STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 87-9

TO: Olivia Craven, Executive Director
Commission of Pardons and Parole

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the Commission of Pardons and Parole have authority to parole an inmate from an indeterminate sentence to a consecutive sentence while the inmate remains incarcerated in a penal or correctional institution?

CONCLUSION:

The Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served. When paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. This opinion applies only to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987.

ANALYSIS:

Your opinion request concerns the eligibility for parole of inmates who are serving indeterminate sentences and who have one or more consecutive sentences remaining to be served. It is helpful to briefly review the powers of the Commission of Pardons and Parole and the background of this issue.

The commission may take four different types of action with regard to an inmate: pardon, commutation, parole and discharge. Under article 4, § 7, of the Idaho Constitution, the power to grant pardons and commutations is vested in a board of pardons; the commission is empowered to exercise the powers and authority of the board of pardons by Idaho Code § 20-210. The authority to

grant pardons and commutations is therefore derived from the constitution.

The commission's third power, i.e., its authority to parole inmates, is derived from Idaho Code § 20-223. The statute sets limits on the eligibility for parole of inmates who have been sentenced to indeterminate sentences for certain crimes. The commission's authority to grant parole is therefore separate from its pardon and commutation powers and is statutory, rather than constitutional, in its derivation. State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979); Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975).

Finally, the commission has the power to discharge a parolee under certain conditions, as set forth in Idaho Code § 20-233, when the commission determines that the parolee's "final release is not incompatible with his welfare and that of society." The term "discharge" is also applied to the order of release of an inmate who has served out his maximum sentence in the penitentiary. Idaho Code § 20-239.

Idaho statutes do not include any specific provisions concerning the parole eligibility of prisoners serving consecutive indeterminate sentences.[1] In the absence of such guidance the

---

[1]The eligibility for parole of persons serving consecutive sentences is generally controlled by statute. Cohen and Gobert, The Law of Probation and Parole, § 3.04 (1983). Some states have provided that the minimum periods to be served under each of the consecutive sentences should be added together to determine the date of parole eligibility. See, e.g., Cal. Penal Code § 3046 (eligibility for parole of persons serving consecutive life sentences). Other states have provided that eligibility should be determined on the basis of the longest sentence to which the inmate has been sentenced. See, e.g., N.H. Rev. Stat. Ann. § 651.A:6(II). Courts in other jurisdictions have interpreted language in statutes which provided that eligibility was to be determined on the basis of the "term or terms" that were being

(Continued)

commission has on occasion granted early "discharges" to inmates who were serving indeterminate sentences and who had consecutive sentences remaining to be served. Such discharges would be granted to inmates at what the commission deemed to be appropriate times to allow them to begin serving the consecutive sentences. This practice was discontinued following a decision in an Ada County case in which the district court ruled that the commission was without authority to grant such discharges. Smith v. State, Ada Co. Case No. HC 2515 (June 17, 1986). The commission's sole power to grant discharges is derived from Idaho Code § 20-233, which provides that only persons who have been on parole for at least one year, or whose maximum term has expired, may be discharged. Discharges are otherwise granted only when the prisoner has served the maximum sentence. Idaho Code § 20-239. In granting early discharges, the commission was exceeding its statutory authority.

This conclusion is bolstered by the fact that an early discharge decreases the inmate's sentence, and is therefore equivalent in effect to a commutation. "A commutation diminishes the severity of a sentence, e.g. shortens the term of punishment." Standlee v. State, 96 Idaho at 852. While the commission has the authority to grant commutations, it must meet the requirements set forth in the Idaho Constitution and applicable statutes. In particular, an application for commutation must be made by the inmate and public notice of the hearing on the application must be given by publication at least once a week for four weeks. Idaho Const., art. 4, § 7; Idaho Code § 20-213; Idaho Att'y Gen. Op. No. 84-8, Annual Report at 75. A commutation granted in the absence of compliance with the constitutional public notice requirement is void. Miller v. Meredith, 59 Idaho 385, 83 P.2d 206 (1938). An early "discharge" granted to an inmate in the absence of compliance with the requirements for application and public notice would violate the

---

(Continued)

served and have held that such language permitted the aggregation of consecutive sentences for the purpose of determining parole eligibility. See, Young v. United States Parole Commission, 682 F.2d 1105 (5th Cir. 1982), cert. denied, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 517; Taylor v. Risley, 684 P.2d 1118 (Mont. 1984).

