



MIKE HUNTER
ATTORNEY GENERAL

June 30, 2020

Mr. Robert Gilliland, J.D.
Chairman, Oklahoma Pardon and Parole Board
2915 N. Classen Blvd., Suite 405
Oklahoma City, OK 73106

Re: Proposed Attorney General Opinion Request

Dear Chairman Gilliland:

I have been advised that the Oklahoma Pardon and Parole Board intends to seek an opinion on the question of whether a death row inmate is eligible, pursuant to Article VI, Section 10 of the Oklahoma Constitution, for consideration under the commutation process set forth in Chapter 15, Title 515 of the Administrative Procedures Act. While the intent to seek such an opinion has been the subject of broad discussion publicly, to date we have not received a formal opinion request from the Board.

In actuality, there is no need to submit the question as this issue has already been addressed by a prior administration. In Attorney General Opinion 2012-17, Attorney General Pruitt found that the Pardon and Parole Board has the authority to recommend, and the Governor has the authority to grant, commutations of the sentences of Oklahoma inmates sentenced to crimes set forth in 21 O.S.2011, § 13.1. *See* 2012 OK AG 17, ¶ 18. Though the opinion is specific to 85% crimes, the same analysis applies to your proposed question. As set forth in the Opinion, "Article VI, Section 10 of Oklahoma's Constitution Grants the Governor the Authority to Commute the Sentence of **any** inmate who has received a favorable recommendation from the Pardon and Parole Board." *See* 2012 OK AG 17, subheading II (emphasis added). *See also* 2012 OK AG 17, ¶ 12.

Finally, the Board clearly has the authority to promulgate rules and procedures as they have done under Title 515 of the Administrative Procedures Act to facilitate an orderly review of applications for relief authorized under Article IV, Section 10.

Sincerely,

A handwritten signature in black ink that reads "Mike Hunter".

Mike Hunter
OKLAHOMA ATTORNEY GENERAL

Enclosure: 2012 OK AG 17



Question Submitted by: Executive Director Terry Jenks, Oklahoma Pardon & Parole Board

2012 OK AG 17

Decided: 10/10/2012

Oklahoma Attorney General Opinions

Cite as: 2012 OK AG 17, __ __

¶0 This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Does the Pardon and Parole Board have the authority to recommend, and the Governor the authority to grant, commutations of the sentences of Oklahoma inmates sentenced for crimes set forth in 21 O.S.2011, § 13.1 ("85% statute"), even when the inmates have not yet served 85% of their sentence?

I.

Introduction

¶1 Your question arises out of a recent controversy surrounding commutations granted to Oklahoma inmates who had been convicted of what are sometimes colloquially referred to as "85% crimes." Much of that controversy surrounds whether the Pardon and Parole Board violated the Open Meetings Act when making certain recommendations. This Opinion does not address that issue, nor does it address whether the commutation power was properly exercised in any particular instance. It only addresses the broader question of whether the commutation power exists.

¶2 These 85% crimes are known as such due in part to 21 O.S.2011, § 12.1, that requires:

A person committing a felony offense listed in Section 30 of this act on or after March 1, 2000, and convicted of the offense shall serve not less than eighty-five percent (85%) of the sentence of imprisonment imposed within the Department of Corrections. Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed and such person shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed.

¶3 The "Section 30" referenced in Section 12.1 is found at 21 O.S.2011, § 13.1, which lists the crimes subject to the 85% requirement:

Persons convicted of:

1. First degree murder as defined in Section 701.7 of this title;
2. Second degree murder as defined by Section 701.8 of this title;
3. Manslaughter in the first degree as defined by Section 711 of this title;
4. Poisoning with intent to kill as defined by Section 651 of this title;
5. Shooting with intent to kill, use of a vehicle to facilitate use of a firearm, crossbow or other weapon, assault, battery, or assault and battery with a deadly weapon or by other means likely to produce death or great bodily harm, as provided for in Section 652 of this title;
6. Assault with intent to kill as provided for in Section 653 of this title;
7. Conjoint robbery as defined by Section 800 of this title;

8. Robbery with a dangerous weapon as defined in Section 801 of this title;
 9. First degree robbery as defined in Section 797 of this title;
 10. First degree rape as provided for in Section 1115 of this title;
 11. First degree arson as defined in Section 1401 of this title;
 12. First degree burglary as provided for in Section 1436 of this title;
 13. Bombing as defined in Section 1767.1 of this title;
 14. Any crime against a child provided for in Section 843.5 of this title;
 15. Forcible sodomy as defined in Section 888 of this title;
 16. Child pornography as defined in Section 1021.2, 1021.3 or 1024.1 of this title;
 17. Child prostitution as defined in Section 1030 of this title;
 18. Lewd molestation of a child as defined in Section 1123 of this title;
 19. Abuse of a vulnerable adult as defined in Section 10-103 of Title 43A of the Oklahoma Statutes who is a resident of a nursing facility;
 20. Aggravated trafficking as provided for in subsection C of Section 2-415 of Title 63 of the Oklahoma Statutes; or
 21. Aggravated assault and battery upon any person defending another person from assault and battery,
- shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole. Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed.

