

**OPINION NO. 91-041****Syllabus:**

1. A warrant of commutation that clearly indicates that the Governor of Ohio intended to commute the sentence of an individual is valid, notwithstanding that the warrant includes references to convictions for which the sentence of imprisonment has been served in full and an inaccurate designation of the county in which the individual's conviction and sentence were rendered and filed.
2. The failure to file a warrant of commutation with the clerk of the court of common pleas in whose office the sentence is recorded, does not render a warrant invalid.

**To: Reginald A. Wilkinson, Director, Department of Rehabilitation and Correction, Columbus, Ohio**

**By: Lee Fisher, Attorney General, September 19, 1991**

I have before me your request for my opinion concerning the validity of a warrant of commutation. By way of background, your request states that during the May 1987 term of the Cuyahoga County Court of Common Pleas, an individual received a three year definite sentence of imprisonment after being found guilty of two counts of theft, *see* R.C. 2913.02, and one count of carrying a concealed weapon, *see* R.C. 2923.12. The individual was subsequently incarcerated in a state reformatory, to remain there until May 8, 1989. On April 7, 1989, while serving his three year definite sentence, the individual was found guilty of three counts of felonious assault, *see* R.C. 2903.11, and sentenced by the Richland County Court of Common Pleas to an aggregate term of imprisonment of fifteen to forty-five years,<sup>1</sup> which he was to begin serving, May 8, 1989, upon the expiration of the three year definite sentence.

On January 10, 1991, the Governor of Ohio executed a warrant commuting this individual's sentence. This warrant of commutation provides, in part:

**WHEREAS**, at the April term of the Court of Common Pleas held in and for the County of Cuyahoga, in the year of our Lord One Thousand Nine Hundred and Eighty-nine [an individual] was convicted of the crime of Theft, grand theft[,] c/c/w [carrying a concealed weapon and] Felonious Assault (3 counts) and sentenced by said Court to imprisonment in the Southern Ohio Correctional Facility for a Term of 15-45 years; and

**WHEREAS**, the Parole Board, by majority vote 6-1 recommends that the sentence be commuted to a minimum term of 4 years and a maximum term of 45 years, thereby making him eligible for parole consideration.

**Therefore**, by virtue of the authority vested in the Governor by the Constitution and laws of this State, I do hereby direct that the sentence of [this individual] be commuted as aforesaid. And of your execution of this warrant you will make due return without delay.

Upon comparison of this warrant of commutation with the facts recited above, it appears that the warrant contains certain inaccuracies. Consequently, you ask the following questions:

<sup>1</sup> For each count of felonious assault the individual received a term of five to fifteen years. These terms were to be served consecutively, *see* R.C. 2929.41(B), thus resulting in an aggregate term of fifteen to forty-five years.

1. Where a warrant of commutation contains the following errors:
  - a. an incorrect term of court
  - b. an incorrect statement of the offenses
  - c. an incorrect designation of the County in which the inmate's conviction and sentence were rendered and filed
  - d. reference to convictions [for] which sentences had expired, and;
  - e. failure to properly notify the correct County where the correct sentence is filed pursuant to Section 2967.06 of the Ohio Revised Code;

is the warrant of commutation valid?
2. If the warrant of commutation is invalid, due to the above stated errors, has a "commutation" or "commutation of sentence" been effected?
3. What action should the Department take in this case?

#### I. Authority of the Governor of Ohio to Grant Commutations

Pursuant to Ohio Const. art. III, § 11, the Governor of Ohio has the authority "to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment." The Governor must, however, exercise this power in compliance with the statutes enacted by the General Assembly regulating the manner of applying for commutations. *See* Ohio Const. art. III, § 11; *see, e.g., State v. Summers*, 32 Ohio App. 2d 312, 291 N.E.2d 489 (Franklin County 1972) (syllabus, paragraph four) ("[j]urisdiction to determine whether a prisoner should be granted a reduction on either the minimum or maximum sentence imposed because of the time such person was confined awaiting trial, is vested in the governor, following a thorough investigation and recommendation by the adult parole authority made upon the application of the prisoner for a commutation of sentence, pursuant to R.C. 2967.07"). *See generally Jamison v. Flanner*, 116 Kan. 624, 228 P. 82 (1924) (syllabus, paragraph seven) ("a pardon or commutation of sentence issued by the governor without compliance with the regulations and restrictions prescribed by law is void").

The provisions regulating applications for commutations of sentence are set forth in R.C. Chapter 2967. R.C. 2967.07, in general, requires that all applications for commutations of sentence be made in writing and that the Adult Parole Authority conduct an investigation into the propriety of granting a commutation and "report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a ... commutation ... the grounds therefor and the records or minutes relating to the case." R.C. 2967.12 further requires that the prosecuting attorney, the judge of the court of common pleas of the county in which the indictment against an individual was found, and where applicable, the victim or the representative member of the victim's family be notified that the Adult Parole Authority has recommended that the individual receive a commutation of sentence. After the requirements of R.C. 2967.07 and R.C. 2967.12 have been satisfied, the Governor is authorized to grant a commutation of sentence.