constitutional and statutory provisions pertaining to commutations.[2]

This situation has led to the inquiry posed in your opinion request: whether an inmate, while remaining incarcerated, may be paroled from an indeterminate sentence to a consecutive sentence. The Idaho Supreme Court dealt with this issue in a case involving an indeterminate life sentence that was enhanced for use of a firearm in State v. Kaiser, 108 Idaho 17, 696 P.2d 868 (1985). Kaiser had been convicted of second degree murder and of carrying or displaying a firearm during the commission of the crime. The trial court imposed an indeterminate life sentence for the murder and a consecutive indeterminate fifteen-year sentence for the use of a firearm.

Initially, the court of appeals held that an indeterminate life sentence could not be enhanced with an additional consecutive sentence despite the clear provision of Idaho Code § 19-2520, which at that time required a consecutive sentence of not less than three nor more than fifteen years for use of a firearm in committing certain specified offenses. State v. Kaiser, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984). On review, the Idaho Supreme Court held that such an enhancement was possible and entirely consistent with the legislative intent behind the sentencing statutes. The court, in analyzing the firearms enhancement statute, stated:

---

[2]In a recent per curiam opinion, the court of appeals stated: "When two genuinely separate and consecutive indeterminate sentences are imposed, the commission may discharge the first sentence at what it deems to be an appropriate time. The second sentence then will start running, and parole may follow." State v. Saykhamchone, 1987 Opinion No. CA-65, slip op. at 4, n.1 (Ct. App. June 17, 1987) (emphasis added). This statement did not constitute a holding in the case on appeal, which involved a challenge to a sentence that consisted of an indeterminate life term enhanced with an indeterminate ten-year term for the use of a firearm. As noted in the text, the commission may not discharge an inmate from the first of two or more consecutive terms unless the inmate has been on parole for at least one year. Idaho Code § 20-233. The commission would exceed its statutory authority by issuing a discharge under any other circumstances.

> The legislative language clearly evidences its intent that involvement of a firearm mandates an additional prison term of three to fifteen years. The legislative purpose obviously was the increase of the penalty for commission of a crime using a firearm.

108 Idaho at 18-19 (emphasis in original.)

How was this legislative intent to impose additional punishment to be effected when the underlying sentence was for a term of life? The court held that this was to be done by continuing to hold the inmate in confinement on the enhancement term following a parole on the underlying term for the crime itself:

> A person serving an indeterminate life sentence is eligible for parole under I.C. § 20-223 after serving ten years. [Citations omitted.] Unlike a fixed life or death penalty sentence, it is highly likely that an inmate with an indeterminate life sentence will be paroled or eventually discharged. Hence, there remains the opportunity within the defendant's lifetime to serve additional years imposed because of commission of a crime with a firearm, as is the will of the people through their legislature. . . . Although the reading of I.C. § 19-2520 by the Court of Appeals may be literally and technically correct, it defies the clear spirit of the enhancement statute. We believe the district court's interpretation of I.C. § 19-2520 was more in accord with the intention of the legislature: a defendant sentenced to an indeterminate life sentence plus an additional term for use of a firearm, said sentences to be served consecutively, must serve the indeterminate life sentence until paroled or pardoned, at which time he or she must immediately begin serving the firearm sentence until paroled, pardoned or discharged.

108 Idaho at 19 (emphasis added).

The Supreme Court's decision in Kaiser expressly states that an inmate who has received an enhancement term for use of a firearm may be paroled from the underlying indeterminate term for the crime itself to begin serving the enhancement term. It also implicitly recognizes that there is nothing in the nature of parole or in the provisions of Idaho law to preclude the parole of any inmate who is serving an indeterminate sentence and who has

consecutive sentences remaining to be served. The possibility of any inmate's serving a consecutive sentence following a parole from a previous sentence was also noted by the court of appeals in dicta in State v. Merrifield, 112 Idaho 365, 732 P.2d 334, 335-36 (Ct. App. 1987).

