

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 72

CORRECTIONAL FACILITIES - Right to accelerated parole-release consideration when Montana State Prison or Women's Correction Center exceeds maximum prisoner population limits;

PARDONS, BOARD OF - Right to accelerated parole-release consideration when Montana State Prison or Women's Correction Center exceeds maximum prisoner population limits;

PRISONERS - Right to accelerated parole-release consideration when Montana State Prison or Women's Correction Center exceeds maximum prisoner population limits;

MONTANA CODE ANNOTATED - Sections 46-18-202, 46-19-301, 46-19-401, 46-23-201, 46-23-401 to 46-23-426, 53-30-105, 53-30-212.

HELD: A convict is entitled to accelerated parole-release eligibility under section 46-23-201(3), MCA, only if he or she is actually residing within the Montana State Prison or the Women's Correction Center during the effective period of certification.

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1 March 1988

Nick A. Rotering  
Chief Legal Counsel  
Department of Institutions  
1539 Eleventh Avenue  
Helena MT 59620

Dear Mr. Rotering:

You have requested my opinion concerning the following question:

Is a person sentenced to incarceration under Montana law but who is located other than at the Montana State Prison or the Women's Correction Center entitled to accelerated parole-release eligibility when certification under section 46-23-201(3), MCA, occurs with respect to the state prison or the correction center?

I conclude that certification under section 46-23-201(3), MCA, with respect to the Montana State Prison or the Women's Correction Center affects the parole-release eligibility only of those inmates actually residing within the facility during the effective period of the certification.

Section 46-23-201, MCA, establishes the minimum time-of-incarceration conditions for parole-release eligibility of persons sentenced under Montana law and not restricted from parole under section 46-18-202(2), MCA. Prisoners, other than those serving a life sentence, are eligible for parole-release consideration after serving (1) one-quarter of their sentences, less any good time allowance earned under section 53-30-105, MCA, if not designated a dangerous offender, or (2) one-half of their sentence, less accrued good-time allowances, if designated a dangerous offender; any inmate serving a time sentence, however, is eligible for parole-release consideration after 17½ years. § 46-23-201(1)(a), MCA. Inmates serving life sentences may be paroled only after 30 years of incarceration less earned good time. § 46-23-201(1)(b), MCA.

Section 46-23-201(3), MCA, accelerates parole-release consideration when specified prisoner-population limits are exceeded at the Montana State Prison or the Women's Correction Center:

If the department of institutions certifies to the board that the population at the Montana

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state prison exceeds its design capacity of 744 by 96 inmates or that the population at the women's correction center exceeds its design capacity of 35 inmates and that the prison or the center has exceeded its capacity for a period of more than 30 days, the board shall consider convicts in the institution in which the design capacity has been exceeded eligible for parole 120 days prior to the eligibility date provided for in subsection (1).

Accelerated consideration under section 46-23-201(3), MCA, may not take place with respect to any inmate who becomes eligible for parole release within his initial twelve months of incarceration at the Montana State Prison. § 46-23-201(4), MCA. Not all inmates committed by district court order to the state prison or the correction center are actually incarcerated there. Thus, for example, male inmates 25 years of age or younger may be located at the Swan River Forest Camp (§ 53-30-212, MCA), and any inmate may, if deemed appropriate, be confined at the Montana State Hospital or, under the supervised release program (§§ 46-23-401 to 426, MCA), at one of four pre-release centers.

Not all inmates convicted under Montana statutes, moreover, serve their sentences within the state's penal facilities. Prisoners may be transferred to an out-of-state institution pursuant to the Western Interstate Corrections Compact or the Interstate Corrections Compact, codified respectively in sections 46-19-301 and 46-19-401, MCA. Under those compacts, party states may contract with one another "for the confinement of inmates on behalf of a sending state in institutions situated within receiving states." Western Interstate Corrections Compact at Article III(1); Interstate Corrections Compact at Article III(a). Inmates so confined remain subject to the general jurisdiction of the sending state (Western Interstate Corrections Compact at Article IV(1) and (3); Interstate Corrections Compact at Article IV(a) and (c)), and "[t]he fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state" (Western Interstate Corrections Compact at Article IV(5); Interstate Corrections Compact at Article IV(e)). See Fest v. Barte, 804 F.2d 559, 560 (9th Cir. 1986) (Nebraska inmate transferred to Nevada prison under Interstate Corrections Compact required to initiate federal habeas corpus proceeding in Nebraska since "[u]nder the compact the Nevada officials are not responsible for the unfavorable parole decision"); Wilkins v. Erickson, 484 F.2d 969, 973 (8th

