

June 20, 1936.

Hon. Elmer Holt
Governor of Montana
The Capitol

Your letter to us of June 16, is as follows:

"I appear to be confronted with a legal question as to whether or not a man once sentenced for a crime and then reprieved must again be sentenced, or whether the original sentence stands. My understanding is that the statutes provide that the re-sentencing shall be done by the sentencing judge. In other words, if a man is sentenced to hang on June 1, 1936, and then is reprieved until June 30, 1936, it is obviously impossible to comply with the mandate of the court as June 1, 1936, no longer exists. I would like to have your advice on this subject."

While no name is specifically mentioned it is apparent from the correspondence accompanying the request for an opinion that the Governor has in mind the situation in which William Clarence Cates finds himself. A brief history of his case is proper here. On August 8, 1933, an information charging him with the unlawful and malicious killing of Paul Read on July 21, 1933, was filed in the district court of Missoula County. On October 9, 1933, he was brought to trial before that court, Honorable Theodore Lentz presiding, and a jury of twelve men. On October 11, after evidence had been heard, instructions given and arguments made, he was found guilty of murder in the first degree and two days later he was sentenced to be hanged on December 8, 1933. On November 7, he appealed to the Supreme court from the judgment of conviction against him. On June 4, 1934, the judgment was affirmed (97 Mont. 173), and on June 26, the remittitur was sent down. Following the receipt of the remittitur by the clerk, the district court speaking through Judge Lentz made an order requiring the sheriff to execute the judgment on July 28, 1934. On July 24, Governor Cooney granted Cates a reprieve until August 28, 1934, and thereafter granted him five additional reprieves. The sixth and last reprieve was granted on November 13, 1935, and it suspended the execution of the judgment until July 7, 1936.

Opinion No. 302A.

Crime and Criminal Procedure—Governor—Reprieve—Courts—Sentence—Execution.

HELD: A reprieve by the governor to a day certain, granted in a capital case, authorizes the execution of sentence on the day on which the reprieve terminates, and it is not necessary that the prisoner should be brought before the court to have the time of execution fixed.

Section 9 of Article VII of the Constitution vests the Governor with power "to grant respites after conviction and judgment for any offenses committed against the criminal laws of the State." A "respite" or "reprieve" is the withholding of a sentence for an interval of time, a postponement of execution, a temporary suspension of execution. (*State ex rel. Bottomly v. District Court*, 73 Mont. 541; *Ex parte Dormitzer*, 249 Pac. 639.) Section 12094, Revised Codes 1921, provides that "no judge, court, or officer, other than the governor, can suspend the execution of a judgment of death, except the sheriff, as provided in the six succeeding sections, unless an appeal is taken." (*State v. Vettere*, 77 Mont. 66.) Section 12101, Revised Codes 1921, provides that "if for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the county attorney, must order the defendant to be brought before it, or, if he be at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time. The sheriff must execute the judgment accordingly." (*State v. Vettere*, above; *People v. Durrant*, 51 Pac. 185; *People v. Chew Lan Ong*, 75 Pac. 186; *Rodriguez v. Sims*, 156 Pac. 94.)

The highest courts of other states with a statute substantially the same as Section 12101 have held, notwithstanding its apparent broadness, that it has no application where the governor grants a reprieve, unless the day on which the reprieve ends has passed. A reprieve by the governor to a day certain, granted in a capital case, authorizes the execution of sentence on the day on which the reprieve terminates, and it is not necessary that the prisoner should be brought before the court to have the time of execution fixed. The governor, under the Constitution, is vested with the prerogative to grant reprieves. This is a power to enlarge and extend the time fixed by the court for the execu-

tion of the sentence of death to a day certain, in the future. The right to execute the sentence on that day inheres in the power to fix the day to which the reprieve shall extend. The postponement of the date of the execution of a capital sentence by a reprieve does not so far affect the sentence as to require a new sentence, or any other order of the court on the expiration of the reprieve. A reprieve merely postpones the execution of a judgment for a time, and does not and cannot defeat the ultimate execution of the judgment of the court, as that would ordinarily occur at the expiration of the temporary extension of the original sentence. A reprieve does not annul the sentence, but merely delays or keeps back the execution of it for the time specified. In other words, it substitutes a day other than that fixed by the court for the execution, and when that day arrives, it is by virtue of the sentence of the court, and not the command of the governor, that the execution takes place. (16 C. J. 1333; 46 C. J. 1197; *Sterling v. Drake*, 29 Ohio St. 457; *People v. Bonilla*, 38 Cal. 699; *In re Buchanan*, 40 N. E. 883; *Rodriguez v. Sims*, supra; *Fickling v. Dixon*, 147 S. E. 524.)

After a close and careful examination of the subject it is our opinion, based upon the available authorities, that Cates may be legally executed on the 7th day of July, 1936, without any affirmative action on the part of the trial court. If for any reason, other than a respite by the governor, the execution should not take place on that day, Cates may be resentenced in open court by one of the judges of the fourth judicial district. The act of resentencing is, of course, the act of the court rather than of the particular judge. (*Eustance v. Francis*, 52 Mont. 295; 16 C. J. 1269; *State v. Barret*, 91 South. 543; *People v. Sanford*, 233 N. M. 192; *State v. Sweetir*, 8 Pac. (2d) 397; *Anderson v. State*, 155 South. 726; *People v. Warden*, 215 N. Y. S. 116; 22 Montana and Pacific Digest, page 77, Section 32; *State v. Bailey*, 99 Mont. 484; *Chiricahua Ranches Co. v. State*, 39 Pac. (2d) 640; *Case v. Fox*, 7 Pac. (2d) 267; 33 C. J. 972.)