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January 21, 1985

The Honorable Joyce C. Hearn
Member, House of Representatives
1300 Berkeley Road
Columbia, South Carolina 29205

Dear Representative Hearn:

You have asked our advice as to whether a person receiving the death penalty whose sentence has been commuted to life imprisonment by the Governor would be subsequently eligible for parole. Based upon my research, I must caution that if the Governor commutes a death sentence to life imprisonment in a particular case, there exists at least the danger the prisoner could be eligible for parole in twenty years.

Article IV, Section 14 of the South Carolina Constitution gives the Governor certain limited clemency powers. The section provides:

> With respect to clemency, the Governor shall have the power only to grant reprieves and to commute a sentence of death to life imprisonment. The granting of all other clemency shall be regulated and provided for by law. (Emphasis added).

The word "only" was added to this provision of the State Constitution in 1973. It is clear the intent of the framers was to insure that, with respect to clemency, the Governor's authority was explicitly and unequivocally limited to the two specific powers mentioned; all other details concerning clemency were intended to be left in the hands of the General Assembly, which

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has delegated such authority principally to the Board of Probation, Pardon and Parole. See, Minutes of the Committee to make a Study of the South Carolina Constitution of 1895, October 27, 1967, at pp. 483-488; Final Report at 55.

Generally speaking, executive clemency or commutation is part of the pardon power. The use of such power is but an "act of grace." Crooks v. Sanders, 123 S.C. 28, 115 S.E. 760, 762 (1922). Clemency deemed is "not a matter of right", but is instead a "mere matter of grace, mercy, privilege or favor... ." 67A C.J.S., Pardons and Parole, § 32.

A number of cases have, it is true, upheld the executive's absolute right to attach various conditions to the commutation of a sentence. Several of these authorities have recognized that this right includes the power to condition the commutation of a death sentence to life imprisonment upon there being no possibility of parole. Schick v. Reed, 419 U.S. 256 (1974); Hamilton v. Ford, 362 F.Supp. 739 (E.D.Ky. 1973); Green v. Teets, 244 F.2d 401 (9th Cir. 1957); Ex Parte Collie, (Cal.), 240 P.2d 275 (1952); Green v. Gordon, 39 Cal.2d 230, 246 P.2d 38 (1952); In re Walker, (Cal.), 518 P.2d 1144 (1974); 67A C.J.S., Pardon and Parole, § 36. However, in virtually every one of these cases, the executive possessed broad, virtually unlimited pardon powers under the relevant constitutional provision. 1/

In South Carolina, there are also several older decisions which hold that the Governor possesses the right to attach reasonable conditions to a grant of clemency. See, Crooks v. Sanders, supra; State v. Barnes, 32 S.C. 14, 10 S.E. 611 (1889);

1/ Schick v. Reed is precisely on point. There, the United States Supreme Court held that the President of the United States possessed the power to attach the condition of no parole to a commutation. The Court noted that the Federal Constitution gives the President broad pardon power; accordingly, said the Court, "...the pardoning power is an enumerated power of the Constitution and its limitations, if any, must be found in the Constitution itself." 419 U.S. at 267. There would be no question, then, if the Governor of this State retained the pardon powers he formerly held under the State Constitution; he could attach the condition of no parole to any commutation he might grant.

State v. Smith, 1 Bail, 283 (1829); State v. Fuller, 1 McCord 178 (1821). Again however, we note that these cases were decided at a time when the Governor possessed the power, pursuant to the State Constitution, to grant pardons "in such manner, on such terms, and under such restrictions as he shall think proper." State v. Barnes, 32 S.C. at 15.

The Governor of this State no longer possesses such broad, unlimited pardon or clemency power under the State Constitution, however. In 1949, the clemency provision of the Constitution was substantially amended. The amendment was proposed to the people as one "To Limit The Pardon Power of the Governor...". See, Joint Resolution No. 864 of 1948. Our Supreme Court soon thereafter described such amendment as one designed "to restrict the clemency power of the Governor to granting reprieves and commuting death sentences to life imprisonment." Bearden v. State, 223 S.C. 211, 214, 74 S.E.2d 912 (1953). Further commenting, the Court noted:

> All other clemency power was vested under this constitutional amendment in a Probation, Parole and Pardon Board which was authorized to "grant pardons, issue paroles and admit to probation under such conditions as it may determine." (Emphasis added.)

