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Opinion No. 63-64-L
R-195
May 6, 1963

REQUESTED BY: MR. FRANK EYMAN, Superintendent
Arizona State Prison

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTIONS:

1. Is an inmate in the Arizona State Prison, convicted and sentenced under A.R.S. § 13-492, required to serve his minimum or maximum sentence before becoming eligible for consideration of parole?
2. Is an inmate in the Arizona State Prison, convicted and sentenced under A.R.S. § 13-492, required to serve his minimum or maximum sentence before becoming eligible for consideration of commutation?

ANSWERS:

1. Minimum
2. See body of opinion.

A.R.S. § 13-492 (A) and (B) define what is commonly referred to as kidnapping for the purpose of committing another crime.

A.R.S. § 13-492 (C) (1) and (2) provide for the sentence or punishment of one found guilty of a violation of either A.R.S. § 13-492(A) or § 13-492(B).

Sentence for a violation of § 13-492(A) and (B) is differentiated on the basis of whether or not "serious bodily harm" was suffered by the victim. "If serious bodily harm was suffered by the victim the person found guilty shall be punished by death or by life imprisonment without possibility of parole, whichever the jury recommends." If the victim did "not suffer serious bodily harm the person found guilty shall be punished by imprisonment in the state prison from twenty to fifty years without possibility of parole until the minimum sentence has been served."

In State v. Coursey, 71 Ariz. 227, 225 P.2d 713 (1950), the Supreme Court of Arizona referring to section 43-3203, Code, 1939 (same as A.R.S. § 13-492) stated:

"It is apparent then that the board has never had the power to grant a parole to a prisoner until his minimum sentence has been served, hence any power which the board previously had or now has was not affected by the statute questioned. The statute under attack is a mere reiteration of the limitation previously placed upon the board by the legislature."
(Emphasis supplied)

It is apparent that the reference in A.R.S. § 13-492 (c) (2) to a minimum sentence is surplusage inasmuch as any inmate must first serve his minimum sentence prior to being considered for a parole. There is no basis in law or fact which would justify the implication the Legislature intended to establish the maximum sentence as a pre-requisite for consideration for parole, for the statute plainly states minimum.

The commutation of sentence as defined in Words and Phrases, Vol. 8, p. 243, is:

" . . . the change of punishment to which a person has been condemned to a less severe one, or the substitution of a lesser for a greater penalty or punishment, . . ."
People v. Jenkins, 156 N.E. 290, 325 Ill. 372

The Arizona Constitution, Article 5, Section 5, vests in the Governor the power to:

" . . . grant reprieves, commutation and pardons, . . . for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law." (Emphasis supplied)

A.R.S. § 31-443 provides:

"§31-443. Power of governor to grant reprieves, commutations and pardons

"The governor, subject to the regulations provided in this chapter, may grant reprieves, commutations

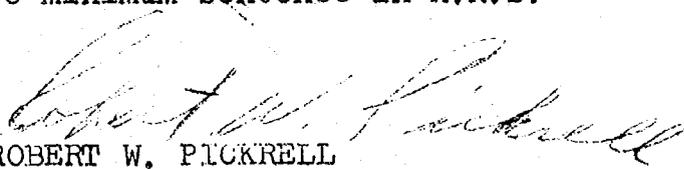
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and pardons, after conviction, for all offenses, except treason and impeachment, upon conditions, restrictions and limitations he deems proper."
(Emphasis supplied)

This power to grant commutations vested in the Governor by virtue of the Arizona Constitution, Article 5, Section 5 and somewhat modified by A.R.S. § 31-443 is further and substantially curtailed by A.R.S. § 31-402 which provides in part:

" . . . No reprieve, commutation, parole or pardon may be granted by the governor unless it has first been recommended by the board."
(Board of Pardons and Paroles) (Emphasis supplied).

Inasmuch as A.R.S. § 13-492 (C) (2), insofar as it refers to a minimum sentence is of no effect as a condition precedent to parole, it necessarily follows it does not establish a pre-requisite for commutation which is an entirely different concept as treated by both the statutes of this state and case law dealing with parole and commutation. Therefore, commutation of a sentence imposed under A.R.S. § 13-492 (C) (2) remains a discretionary power vested jointly with the Board of Pardons and Paroles and the Governor of this state to be exercised in their sound discretion, uneffected by the reference to minimum sentence in A.R.S. § 13-492 (C) (2).


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