jamison v. Flanner, 116 Kan. 624 (1924), undertook an in-depth analysis of the governor's pardoning power. In discussing the constitutional provision in the context of the constitutional convention, the court stated:

"While there had been controversy over the questions, it had been decided that the pardoning power in its general scope included the power to grant reprieves, commutations of sentences, pardons or commutations with any conditions which were not immoral, illegal, or impossible and the power to remit fines and forfeitures in penal cases." (Emphasis added.) Id. at 644.

The court concluded its analysis by saying:

"We think it clear that under the Constitution of this state the legislature may restrict and regulate the pardoning power of the governor, and that any pardon issued by him, when the restrictions and regulations provided by law have not been complied with, is issued without authority and is void . . . ." Id. at 660.

It is clear from our reading of Jamison, as well as the Kansas Constitution, that the governor is vested with the power to pardon or commute sentences, subject to legislative regulations prescribed in K.S.A. 22-3701. Additionally, the governor may impose terms and conditions on a grant of pardon or commutation, provided the conditions are not immoral, illegal or impossible.

The question has arisen whether the condition deferring parole release usurps the jurisdiction of the Kansas Adult Authority and, thus, could be considered illegal. A prior letter opinion issued by Attorney General Vern Miller on December 15, 1971 (Volume VII, Opinions of the Attorney General, page 467) dealt with a similar situation, wherein the governor commuted a death sentence to life imprisonment upon the condition that the prisoner never be eligible for parole, or that he become parole eligible only after serving any term in excess of fifteen (15) years. The letter opinion addressed the question of whether the conditions imposed were valid, and states in part:

"The United States Court of Appeals (5th Cir.), in Hagelberger v. U.S., 445 Fed.2d 279 (1971), held that where

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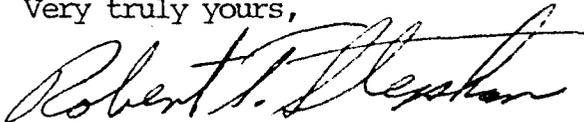
the president commuted petitioner's death sentence to confinement for fifty-five (55) years commencing on the date of commutation upon condition that petitioner should never have any rights to parole, petitioner was not entitled to any credit for time he spent on death row before his commutation, and that conditioning the commuted term from date of commutation was not unreasonable. The Circuit Court cited, among others, Bishop v. U.S., 96 U.S. App.D.C. 117, 223 Fed.2d 582 (1955), in which case the appellant contended that the president had no power to condition the order of commutation for life to begin to run at the date of order, which had the practical effect of delaying the appellant's parole eligibility under 18 U.S.C.A. 4202 [by virtue of which a lifer was eligible for parole after fifteen (15) years.] The Circuit Court held such power to include or attach reasonable conditions.

"In view of the persuasive authorities referred to above, it is the opinion of this office that the question you posed must be answered in the affirmative. We have been unable to find any Kansas Supreme Court case determining this precise question, but believe that the governor has the authority to commute a death sentence to life or for any term in excess of ten (10) years upon such terms and conditions as he may prescribe in his order of commutation, and since the conditions suggested in the question have been held to be moral, legal, and reasonable, we see no substantial legal impediment."

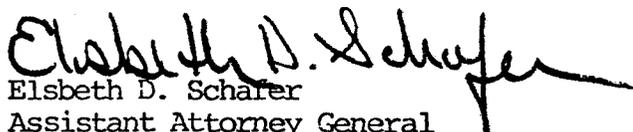
We find the authority and reasoning presented in the Attorney General Miller's opinion persuasive on the question raised in your letter. Accordingly, it is our opinion that the condition deferring parole eligibility is a valid exercise of the executive's pardoning power.

Please find attached a copy of the letter opinion for your information.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Elsbeth D. Schafer  
Assistant Attorney General

RTS:TDH:EDS:may  
Enclosure

Vol. 7

LETTER, December 15, 1971, to Frank L. Johnson, Pardon and Extradition Attorney

Re: SAME—*Sentence Commuted from Death to Life*

In your letter of inquiry dated October 29, 1971, you pose the following question: May the governor, under Kansas law, commute a death sentence to imprisonment for life upon the express condition that: (1) the prisoner never be eligible for parole; or (2) the prisoner be ineligible for parole until he has served any term in excess of fifteen (15) years?

Section 7 of Article 1 of the Constitution of Kansas provides as follows:

"The pardoning power shall be vested in the governor, under regulations and restrictions prescribed by law."

The pertinent provisions of the Kansas Code of Criminal Procedure are as follows:

K. S. A. 1971 Supp. 22-3701 (1) provides:

"*Pardons and commutations.* (1) The governor may pardon, or commute the sentence of, any person convicted of a crime in any court of this state upon such terms and conditions as he may prescribe in the order granting the pardon or commutation."