Then in 1973, the section was amended again, this time inserting the word "only" in order to leave no doubt whatever that the Governor's power in this area was expressly limited to the two circumstances of granting reprieves and commutation of death to life imprisonment. In all other instances, pardons and clemency were to remain in the discretion of the General Assembly, to be delegated by statute. See, Final Report, supra. Moreover, in no circumstances, could the Governor be given additional clemency power except by constitutional amendment. Minutes, supra at 487.

Thus, there exists now considerable question that the Governor can condition the commutation of a death sentence to life imprisonment upon there being no possibility of parole. Since the Constitution has explicitly granted the Governor only two specific powers, to grant reprieves and to commute death to life imprisonment, a court could well rule that all other powers, such as attachment of conditions, have now been denied. See, 2A Sutherland Statutory Construction, § 47.23. Such

argument is particularly persuasive in light of the fact that the 1949 constitutional amendment removed any mention of the Governor's previous authority to grant clemency "on such terms and under such restrictions or he shall think proper." Instead, such explicit authority was shifted to the Pardon and Parole Board. We recognize, of course, that a court might still find that the Governor impliedly or inherently retained authority to attach conditions to the commutation of death to life imprisonment, see State v. Smith, supra, such as by declaring that there will be no possibility of parole; however, in our view, such would at least be questionable in light of the people's removal of his express authority to do so and in view of the specific insertion of the word "only" into Article IV, § 14. It would seem likely that if the framers of Article IV, § 14 had intended that the Governor retain any authority over withholding parole in the specific area of commutation of death sentences, the constitutional provision would have so stated expressly. 2/

Moreover, a court would also be faced with the general proposition of law that the Governor possess no prerogative powers, State v. Rhame, 92 S.C. 455 (1912), but has instead only those powers granted by the constitution or statute. 35 Am.Jur.2d, Governor, § 4. Such is consistent in this instance with the framers' underlying intent in subsequent amendments to Article IV, Section 14, to shift the majority of the pardon power away from the Governor and instead to allow the General Assembly, by statute, to provide for other means and forms of pardon, probation and parole. See also, Article XII, §§ 2, 9.

2/ Of course, Article IV, § 14 does say that the Governor possesses the power to commute a sentence of death to "life imprisonment" and thus perhaps it could be argued that "life imprisonment" means literally without parole. In South Carolina, however, the General Assembly has previously declared by various statutory enactments that "life imprisonment" means eligibility for parole in either ten or twenty years. See, § 24-21-610; § 16-3-20(A). And courts have held that the condition of "no parole" must be expressly stated. Compare, State v.Spence, 367 A.2d 983 (Del. 1976). Thus, to be certain that there is no possibility of parole in the situation you present, corrective legislation is probably necessary. See below.

Indeed, the General Assembly has already expressly provided for the possibility of parole in this situation. Section 16-3-20(A) provides in pertinent part that

> A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years notwithstanding any other provisions of law. (Emphasis added).

It is clear from this provision that unless the Governor impliedly or inherently retains authority to attach the condition of no parole to his commutation of a death sentence to life imprisonment, which is certainly questionable in light of the authority cited above, 3/ then a prisoner receiving such commutation could be eligible for parole in twenty years. Cf., Pittman v. Richardson, 201 S.C. 344, 23 S.E.2d 17 (1942). 4/ No court in South Carolina, interpreting Article IV, § 14 as amended, has declared otherwise.

CONCLUSION

In summary, where a death sentence is commuted to life imprisonment, there exists at least the danger of eligibility for parole of one originally sentenced to death. This Office

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3/ Even where the constitutions in other jurisdictions give the chief executive broad, unlimited pardon power, it is the view of some judges that where there exists a specific statute governing parole, as there is here, the executive possesses no authority to act in contradiction of that statute by conditioning commutation upon no possibility of parole. See, Schick v. Reed, 419 U.S. at 268-280; Green v. Gordon, 246 P.2d at 39-40. Consistent with the intent of the framers of Article IV, Section 14, is the statement by these courts that "[p]rescribing punishment is a prerogative reserved for the lawmaking branch of government, the legislature." Schick v. Reed, 419 U.S. at 275-276.

4/ We do not comment upon whether parole might be available in less than 20 years.

shares your concern about this matter and will be happy to assist you in drafting corrective legislation. Such would insure that if clemency is ever granted in a particular capital case, the prisoner would not be eligible for parole.

With kindest regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg