

VOLUME NO. 38

OPINION NO. 13

PROBATION AND PAROLE - Parole eligibility;
SENTENCES - Effect of consecutive sentences upon parole
eligibility;

SENTENCES - Sentencing for crimes committed by prisoners parolees and furloughees;
MONTANA CODE ANNOTATED - Sections 46-18-401(5), 46-23-201(1), 46-23-217, 46- 23-218;
REVISED CODES OF MONTANA, 1947, - Sections 95-2213(e), 95-3214(1), 95-3214(5), 95-3221;
ADMINISTRATIVE RULES OF MONTANA - Sections 20-3.10(6)-S10000, 20-3.10(6)-S10020.

- HELD: 1. Section 46-23-217, MCA (section 95-3221, R.C.M. 1947), was impliedly repealed by the 1977 enactment of section 46-18-401(5), MCA (section 95-2213(e), R.C.M. 1947). Any sentences imposed with respect to a crime committed after July 1, 1977, by a prisoner imprisoned at the state prison or on parole or furlough, runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court.
2. If a prisoner who has received a new consecutive sentence under section 46-18-401(5), MCA (section 95- 2213(e), R.C.M. 1947), is paroled, the remaining time of his new and original sentences thereafter run concurrently.
3. A prisoner sentenced pursuant to section 46-18-401(5), MCA (section 95-2213(e), R.C.M. 1947), must serve that term consecutively with the remainder of his original term. If the prisoner has not been designated a non-dangerous offender, he is ineligible for parole until he has served at least one-half of his new sentence in addition to any minimum time he must serve with respect to his original sentence.

8 March 1979

Nick A. Rotering, Esq.
Legal Counsel
Department of Institutions
1539 Eleventh Avenue
Helena, Montana 59601

Dear Mr. Rotering:

You have requested an opinion concerning the following question:

When does a sentence imposed for a crime committed by a prisoner run concurrently with the prisoner's original sentence?

A

Initially, your question requires consideration of two separate and conflicting statutory provisions. The first is section 46-23-217, MCA (section 95-3221, R.C.M. 1947), which provides:

Service of term for additional crime. Any prisoner who commits a crime while at large upon parole or conditional release and who is convicted and sentenced therefor shall serve such sentence concurrently with the terms under which he was released unless otherwise ordered by the court in sentencing for the new offense. (Emphasis added.)

This section was enacted in 1955 Montana Laws, chapter 153, section 19, and has not been expressly repealed. However, in 1977 the Legislature enacted a new provision which also governs sentences imposed for crimes committed by prisoners on parole or furlough. That provision was enacted as 1977 Montana Laws, chapter 340, section 2, and is codified at 46-18-401(5), MCA (section 95-2213(e), R.C.M. 1947). It provides:

(5) Except as provided in this subsection, when a prisoner is sentenced for an offense committed while he was imprisoned in the state prison or while he was released on parole or under the prisoner furlough program, the new sentence runs consecutively with the remainder of the original sentence. The prisoner starts serving the new sentence when the original sentence has expired or when he is released on parole under chapter 23, part 2, of this title in regard to the original sentence, whichever is sooner. In the latter case, the sentences run concurrently from the time of his release on parole. (Emphasis added.)

The new section is mandatory and automatic. All sentences to which the section applies run consecutively. Thus, the new section is inconsistent and incompatible with section 46-23-217, which permits concurrent sentencing with respect to crimes committed by prisoners on parole or furlough. The conflict is direct and unavoidable and it is therefore my

opinion that section 46-23-217 was impliedly repealed by the enactment of section 46-18-401(5). Where two statutes are "wholly inconsistent, incompatible and not capable of being reconciled," the later statute impliedly repeals the earlier one if it does not expressly do so. State ex rel. Jenkins v. Carisch Theatres, Inc., ___ Mont. ___, 564 P.2d 1316, 1319 (1977).

Caution should be used in applying section 46-18-401(5). The Legislature has made specific provision for the implementation of this section, providing that it applies only to offenses committed after July 1, 1977. Mont. Laws, ch. 340, § 5. Section 46-23-217 still applies to sentences imposed for crimes committed on or before July 1, 1977.

