

VOLUME NO. 37

OPINION NO. 43

BOARD OF PARDONS - Postponement of application for executive clemency; COMMUTATION - Consecutive sentences may be commuted either individually or aggregately; CONSECUTIVE SENTENCES - May be commuted either individually or aggregately; EXECUTIVE CLEMENCY - Such may not be postponed until exhaustion of other remedies; EXHAUSTION OF REMEDIES - One need not exhaust appeal and sentence review procedures before having request for executive clemency acted upon; REVISED CODES OF MONTANA, 1947 - Section 82-4202, 82-4203, 95-3223.

HELD: 1. Under its present rules, the Board of Pardons may not postpone consideration of an application for executive clemency until the applicant has exhausted the appeal and sentence review processes.

2. Consecutive sentences may be commuted either individually or aggregately.

5 July 1977

John Lynch, Executive Secretary  
Montana State Board of Pardons  
1119 Main Street  
Deer Lodge, Montana 59722

Dear Mr. Lynch:

You have requested my opinion regarding the following questions:

1. May the Board of Pardons postpone consideration of an application for executive clemency until the applicant has exhausted the appeal and sentence review processes?
2. Are consecutive sentences to be commuted individually or aggregately?

Your initial question involves the possible postponement by the Board of Pardons of applications for executive clemency until other processes have been exhausted. In this regard, section 95-3223, R.C.M. 1947, provides:

The board shall investigate and report to the governor with respect to all cases of executive clemency. A majority of the board shall advise, investigate, and approve each such case before the action of the governor shall be final. All applications for executive clemency shall be made to the board, which shall cause an investigation to be made of all the circumstances surrounding the crime for which the applicant was convicted, and as to the individual circumstances relating to social conditions of the applicant. If the board, or a majority thereof, approves such application for executive clemency, it shall advise the governor and recommend action to be taken. (Emphasis added.)

The Board of Pardons has adopted a rule more explicitly defining the timetable for processing applications. The Montana Administrative Code provides: "Thirty days will ordinarily be required for an investigation by the field

staff of the board, and their written report will be considered by the board at the meeting following receipt of each investigation report." M.A.C. §20-3.10(10)-S10100(1).

The statute requires that when an application is made, the board "shall cause an investigation to be made," while the rule gives notice that the investigation will not "ordinarily" require more than thirty days, and that the board will consider the application at its next regular meeting following the investigation. No exceptions to this timetable are provided for applications which precede exhaustion of judicial remedies. The word "ordinarily" in the rule excepts unforeseeable circumstances, but cannot by itself except a clearly delineated class of applications such as the class at issue here. To read the rule otherwise would substantially impair its notice-giving function. Under the existing rule, an application for executive clemency filed before exhaustion of judicial remedies must be treated like any other application.

Where statutes or rules do not interfere, the board and the Governor may exercise broad discretion in dispensing executive clemency. Goff v. State, 139 Mont. 641, 642-43, 367 P.2d 557 (1961), cert. denied, 369 U.S. 806, 7 L.Ed.2d 553, 82 S.Ct. 648 (1962); State ex rel. Biles v. District Court, 125 Mont. 337, 338-39, 238 P.2d 908 (1951). This discretion is broad enough to permit a policy of postponing consideration of clemency applications until judicial remedies are exhausted. But such a policy must be clearly stated in a properly promulgated rule.

The Montana Administrative Procedure Act partially exempts the Board of Pardons from its requirements, section 82-4202(1)(e), R.C.M. 1947, but the board is subject to section 82-4203 of that Act. That section requires the board to "[a]dopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency." Section 82-4203(1)(b), R.C.M. 1947. A policy of postponing consideration of clemency applications pending exhaustion of judicial remedies would be a "procedure" covered by this section, requiring adoption of a rule.

A new rule could be adopted providing that applications for clemency will not be accepted until certain specified judicial remedies are exhausted. Section 20-3.10(10)-S10100 could then be left intact, since it only applies to applica-

tions once filed. There is already precedent for this approach in the board's rules. Section 20-3.10(10)-S10110, M.A.C., provides that a new clemency application may be filed six months after the denial of an earlier application--clearly implying that it may not be filed before that time. The rule proposed here would be to the same general effect, providing that no application may be filed prior to exhaustion of certain judicial remedies.

It should be noted that as the law now stands, there is nothing to prevent the board and the Governor from granting clemency prior to exhaustion of judicial remedies. This is an element of the broad discretion mentioned earlier. Several courts have held that clemency may be granted while an appeal is pending. Goss v. State, 107 Tex. Crim. 659, 298 S.W. 585, 586 (1927); State ex rel. Barnes v. Garrett, 135 Tenn. 617, 188 S.W. 58, 60 (1916); Gilmore v. State, 3 Okla. Crim. 639, 108 P. 416, 416-17 (1910); People v. Marsh, 125 Mich. 410, 84 N.W. 472, 474 (1900). The breadth of discretion which allows clemency pending appeal would also allow clemency pending sentence review.

As to the second portion of your request, although the Montana Supreme Court has never addressed this precise issue, it has addressed a very similar one. In State ex rel. Herman v. Powell, 139 Mont. 583, 367 P.2d 553 (1961), the court ruled on the Board of Pardon's practice of treating consecutive sentences individually for parole purposes. It found the practice to be within the board's discretion, id. at 589, for reasons which seem clearly to extend to clemency as well. The court, after calling the practice "cumbersome and confusing," id., concluded: "However, the object to be served thereby is well within the spirit and intent of the Probation, Parole, and Executive Clemency Act (i.e., to permit worthy inmates to go out on parole)." Id. Since a further objective of that Act is to provide worthy inmates with the benefits of executive clemency, the court's conclusion should extend to commutation as well. Thus, the board may commute consecutive sentences individually.

The Herman opinion went on to say that "[t]he Board could, in order to avoid any ambiguity or confusion in the case of consecutive sentences, issue one parole to cover the maximum period of confinement." Id. Again, the same reasoning applies to commutation, and the conclusion must be that the board may commute consecutive sentences aggregately.

THEREFORE, IT IS MY OPINION:

1. Under its present rules, the Board of Pardons may not postpone consideration of an application for executive clemency until the applicant has exhausted the appeal and sentence review processes.
2. Consecutive sentences may be commuted either individually or aggregately.

Very truly yours,

MIKE GREELY  
Attorney General