With respect to the warrant of commutation with which you are concerned, information provided indicates that the individual in question submitted a written application for a commutation of sentence. In addition, the Adult Parole Authority has conducted an investigation into the propriety of granting the commutation, and reported in writing to the Governor a brief statement of the facts of the case and a recommendation that the Governor grant the commutation of sentence. The Adult Parole Authority also has timely notified the individuals who are required to receive, pursuant to R.C. 2967.12, notice of the Authority's recommendation to the Governor that the individual's sentence be commuted.

The requirements of R.C. 2967.07 and R.C. 2967.12, thus, have been complied with. Accordingly, your specific questions relate to a situation in which there has been full compliance with the procedural requirements of R.C. 2967.07 and

R.C. 2967.12, but the warrant of commutation itself sets forth inaccurate information.

## II. Validity of a Warrant of Commutation that Contains Inaccurate Information

I turn now to the portion of your first question that asks whether a warrant of commutation setting forth inaccurate information is valid. I note that neither the Ohio Constitution nor the Ohio Revised Code sets out provisions governing the composition of a warrant of commutation. In addition, there is a marked paucity of Ohio case law concerning the effect of inaccuracies of whatever nature or character within a warrant of commutation.

Courts of other jurisdictions, however, have examined the composition of warrants of commutation and the effect of inaccuracies contained therein. A review of the decisions of these courts reveals a well-established rule that the object of a court in construing an instrument purporting to pardon or commute an individual's sentence is to ascertain and effectuate the intention of the person or body issuing the instrument. *See, e.g., Hogan v. Hartwell*, 242 Ala. 646, 7 So. 2d 889 (1942); *Carson v. Henslee*, 221 Ark. 248, 252 S.W.2d 609 (1952); *see also* Annotation, *Offenses and Convictions Covered by Pardon*, 35 A.L.R. 2d 1261, 1262 (1954). Moreover, "a document in the nature of a pardon or commutation must always be construed most favorably towards the prisoner where its terms are ambiguous." *U.S. v. Debruyn*, 8 F.2d 319, 320 (E.D. N.Y. 1925); *accord Hogan v. Hartwell; Carson v. Henslee*; 1934 Op. Att'y Gen. No. 3402, vol. II, p. 1535. With these principles in mind, I turn to an examination of the warrant of commutation with which you are concerned.

### A. References to Unrelated Convictions Do Not Invalidate a Warrant of Commutation

The warrant of commutation states that the individual was convicted of theft, grand theft, carrying a concealed weapon, and three counts of felonious assault. The warrant also states that the individual was sentenced to a term of imprisonment of fifteen to forty-five years, and commutes this sentence to a term of imprisonment of four to forty-five years. The sentence of fifteen to forty-five years, however, was for the three felonious assault convictions not for the theft, grand theft, and carrying a concealed weapon convictions. Further, at the time the commutation was granted, the individual had finished serving the three year definite sentence of imprisonment imposed upon him for his theft, grand theft, and carrying a concealed weapon convictions, and was serving only the fifteen to forty-five year sentence for his three felonious assault convictions. The warrant of commutation, therefore, in addition to referencing those convictions to which the warrant of commutation was intended to apply, includes references to convictions for which the sentence of imprisonment had been served in full.

I conclude that the references to the convictions for which the sentence of imprisonment that had been served in full do not render the warrant invalid. The plain language of the warrant indicates that the Governor intended to commute a fifteen to forty-five year sentence to a four to forty-five year sentence. The warrant of commutation also expressly states that the individual was convicted of three counts of felonious assault; hence, the Governor was aware of the felonious assault convictions, which led to the imposition of the fifteen to forty-five year sentence. Consequently, insofar as the Governor had knowledge of the three felonious assault convictions and of the fifteen to forty-five year sentence, it must be concluded that the Governor intended to commute the sentence imposed upon the individual for his three counts of felonious assault. That the warrant contains references to convictions for which the sentence of imprisonment has been served in full cannot be used to negate the clear intention of the Governor, as expressed through the language of that warrant, in granting the individual the commutation. Furthermore, as indicated above, a warrant of commutation must be construed in favor of the individual to whom it is granted. *See generally U.S. v. Debruyn; Hogan v. Hartwell; Carson v. Henslee*; 1934 Op. No. 3402. I find, accordingly, that a warrant of commutation is not invalidated by inclusion therein of prior convictions for which the sentence has been served in full.

### **B. Reference to an Incorrect Court Does Not Invalidate a Warrant of Commutation**

You also state that the warrant of commutation contains an inaccurate term of court and an inaccurate designation of the county in which the individual's conviction and sentence were rendered and filed. Specifically, the warrant states that the conviction and sentence occurred "at the April term of the Court of Common Pleas held in and for the County of Cuyahoga, in the year of our Lord One Thousand Nine Hundred and Eighty-nine." The individual received his conviction and sentence for his felonious assault convictions on April 7, 1989, during the April 1989 term of the Richland County Court of Common Pleas. The warrant, thus, correctly states the date upon which the individual received his felonious assault convictions. However, the warrant cites Cuyahoga County, rather than Richland County, as the county of conviction.