B

Although section 46-18-401(5) mandates that a sentence imposed for a crime committed by a prisoner run consecutively with the remainder of the prisoner's original sentence, the section goes on to provide that in the event the prisoner is "released on parole *** in regard to the original sentence," the new and old sentences will there after run concurrently. The transformation of the "consecutive" nature of the second sentence to a new status of "concurrent" is automatic upon a prisoner's release on parole. This feature, however, has created some confusion with respect to its application. The confusion is focused upon the implications which it might have with respect to parole eligibility. Specifically, it has been suggested that a sentence imposed under section 46-18-401(5) should be disregarded for purposes of computing the minimum time which the prisoner must serve before he is eligible for parole. If this interpretation is correct, a parolee who is sentenced for a crime committed while on parole would be eligible for a new parole the moment he returned to prison, assuming he is subject to no other restrictions imposed by the Board of Pardons. The suggestion, however, is meritless.

On its face, section 46-18-401(5) does not concern parole eligibility. It merely specifies a consequence which flows from the granting of parole. Another statutory provision, specifically section 46-23-201(1), MCA (section 95-3214(1), R.C.M. 1947), fixes the minimum time which a prisoner must serve before he is eligible for parole. In connection with crimes committed prior to July 1, 1977, that minimum time was generally one-quarter of the prisoner's "full term." See 38 Op. Att'y Gen. No. 11. The section was amended in 1977 and now provides:

Prisoners eligible for parole. (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community:

(a) No convict serving a time sentence may be paroled until he has served at least one-half of his full term, less the good time allowance provided for in 53-30-105; except that a convict designated as a non-dangerous offender under 46-18-404 may be paroled after he has served one-quarter of his full term, less the good time allowance provided for in 53-30-105. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, 17 1/2 years.

(b) No convict serving a life sentence may be paroled until he has served 30 years, less the good time allowance provided for in 53-30-105. (Emphasis added.)

The minimum time specified by section 46-23-201(1), MCA, is computed upon the prisoner's "full term."

A consecutive sentence is cumulative to any other sentence. It is a different and additional sentence and cannot be disregarded for purposes of section 46-23-201(1). Cf. State ex rel. Herman v. Powell, 139 Mont. 583, 367 P.2d 553 (1961). Therefore, a prisoner sentenced to a new consecutive sentence pursuant to section 46-18-40(5) and not designated a non-dangerous offender, is ineligible for parole until he has served at least one-half of his new sentence in addition to any time he must serve to become eligible for parole with respect to his first sentence. The transformation feature of second and third sentences of section 46-18-40(5) merely recognizes the possibility that a prisoner sentenced to a new consecutive term thereunder may become eligible for and be released upon parole prior to the expiration of his original sentence, see e.g., State ex rel. Herman v. Powell, supra, and makes provision that the remainders of the original and new sentences will thereafter run concurrently.

This does not mean that once a prisoner has served the minimum time prescribed under section 46-23-201(1), MCA,

that he is automatically eligible for parole. "The granting of a parole is not a matter of right but is a matter of grace, privilege, or clemency granted to the deserving and withheld from the undeserving, as sound official discretion may dictate." Herman, supra, 139 Mont. at 589. The Board may require a prisoner who commits a new offense while in prison or on parole or furlough to serve a longer time than provided by section 46-23-201(1) before considering him for parole. For example, a prisoner may be required to serve to the discharge date of his original sentence before commencing his new sentence, and then serve the minimum required time of his second sentence before becoming eligible for parole. E.g. Petition of Ferguson, 146 Mont. 246, 405 P.2d 217 (1965). The board is expressly empowered to adopt rules governing "the eligibility of prisoners for parole," Section 46-23-218, MCA (section 95-3214(5), R.C.M. 1947), and in fact has adopted a number of rules with respect to parole eligibility. These rules may delay the parole eligibility of a prisoner committing a crime while in prison, or on parole or furlough, beyond the minimum time prescribed by section 46-23-201(1). See e.g. §§ 20-3.10(6)-S10000(3) and S10020, ARM.

THEREFORE, IT IS MY OPINION:

1. Section 46-23-217, MCA (section 95-3221, R.C.M. 1947), was impliedly repealed by the 1977 enactment of section 46-18-401(5), MCA (section 95-2213(e), R.C.M. 1947). Any sentences imposed with respect to a crime committed after July 1, 1977, by a prisoner imprisoned at the state prison or on parole or furlough, runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court.
2. If a prisoner who has received a new consecutive sentence under section 46-18-401(5), MCA (section 95-2213(e), R.C.M. 1947), is paroled, the remaining time of his new and original sentences thereafter run concurrently.
3. A prisoner sentenced pursuant to section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947), must serve that term consecutively with the remainder of his original term. If the prisoner has not been designated a non-dangerous

offender, he is ineligible for parole until he has served at least one-half of his new sentence in addition to any minimum time he must serve with respect to his original sentence.

Very truly yours,

MIKE GREELY
Attorney General