Id. Your question seeks to ascertain whether the Pardon and Parole Board can recommend, and the Governor can commute, the sentences of inmates who have been convicted of one of these 85% crimes, but who have not yet served 85% of their sentences.

¶4 The answer to this question requires an analysis of these statutory provisions, as well as their interplay with Article VI, Section 10 of the Oklahoma Constitution, that grants the Governor the power to grant commutations, pardons, and paroles after a favorable recommendation by the Pardon and Parole Board:

There is hereby created a Pardon and Parole Board to be composed of five members; three to be appointed by the Governor; one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals or its successor. An attorney member of the Board shall be prohibited from representing in the courts of this state persons charged with felony offenses. The appointed members shall hold their offices coterminous with that of the Governor and shall be removable for cause only in the manner provided by law for elective officers not liable to impeachment.

It shall be the duty of the Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency. Provided, the Pardon and Parole Board shall have no authority to make recommendations regarding parole for convicts sentenced to death or sentenced to life imprisonment without parole.

The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. Provided, the Governor shall not have the power to grant paroles if a convict has been sentenced to death or sentenced to life imprisonment without parole. ***The Legislature shall have the authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole.*** The Governor shall have power to grant after conviction, reprieves, or leaves of absence not to exceed sixty (60) days, without the action of said Board.

He shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction, and the date of commutation, pardon, parole and reprieve.

Id. (emphasis added).

¶5 In conducting this analysis, we are mindful that what we seek to determine is the statutory intent. Indeed, the sole means by which a Legislature has to make law is to agree upon the final language that passes into law. Thus, we must determine the best and fairest meaning of the words that the Legislature and the people chose in these provisions of law. See *Rogers v. Quiktrip Corp.*, 230 P.3d 853, 859 (Okla. 2010) ("[I]ntent is first divined from the language of a statute.").

II.

Article VI, Section 10 of Oklahoma's Constitution Grants the Governor the Authority to Commute the Sentence of Any Inmate Who Has Received a Favorable Recommendation From the Pardon and Parole Board. While the Legislature is Authorized by the Constitution to Substantively Limit the Parole Power, the Legislature is Not Authorized to Limit the Commutation Power.

¶6 As explained above, Article VI, Section 10 of Oklahoma's Constitution generally grants the Governor powers to commute, pardon, parole, and reprieve.

¶7 While each of these powers falls under the general umbrella of "clemency," the commutation, pardon, parole, and reprieve powers are distinct—the state Constitution treats them as such and the State's courts have followed suit. Generally speaking, a "commutation" is the substitution of a less severe punishment than was originally imposed. *Ex parte Denton*, 101 P.2d 276, 278 (Okla. Crim. App. 1940). A "parole," on the other hand, does not change the original punishment, but rather suspends the punishment contingent on certain conditions being met. *Ex parte Mason*, 233 P. 785, 786 (Okla. Crim. App. 1925). A "pardon" is an outright official forgiveness (but not a forgetting) of an offense that cancels the original punishment. *Stone v. Okla. Real Estate Comm'n*, 369 P.2d 648, 645-46 (Okla. 1962). A "reprieve" is merely the "postponement of the execution of a sentence." 67A C.J.S. *Pardon & Parole* § 3 (2002).

¶8 These powers are not absolute, however, as Article VI, Section 10 contains several limitations on the powers. First, the Governor can only commute, pardon, and parole *after* the Pardon and Parole Board has so recommended.¹ Second, the Governor's power is "subject to such regulations as may be prescribed by law." *Id.* And third, the Legislature may limit the Governor's parole power through legislation requiring a "minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole." *Id.*

¶9 The first of these constitutional limitations is self-explanatory and merits no further discussion. The second is less clear. It makes the Governor's power to commute, pardon, and parole "subject to such regulation as may be prescribed by law," which could be viewed as a significant limitation. Okla. Const. art. VI, § 10. In interpreting that provision, however, the Oklahoma Supreme Court has held that it simply authorizes the Legislature to adopt procedural regulations governing the manner in which clemency can be sought:

Under our Constitution *the pardoning power is vested exclusively in the Governor of the state, and any law which restricted this power would be unconstitutional and void.* The co-ordinate departments of the government have nothing to do with the pardoning power, except that *the Legislature may by law provide how applications may be made, and is entitled to a report at each regular session of the action taken.*

Ex parte Ridley, 106 P. 549, 551 (Okla. Crim. App. 1910) (emphasis added); see also *Ex parte Horine*, 148 P. 825, 827 (Okla. Crim. App. 1915) ("Th[e] clemency] power is not derived from legislation, and it is quite clear that, under any pretense of regulating its exercise, the supreme executive power [cannot] be deprived of its constitutional authority in relation thereto, but provision may be made by legislation, which shall render the exercise of such a power convenient and efficient."); see also A.G. Opin. 2011-15, at 120 ("The language that paroles are 'subject to such regulations as may be prescribed by law' has been interpreted to authorize the Legislature to provide **how applications may be made.**") (emphasis added).