K. S. A. 1971 Supp. 22-3705 states:

"The governor may, when he deems it proper or advisable, commute a sentence in any criminal case by reducing the penalty as follows:

(a) If the sentence is death, to imprisonment for life or for any term not less than ten years;"

K. S. A. 1971 Supp. 22-3717, "Parole authority and procedure," provides:

"(1) The board shall have power to release on parole those persons confined in institutions who are eligible for parole when in the opinion of the board, there is reasonable probability that such persons can be released without detriment to the community or to themselves.

"(2) Persons confined in institutions shall be eligible for parole;

"(a) After 15 years if sentenced to life imprisonment or to a minimum term which, after deduction of work and good behavior credits, aggregates more than 15 years;

"(c) After service of the minimum term of the sentence less work and good behavior credits in all other cases.

"(3) . . . . A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence of a pardon."

In the landmark case, and often quoted, *Jamison v. Flanner*, 116 Kan. 624 (1924), the Kansas Supreme Court interpreted Section 7 of Article I of the Kansas Constitution to include the power to

grant commutations of sentences, pardons, and commutations with or without conditions, and to remit fines and forfeitures. It was further held that: (a) the legislature may make such regulations and restrictions upon the pardoning power of the governor as it determines best; and (b) a pardon or commutation of sentence issued by the governor without compliance with the regulations and restrictions prescribed by law is void.

In this case, the Kansas Supreme Court construed the word "regulation" as authorizing the legislature to establish a procedure for the granting of a pardon, without compliance of which a pardon could not be granted, and added that the word "restrictions" intended to place a limitation upon the class of crimes for which pardons could be granted or the time with reference to the commission of a crime or the trial of the accused therefore. The Court, in its position, sets forth the constitutional provisions relative to the power to pardon of several states whose constitutions were available for study by the framers of the Kansas Constitution. Noteworthy is the fact that most of the states had made the pardoning authority subject to either: (1) such regulations as may be prescribed by law relative to the manner of applying for pardons; or (2) such regulations as prescribed by law, and the latter prescription appears to be more restrictive than the former, even without the word "restrictions," which is contained in the Kansas proscription.

Neither the Constitution (Article I, Section 7) nor K. S. A. 1971 Supp. 22-3701 (1) place any limitation or restriction on the power of the governor to pardon or commute the sentence of any person convicted of a crime in any court of this state, provided the procedural requirements promulgated by the State Board of Probation and Parole and the requirements set forth in K. S. A. 1971 Supp. 22-3701 (3) and (4) have been satisfied. But the legislature has restricted the governor's power of commutation in K. S. A. 1971 Supp. 22-3705 (a): (1) if the sentence is death; (2) imprisonment for life; or (3) for any term for *not less than ten (10) years*. The statute [22-3701 (1)] authorizes the governor to grant a pardon or commutation of sentence *upon terms and conditions as he may prescribe in the order*, and the Kansas Supreme Court, in the *Jamison* case, *supra*, held that such "terms and conditions prescribed" had only to be moral, legal, and reasonable to the valid. The broad authority set forth in 22-3701 (1) is significant because all inmates sentenced to life or to a minimum term, which after deduction of work and good behavior credits, aggregates more than

fifteen (15) years are eligible for parole after fifteen (15) years under K. S. A. 1971 Supp. 22-3717 (2) (a).

In light of the provisions of this last statute, is an inmate, whose death sentence is commuted to life or for any term in excess of ten (10) years, eligible for parole pursuant to 22-3717, if the commutation order clearly expresses that he shall not be? The answer must, we believe, turn on whether such condition is moral, legal, and reasonable. Our research leads us to believe that the question must be answered in the negative.

In 50 Corpus Juris, p. 348, notes 34-38, p. 350, notes 75-76, it is stated that ordinarily a prisoner is entitled to a "diminution" for his sentence for good conduct in case of a commutation of his sentence; *but this right depends on the terms of the commutation; and where it's apparent that the authority granting the commutation intended that no allowances for good conduct should be made, such intention will be given effect.* Citing *State v. Wolfer*, 148 N. W. 696, 127 Minn. 102, L. R. A. 1915 B 95; *Pittman v. Richardson*, 23 S. E. 2d 17, 201 S. C. 344.

In the *Pittman* case, *supra*, the governor commuted a sentence on February 15, 1942, to expire on December 31, 1942, and the Court held that the commutation disclosed intention that no allowances for good conduct shall be made, and the statute relating to diminution of sentence for good conduct had no application. In *Meyer v. Jackson*, 245 Mich. 692, 224 N. W. 356, it was held that one sentenced to life and whose sentence was commuted to expire fifteen (15) years from date of sentence was not entitled to reduction for good conduct, and that meaning of commutation was clear and unambiguous, and if the prisoner accepted it, he was required to accept it according to its terms. In *Re Hall*, 34 Neb. 206 51 N. W. 750, it was held that where a sentence of life imprisonment is commuted by the governor to "nine (9) years of actual time in the penitentiary," and the commutation order so provides, the prisoner is not entitled to the benefit of good time law for the purpose of reducing his term less than the amount of time specified in the commutation. In *McCoy v. Harris*, 108 Utah, 407, 160 P. 2d 721, it was held that where a life sentence was commuted to twenty-five (25) years, the prisoner was not entitled to a good time allowance. Other authorities cited: 95 A. L. R. 2d 1281, 41 Am. Jur. Supp., p. 157.