This position has also been adopted in other jurisdictions. In Howell v. State, 569 S.W.2d 428 (Tenn. 1978), the court was asked to determine the parole eligibility of an inmate who had

---

[3] In State v. Saykhamchone, supra, a defendant convicted of first degree murder was sentenced to an indeterminate life term enhanced by a consecutive indeterminate ten-year term for the use of a firearm. He challenged this sentence, claiming that the consecutive enhancement term would convert his indeterminate life sentence to a fixed life sentence because the commission would not consider him for parole during the first sentence. The court of appeals affirmed the sentence, and went on to note:

> There are conceptual problems with enhancements of life sentences. But there is a pragmatic solution. The commission readily can determine what period a prisoner would serve before a tentative parole date is available for an indeterminate life segment of the sentence. The commission also can calculate such a period for the enhancement segment. Adding these two periods together would yield the total period the defendant must serve in confinement before receiving parole consideration on the whole sentence. There should not, and need not, be separately or consecutively served sentences.

Slip op. at 4.

It is true that the periods of imprisonment for the substantive crime and for the use of a firearm do not constitute two separate sentences, but rather two separate terms comprising a single sentence. The calculation suggested by the court of appeals will inform both the commission and the inmate of the earliest possible date of the inmate's release from confinement in the penitentiary. However, the supreme court made it clear in State v. Kaiser, supra, that the inmate must serve the term for the substantive crime until pardoned or paroled, at which time the inmate begins serving the firearm enhancement term. That term is then served until the inmate is paroled, pardoned or discharged. 108 Idaho at 19.

been given consecutive determinate 35-year sentences. Under Tennessee law, an inmate must serve one-half of such sentences before becoming eligible for parole. 569 S.W.2d at 431. Howell maintained that he would become eligible for parole after serving 17 and one-half years, or one-half of his first sentence and that, if paroled at that time, he would be free to leave the penitentiary for the remaining 17 and one-half years of his sentence. At the conclusion of that time, he would be returned to the penitentiary to begin serving his second sentence. Howell claimed that he could not begin serving his second term while on parole from his first sentence because a consecutive sentence can only begin when the prior sentence has terminated, and parole does not terminate a sentence. The court, while characterizing this argument as "ingenious and superficially plausible," found that Howell's approach would "erode, if not destroy, the whole concept of consecutive sentencing." 569 S.W.2d at 431-32. It therefore held that, following his parole on the first sentence, Howell would immediately commence serving his second sentence without an intervening period of release. During the first portion of his second sentence, "the prisoner simultaneously serves the first portion of his second sentence and, as a resident parolee, or cell-parolee, completes the remaining portion of his first sentence"; after serving one-half of the second sentence, the prisoner would be eligible for parole and release from physical custody. 569 S.W.2d at 433. The court thus acknowledged that it was quite possible for an inmate to be a parolee from a prior sentence and an inmate on a consecutive sentence at the same time. See also, Ex parte Fitzpatrick, 75 A.2d 636 (N.J. Mercer County Ct. 1950), aff'd, 82 A.2d 8 (N.J. Super. Ct. App. Div. 1951); Cawley v. Board of Pardons and Paroles, 701 P.2d 1188 (Ariz. 1985), aff'g, 701 P.2d 1195 (Ariz. App. 1984); Fox v. Board of Pardons and Paroles, 717 P.2d 476 (Ariz. App. 1986); State v. LaBarre, 610 P.2d 1058 (Ariz. App. 1980).

It must be acknowledged that some authority does exist for the position that a parolee from a prior sentence cannot simultaneously serve a consecutive sentence. See, for example, People v. Dandridge, 282 N.E.2d 18 (Ill. App. 1972); Mileham v. Board of Pardons and Paroles, 520 P.2d 840 (Ariz. 1974). See also, Ariz. Att'y Gen. Op. No. 77-214; Alaska Att'y Gen. Op., February 6, 1974.

It is our opinion that the Idaho Supreme Court's decision in State v. Kaiser, supra, and the more persuasive authority from other jurisdictions, lead to the conclusion that there is nothing in the nature of parole that precludes the parole of a prisoner to

a consecutive sentence. Nor has the legislature indicated an intention to prevent such paroles.

Therefore, the commission has authority to establish rules, regulations, policies and procedures for the parole of inmates serving indeterminate sentences who have consecutive sentences remaining to be served. In doing so, the commission may set forth the standards that will be applied in considering such inmates for parole, the basic parole conditions that will be imposed in such cases, and the nature of the supervision of parolees while they continue to be inmates.