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Cir. 1973) (Montana inmate housed in South Dakota prison pursuant to Western Interstate Corrections Compact must initiate federal habeas corpus proceeding in Montana since "South Dakota is acting only as agent for Montana"); Falkner v. Nebraska Board of Parole, 213 Neb. 474, 330 N.W.2d 141, 142 (1983) (time served in Nebraska prison following transfer from Iowa under Interstate Corrections Compact did not accrue against sentence for prior Nebraska crime because, "[a]lthough confined in Nebraska, he continued to serve the Iowa sentence"). An inmate confined out of state under the compacts is further entitled "to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state." Western Interstate Corrections Compact at Article IV(8); Interstate Corrections Compact at Article IV(h).

Your question is directed to the effect of certification under section 46-23-201(3), MCA, on parole-release eligibility of inmates confined other than at the Montana State Prison or the Women's Correction Center. Section 46-23-201(3), MCA, is unambiguous in accelerating parole-release eligibility only for those inmates who are actually housed in the facility as to which the certification is made; i.e., any person among that population whose number exceeds the facility's design capacity by the stated amount and who is, if at the state prison, not otherwise eligible for parole-release consideration during his first twelve months of incarceration there. Because prisoners located at the Swan River Forest Camp, the Montana State Hospital, or a pre-release center are not among that population, their parole-release eligibility is unaffected by certification under section 46-23-201(3), MCA. Similarly, certification as to the state prison has no effect on such eligibility for persons incarcerated at the correction center, nor does certification as to the latter facility affect parole-release eligibility of inmates at the former. Excluding those individuals confined out of state pursuant to the Western Interstate Corrections Compact or the Interstate Corrections Compact, your question must be answered negatively.

As to individuals placed out of state pursuant to those compacts, the issue is complicated by their entitlement not to be deprived of any legal rights which they would have "if confined in an appropriate institution of the sending state." The ostensible purpose of this provision is to ensure that all substantive rights possessed under Montana law are retained by a person

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from this state who is confined under either compact. Although entitlement to parole-release consideration is clearly one of those rights (Hannon v. Maynard, 3 Kan. App. 2d 522, 597 P.2d 1125, 1126 (1979)), it is nonetheless equally obvious that prisoners confined out of state are not among the class of individuals for whom accelerated eligibility is directed when certification under section 46-23-201(3), MCA, occurs and that such prisoners therefore possess no right to early parole-release consideration under Montana law. In this regard, it should be emphasized that Article IV(5) of the Western Interstate Corrections Compact and Article IV(e) of the Interstate Corrections Compact refer only to confinement at "an appropriate institution" of the sending state, and the term "institution" is broadly defined in Article II(5) of the former compact as "any prison, reformatory, or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may be lawfully confined" and in Article II(e) of the latter in essentially the same manner. Inmates placed out of state under the compacts are thus not assured of treatment precisely identical to that which they would experience if incarcerated at a particular facility; they are instead guaranteed only those rights to which all Montana prisoners, irrespective of where located in this state, are entitled. I accordingly refuse to adopt an interpretation of the compacts which would require departure from the otherwise clear and unequivocal directive of section 46-23-201(3), MCA.

Lastly, nothing in Article IV(8) of the Western Interstate Corrections Compact or Article IV(h) of the Interstate Corrections Compact affects my conclusion. Those provisions apply only to benefits or obligations associated with any "action or proceeding" in which an inmate could have participated if confined at a Montana institution, and the entitlement at issue is statutory in nature.

THEREFORE, IT IS MY OPINION:

A convict is entitled to accelerated parole-release eligibility under section 46-23-201(3), MCA, only if he or she is actually residing within the Montana State Prison or the Women's Correction Center during the effective period of certification.

Very truly yours,

MIKE GREELY  
Attorney General