The California Supreme Court held that when the governor commuted a death sentence to "life and never be eligible for parole," when a lifer would by statute be eligible for parole after seven (7)

years, was not an unreasonable condition. In its opinion, the Court said:

"In the absence of clear expression of intent to deprive the governor of power to withhold parole on commutation of a death sentence to life imprisonment statutes relating to parole would not be considered as an attempt to interfere with the governor's power." *Ex parte Collie*, 240 P. 275, (1952).

In a later decision, the California Supreme Court cites the *Collie* case, *supra*, and held that the governor commuting death sentence to "life without parole" was a reasonable condition, and while a commutation may not be imposed on a prisoner without his consent, if he accepts it, he takes it subject to the specified conditions. *Green v. Gordan*, 246 P. 2d 38 (1952).

In 67 C. C. S. p. 602, it is stated that "a parole board has no authority to grant a parole interfering with the prior exercise of the power of conditional commutation by the governor under constitutional authority. Citing *Hammond v. Long*, 207 N. Y. S. 788, 212 App. Div. 213; 46 C. J. p. 1206, note 90; *Espinoza v. Tinsley*, 157 Colo. 62, 409 P. 835, 838; *Erhardt v. N. Y. S. Board of Parole*, 102 N. Y. S. 2d 327, 199 Misc. 131.

In an Illinois case, the Supreme Court of that state in *People v. Jenkins*, 325 Ill. 372, 156 N. E. 290 (1927), held that the governor's commutation of a death sentence to one of eight (8) years and three (3) months, which was the shortest period in which a sentence for the minimum punishment for murder could be served allowing for good time under statute, was not a change in the form of punishment; notwithstanding that under the statute the minimum punishment for murder was imprisonment for fourteen (14) years. The Court also held that if the governor's act is inconsistent with the parole act, the latter must give way to the constitutional power of the governor.

The United States Court of Appeals (5th Cir.), in *Hagelberger v. U. S.*, 445 Fed. 2d 279 (1971), held that where the president commuted petitioner's death sentence to confinement for fifty-five (55) years commencing on the date of commutation upon condition that petitioner should never have any rights to parole, petitioner was not entitled to any credit for time he spent on death row before his commutation, and that conditioning the commuted term from date of commutation was not unreasonable. The Circuit Court cited, among others, *Bishop v. U. S.*, 96 U. S. App. D. C. 117, 223 Fed. 2d 582 (1955), in which case the appellant contended that the president had no power to condition the order of commutation for life to begin to run at the date of order, which had the practical effect of

delaying the appellant's parole eligibility under 18 U. S. C. A. 4202 [by virtue of which a lifer was eligible for parole after fifteen (15) years.] The Circuit Court held such power to include or attach reasonable conditions.

In view of the persuasive authorities referred to above, it is the opinion of this office that the question you posed must be answered in the affirmative. We have been unable to find any Kansas Supreme Court case determining this precise question, but believe that the governor has the authority to commute a death sentence to life or for any term in excess of ten (10) years upon such terms and conditions as he may prescribe in his order of commutation, and since the conditions suggested in the question have been held to be moral, legal, and reasonable, we see no substantial legal impediment.

BCH

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LETTER, December 16, 1971, to Edward S. Dunn, County Attorney, Holton  
*Re: SAME—Costs of Coroner's Inquest*

In response to your inquiry of November 22, 1971, we have been unable to find any authority for the county to assess the costs of a coroner's inquest against the decedent's estate.

K. S. A. 22-3801, 1971 Supp., sets out the manner in which the costs will be assessed in criminal cases. Under this act, the defendant when found guilty is liable for the court costs as set out in the statute. However, in our opinion the assessment of criminal costs against the defendant is not analogous to the assessment of costs in a coroner's inquest, even though the deceased if he had been living would have been found guilty of committing a criminal act.

JTW

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LETTER, September 25, 1972, to Hon. Robert B. Docking, Governor  
*Re: SAME—Transporting Witness to Another State*

This is to acknowledge the request by your office for a ruling on the legality of transporting a prisoner of the state of Kansas now confined in the Kansas State Penitentiary to another state as a material witness in a case pending in a court of that other state, pursuant to the Uniform Act to Secure Attendance of Witnesses from Without the State. In pertinent part, K. S. A. 22-4202 states that:

"If a judge of a court of record in any state which by its laws has made