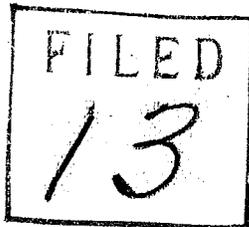


BOARD OF PROBATION & PAROLE: Grounds for recommending pardons
CRIMINAL LAW: to the Governor by the Board of
PARDONS: Probation and Parole.



March 11, 1954

Board of Probation and Parole
State of Missouri
Jefferson City, Missouri

Attention: Mr. Donald W. Bunker
Executive Secretary

Gentlemen:

This will acknowledge receipt of your request, which reads:

" _____, #26169 MSP, was committed to the Missouri State Penitentiary to serve a life sentence November 21, 1923 for the charge of first degree murder. He was seventeen years of age at the time of this offense. An English subject, he was paroled for the purpose of deportation September 24, 1935. He was returned to England and is still there.

"The subject, through his sister, _____ of New York City, has corresponded with the Board of Probation and Parole a number of times since September, 1938, in an effort to get a Governor's Pardon. He had been declared by the Immigration and Naturalization Service to be ineligible for re-entry into this country. It was thought that a pardon would remove the disabilities incurred by reason of the original conviction, and enable the subject to return to this country and become a citizen.

"The sister is renewing the request for pardon.

"The Board of Probation and Parole has heretofore interpreted the term 'Pardon' to mean in one instance that the applicant for pardon

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will thereby be absolved of all guilt, and in the other instance to mean a complete Restoration of all Civil Rights.

"In the case of _____ no claim of innocence is made at this time. Therefore, the Board is not in a position to recommend complete pardon absolving _____ of guilt from the crime for which he is serving a life sentence.

"The fact that _____ has always been an alien in this country, the Board is not in a position to recommend to the Governor that he restore civil rights which the subject has never had.

"In the Attorney General's Survey of Release Procedures, Chapter 2 of Volume III, Pardon, the subject of 'Pardon for Reformation' is treated, and the following quotes are excerpts from that section:

"'A sentence may seem just when imposed. But circumstances change and the sentence which covers a long period of years may become unnecessary, harmful, and thus unjust . . .'

"'Every sentence is but a rough estimation into which enter problems related to the personality of the wrongdoer and conditions of the outside world . . .'

"'Cases are imaginable where a full and free pardon would be, sociologically and psychologically, the "juster" method . . .'

"'It is the practice of all nations to discharge most of their "lifers" when, after many years, the notoriety of their crime grows pale . . .'

"As we have found, the pardoning power has a number of uses other than 'to absolve of all guilt' and 'to restore civil rights.'

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"The Board of Probation and Parole would appreciate your opinion, before making a recommendation to the Governor, as to whether _____ can be pardoned for any one or more of the reasons stated above and quoted from the Attorney General's Survey of Release Procedures, Chapter 2 of Volume III, Pardon."

Under Section 7, Article IV, Constitution of Missouri, the Governor of this State may grant a pardon for all offenses save treason and cases of impeachment, subject only to the law as to the manner of complying for pardons. Said section reads:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

Under Section 549.250, RSMo 1949, it becomes the duty of the Board of Probation and Parole to make recommendation to the Governor of any inmate who in its opinion may be eligible for pardon or when requested by the Governor to investigate and report on any applicant for a pardon. Said section reads:

"The board of probation and parole is hereby authorized and it shall be its duty to recommend to the governor for his consideration such inmates as in the opinion of the board may be eligible for pardon or commutation of sentence; or, on request of the governor, the board shall investigate and report to him with respect to any application for pardon, commutation of sentence, or reprieve."

In State ex rel. Oliver v. Hunt, 247 S.W. (2d) 967, 973, the court held that a pardon is an act of grace proceeding from power entrusted to the execution of laws, which exempts the individual on whom it is bestowed, from punishment that the law inflicts for a crime he has committed and further held that a

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pardon is conceived in mercy and is said to be in derogation of law. See also State ex rel. Stewart v. Blair, 203 S.W. (2d) 716, 718, 356 Mo. 790; State v. Brinkley, 193 S.W. (2d) 49, l.c. 58, 354 Mo. 1051.

In State v. Jacobson, 152 S.W. (2d) 1061, l.c. 1063, 138 A.L.R. 1154, the defendant took an appeal from a judgment sentencing him to five years in the penitentiary. The State filed a motion to dismiss his appeal because pending the appeal and while the defendant was incarcerated under said judgment, he was granted an unconditional pardon by the governor. The State contended by the defendant accepting the pardon, he waived the right of appeal. Said motion was overruled by the court and the court held that the defendant was entitled to an opportunity to remove the stigma from the judgment or conviction, the fact that he was convicted remains. The court further held that the essence of pardon is forgiveness or remission of penalty, and that pardon implies guilt and acceptance thereof a confession of guilt, and in so holding said:

"In Lime v. Blagg, 345 Mo. 1, 131 S.W. 2d. 583, 585, the court en banc gave approval to definitions of the term 'pardon,' as follows: 'A pardon as defined in 20 R.C.L. Sec. 1, p. 521, is "a declaration on record by the chief magistrate of a state or county that a person named is relieved from the legal consequences of a specific crime," or, as stated in 46 C.J. Sec. 1, p. 1181, "a pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."' Moreover, 'as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt.' 46 C.J. Sec. 32, p. 1193. A pardon 'carries an imputation of guilt; acceptance a confession of it.' 20 R.C.L. Sec. 4, p. 523. (Italics ours.) A pardon 'affirms the verdict and disaffirms it not.' Searle v. Williams, Hob. 288, 293. These definitions and connotations point to the reason for the rule announced by the text. Accordingly, it has been held that a party may not accept a benefit based on the

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legality of a judgment, and thereafter be heard to complain that the judgment is erroneous. He may not so attack the judgment because by asking and accepting executive clemency he said, in effect, that he was rightly convicted. He may not admit guilt to escape imprisonment, and at the same time protest innocence to avoid payment of fine and costs. *Manlove v. State*, 153 Ind. 80, 53 N.E. 385; 2 Ency. Pl. & Pr. 173-182, and cases cited. But see *Eighty v. People*, 78 N.Y. 330, holding the fact that the accused had received a pardon would not authorize the dismissal of his writ of error because injury may be presumed from the judgment until reversed, as the infamy and discredit to which he is subjected by it will remain.

"(1) Do the facts of the instant case call for the application of the principle that the acceptance of a pardon amounts to a waiver of the defendant's rights on appeal? The instrument evidencing the pardon issued by the Governor (the deed or charter of pardon, as it is sometimes called) recites on its face that it was granted 'Upon the attached recommendation of the Board of Probation and Parole, and because of the fact that I am convinced that this man is not guilty. * * *' (Italics ours.) We need not pause to determine the legal effect of the italicized language. It is sufficient to say that it would be harsh and ironical to imply a confession of guilt from the fact of acceptance of such a pardon. It is sometimes the case that the only redress open to an innocent man is through a pardon. Here the Governor deemed defendant a fit subject for executive clemency because he thought him not guilty. There is no inconsistency whatever in the defendant accepting such a pardon and at the same time denying his guilt. For these reasons, a distinction may be drawn between the ordinary pardon, which is governed by the general rules hereinabove noted, and one where it affirmatively appears to have been granted because the Governor was satisfied of the innocence of the accused. * * *"

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The foregoing decision is conclusive that pardons are granted for other reasons than for the innocence of the accused.

Volume 67, C.J.S., Section 2, p. 565, provides that the Constitution of the State is a source of the governor's power to pardon and reads:

"The pardoning power is not inherent in any officer of the state, or any department of the state, but, instead, is a sovereign power inherent in the state or a governmental power inherent in the people who may, by constitutional provision, confer it on any officer or department as they see fit. The constitution of a state is, of course, the source of the governor's power to grant pardons when such power is conferred on him by the constitution. While it has been said that there are many reasons why a power of this kind should be confined to the highest executive officer, and that it is not a judicial power, it has also been asserted that it is neither naturally nor necessarily an executive function. At any rate, the power of the governor to grant pardons, when conferred on him by the constitution of the state, discussed infra Section 3b, is an executive power and function.

"The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times.

"The pardoning power is in derogation of the law, that is to say, if laws could always be enacted and administered so as to be just in every circumstance to which they are applied there would be no need of the pardoning power."

Volume 67, C.J.S., Section 6, p. 571, further states the general principle of law that the exercise of power to pardon is within the uncontrolled discretion of the officer within whom it is vested and reads:

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"The power of pardoning is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made; but, not being a judicial process, it is not a corrective judicial process to remedy a wrong. A pardon is granted, not as a matter of right, but as a matter of grace bestowed by the government through its duly authorized officers or departments. It is, however, not a personal favor or a private act of grace from the individual happening to possess power; it is granted in the exercise of a public function or as an act in the interest of the public welfare. The exercise of the power lies in the absolute and uncontrolled discretion of the officer in whom it is vested."

As seen under the foregoing decision, constitutional provisions and statutes, a pardon may be granted regardless of whether the one seeking it may be completely innocent of the crime of which he was convicted. Frequently, pardons are granted upon grounds similar to those referred to in your letter comprising a part of the Attorney General's Survey of Criminal Procedures, Chapter 2, Volume III, on pardons.

The authority vested in the governor of this State to pardon is not restricted as to the grounds upon which a pardon may be granted, other than treason and cases of impeachment, so in fact this request boils down to whether you desire to recommend a pardon, even though you may be fairly well convinced that the applicant is not entirely innocent of the crime for which he was sentenced. This is a matter entirely within your discretion.

CONCLUSION

Therefore, it is the opinion of this department that in the case at bar you may recommend that a pardon be granted on

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other grounds than that the applicant is innocent of the commission of the crime for which he was sentenced and for which he is now incarcerated in the State Penitentiary. As hereinabove stated, this is a matter entirely within your discretion. Your recommendation may be as a result of many conditions and circumstances similar to those referred to in your request and taken from the Attorney General's Survey on pardons.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARM:sm:ml