Opinion No. 14-1175

March 26, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Honorable William C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

POWER OF GOVERNOR.

Governor has power to commute sentence of imprisonment in penitentiary to imprisonment in reform school.

OPINION

*{*32}* I have before me your letter of the 24th inst., in which you say that there is a young man in the penitentiary who claims that he was under eighteen years of age when the crime with which he was charged was committed, and that his friends now want him transferred to the reform school, but that you are in much doubt as to your authority, and as to the power of the court to change the sentence from penitentiary to reform school.

I am quite clearly of opinion that it is within your lawful authority to commute the punishment of such a defendant from imprisonment in the penitentiary to imprisonment in the reform school. I suggest, however, if you take such action, that it would be well to recite the fact as to his age and the fact that the attention of the judge of the District Court where he was sentenced was not called to the age of the defendant.

This power has been exercised by former governors, and I have in mind the case of one Alarid, whose sentence to confinement in the penitentiary was, by Governor Mills, commuted to imprisonment for a shorter term in the county jail of Santa Fe County. The only way that the validity of such action on the part of the Governor could be questioned would be by an attempt, through the courts, to have the defendant released upon a writ of habeas corpus, and there was some attempt to view the law in that way in the Alarid case in the Supreme Court. That case had been reviewed by the Circuit Court of Appeals and the judgment affirmed, and when the case was remanded to our Supreme Court it was there presented, together with the order of commutation made by Governor Mills. Mr. Catron, in an informal way, suggested to the members of the Court and to me that the Governor had no such power, but he would have the power to pardon, and that his action must be taken as a pardon because he could not change the punishment from the penitentiary to the county jail. He asked for some delay so that he could present argument on this point, but he never did present any, while Mr. Spiess, who had been the attorney for Alarid, stated to the Court his conclusion that there was nothing in that point.

In my examination of the matter I found a very interesting case which is reported in Vol. 18, of Howard's Reports of the Supreme Court of the United States, beginning at page 307. In that case one William Wells was convicted in the criminal court for the County of Washington, District of Columbia, of the crime of murder and sentenced *{*33}* to be hanged, but on the day set for execution President Fill-more granted a pardon of the offence of which he was convicted upon condition that he be imprisoned during his natural life in the penitentiary at Washington. He accepted the pardon with the condition annexed, and later sought to be released upon a writ of habeas corpus. The Constitution of the United States gives the President "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The Court held that the action of the President in granting this pardon upon a condition was a valid exercise of his power under the Constitution, and that when accepted by the convicted person was binding upon him and estopped him from obtaining a release in the manner adopted.

There was a difficulty in the Wells case which does not present itself in the one about which you asked me, and that was on account of the fact that the statute of the United States prescribes no punishment for murder except that of death. This made it necessary that the convicted should distinctly accept the conditional pardon, as the law did not prescribe any punishment of imprisonment for the crime of murder. Here in New Mexico the reform school is, by Sec. 10 of Chap. 2 of the laws of 1903, specified as the place of imprisonment for all juvenile offenders under the age of eighteen years convicted of any offence less than felony punishable by imprisonment for life, and it is made the duty of the Court, when it is shown that the person convicted is under the age of eighteen years, to order the sentence to be executed by imprisonment in the reform school instead of the penitentiary.

Your power, like that of the President, is to grant reprieves and pardons, and the Supreme Court, in the Wells case, held that this included the power to grant a conditional pardon. If we follow that case strictly as a precedent, and perhaps it would be well for you to do so, you should give this boy a pardon upon condition that he be confined for the time fixed by the Court in the reform school instead of in the penitentiary, and it would be well, also, to have him and his father, as his guardian, accept the pardon with the condition specified.

As to the power of the Court to change the sentence from the penitentiary to the reform school, about which you ask, I think that is, to say the least, doubtful. I understand that the case about which you write is the one presented to you by Mr. Melvin W. Mills, and that case was appealed to the Supreme Court and affirmed. I believe that the record in the case has now passed beyond the power and control of both the District and Supreme Court, and it would be very unsafe for the Court to attempt to make any change in it.