Finally, it should be noted that a different set of rules will apply under the Unified Sentencing Act, the principal provision of which is contained in Idaho Code § 19-2513. Under this act, which took effect February 1, 1987, a sentencing court shall specify a minimum period of confinement during which the prisoner is not eligible for parole and may specify a subsequent indeterminate period of custody. Further, if there are consecutive sentences or enhancement terms, all minimum terms of confinement must be served before any indeterminate period begins to run. As an example, we may consider the case of an inmate who is sentenced to two consecutive sentences, each consisting of a minimum period of confinement of five years followed by an indeterminate period of ten years. The sentences would be served as follows:

1. First five years -- The inmate serves the minimum period of confinement under the first sentence.

2. Next five years -- The inmate serves the minimum period of confinement under the second sentence.

3. Next ten years -- The inmate serves the indeterminate portion of the first sentence. The commission may consider the inmate for parole at any time during this period. Since the inmate has served the minimum period of confinement under the second sentence, the commission may simultaneously consider the inmate for parole on that sentence as well, which would result in the inmate's release from the penitentiary on parole. If the inmate is not paroled during this ten-year period, a discharge from the first sentence should be issued at its conclusion.

4. Next ten years -- The inmate serves the indeterminate portion of the second sentence. The commission may consider the inmate for parole from the second sentence.

Under the Unified Sentencing Act, there would appear to be no purpose to be served by paroling an inmate from one sentence to a consecutive sentence. Therefore, such an approach should be used only for those inmates who are serving indeterminate sentences under the prior law and who are subject to remaining consecutive sentences. By employing such an approach, the commission will be able to avoid the harsh result of the conversion of an indeterminate sentence to a fixed sentence as a result of the presence of a consecutive term.

AUTHORITIES CONSIDERED:

Constitutions:

Idaho Constitution, article 4, § 7

Idaho Statutes:

Idaho Code § 19-2513
Idaho Code § 19-2520
Idaho Code § 20-210
Idaho Code § 20-213
Idaho Code § 20-223
Idaho Code § 20-233
Idaho Code § 20-239

Idaho Cases:

State v. Kaiser, 108 Idaho 17, 696 P.2d 868 (1985)

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

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

Miller v. Meredith, 59 Idaho 385, 83 P.2d 206 (1938)

State v. Saykhamchone, 1987 Opinion No. CA-65 (Ct. App. June 17, 1987)

State v. Merrifield, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987)

State v. Kaiser, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984)

Smith v. State, Ada Co. Case No. HC 2515 (June 17, 1986)

Statutes Cited from Other Jurisdictions:

Ariz. Rev. Stat. § 31-412

Cal. Penal Code § 3046

N.H. Rev. Stat. Ann. § 651-A:6(II)

Cases Cited from Other Jurisdictions:

Young v. United States Parole Commission, 682 F.2d 1105 (5th Cir. 1982), cert. denied, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 517

Cawley v. Board of Pardons and Paroles, 701 P.2d 1188 (Ariz. 1985), aff'g, 701 P.2d 1195 (Ariz. App. 1984)

Mileham v. Board of Pardons and Paroles, 520 P.2d 840 (Ariz. 1974)

Fox v. Board of Pardons and Paroles, 717 P.2d 476 (Ariz. App. 1986)

State v. LaBarre, 610 P.2d 1058 (Ariz. App. 1980)

People v. Dandridge, 282 N.E.2d 18 (Ill. App. 1972)

Taylor v. Risley, 684 P.2d 1118 (Mont. 1984)

Ex parte Fitzpatrick, 75 A.2d 636 (N.J. Mercer County Ct. 1950), aff'd, 82 A.2d 8 (N.J. Super. Ct. App. Div. 1951)

Howell v. State, 569 S.W.2d 428 (Tenn. 1978)

Other Authorities:

Alaska Att'y Gen. Op., February 6, 1974

Ariz. Att'y Gen. Op. No. 77-214

Idaho Att'y Gen. Op. No. 84-8, Annual Report at 75

Cohen and Gobert, The Law of Probation and Parole, § 3.04 (1983)

DATED this 19th day of August, 1987.

ATTORNEY GENERAL
State of Idaho

JIM JONES

ANALYSIS BY:

MICHAEL A. HENDERSON
Deputy Attorney General