As noted, an instrument pardoning or commuting a sentence is not rendered ineffective by an inaccuracy where other particulars within the instrument indicate the intention of the person or body issuing the instrument. *See, e.g., Carson v. Henslee; In re Stanley*, 120 Kan. 1, 241 P. 685 (1925); *In re Eggleston*, 118 Kan. 381, 234 P. 970 (1925). As stated previously, the warrant of commutation with which you are concerned clearly discloses that the Governor of Ohio intended to commute the fifteen to forty-five year sentence imposed upon the individual named therein for his three counts of felonious assault. In addition, the individual is only serving the fifteen to forty-five year term of imprisonment for his three felonious assault convictions from Richland County. Accordingly, it is clear that the warrant of commutation was intended to apply to this sentence. *See generally Carson v. Henslee*, 221 Ark. at 250, 252 S.W.2d at 609-10 ("[n]otwithstanding the fact that the pardon does not accurately describe, by dates and places, all the admitted convictions yet we think, under the rules announced by this Court for the interpretation of pardons, it was adequate to show the intention of the Governor to pardon petitioner for all convictions"); *Abston v. State*, 139 Tex. Crim. 416, 141 S.W.2d 337 (1940) (syllabus, paragraph three) ("[w]here Governor's pardon of convict recited a wrong date of conviction, but the undisputed evidence showed that the pardoned convict had been convicted only the one time, pardoned convict was a competent witness, since the error as to the date of the conviction in the pardon was descriptive only and harmless"). I find, therefore, that a warrant of commutation is not invalidated by an inclusion of an inaccurate designation of the county in which the individual's conviction and sentence were rendered and filed.

### **III. Failure to File Warrant of Commutation with the Clerk of the Court of Common Pleas in whose Office the Sentence is Recorded Does Not Invalidate the Warrant**

Your first question also asks whether the failure to file a warrant of commutation with the clerk of the court of common pleas in whose office the sentence is recorded renders the warrant invalid. R.C. 2967.06, which requires the distribution of warrants of commutation, provides, in part:

Warrants of pardon and commutation shall be issued in triplicate, one to be given to the convict, one to be filed with the clerk of the court of common pleas in whose office the sentence is recorded, and one to be filed with the head of the institution in which the convict was confined, in case he was confined.

It is apparent from the language of R.C. 2967.06 that the filing of the warrant of commutation with the clerk of the court of common pleas is a ministerial duty that is required to be discharged after the Governor's granting of the commutation of sentence. *See generally McNelly v. Clay Township*, 11 Ohio N.P. (n.s.) 33, 23 Ohio Dec. 506 (C.P. Montgomery County 1910) (a ministerial duty being one which involves simply the following of instructions).

As indicated above, after the requirements of R.C. 2967.07 and R.C. 2967.12 have been satisfied, the Governor is authorized to grant a commutation. *See Ohio Const. art. III, § 11*. Upon the granting and the deliverance of a commutation, the commutation, if not void in its inception, is a valid order of the Governor, *see Knapp v. Thomas*, 39 Ohio St. 377 (1883), and the recipient can be deprived of its

benefits only in some appropriate legal proceeding. *See Ex parte Alvarez*, 50 Fla. 24, 39 So. 481 (1905); *Ex parte Bess*, 152 S.C. 410, 150 S.E. 54 (1929). Accordingly, if the prerequisites of R.C. 2967.07 and R.C. 2967.12 have been satisfied, and a commutation is granted and delivered, the warrant of commutation is a valid order of the Governor of Ohio. The failure to discharge the ministerial duty to file the warrant imposed by R.C. 2967.06, therefore, does not affect the validity of the warrant.

As noted, the Adult Parole Authority has complied with the reporting and notice requirements of R.C. 2967.07 and R.C. 2967.12, respectively, and recommended that the individual's sentence be commuted. *See generally* R.C. 2967.03 ("the [adult parole] authority shall not recommend a pardon or commutation of sentence of, ... any convict or prisoner until the authority has complied with the applicable notice requirements of section 2967.12 of the Revised Code"). Furthermore, the warrant of commutation was delivered to the individual named therein. Accordingly, the requirements affecting the validity of the warrant have been satisfied, and the warrant is a valid order of the Governor of Ohio. Therefore, in response to your third question, the Department of Rehabilitation and Correction is required to perform those duties that it normally performs after the granting of a valid warrant of commutation.

#### IV. Conclusion

Based upon my answer to your first question, I find it unnecessary, for purposes of this opinion, to address your second question concerning the effect of an invalid warrant. It is, therefore, my opinion, and you are hereby advised, as follows:

1. A warrant of commutation that clearly indicates that the Governor of Ohio intended to commute the sentence of an individual is valid, notwithstanding that the warrant includes references to convictions for which the sentence of imprisonment has been served in full and an inaccurate designation of the county in which the individual's conviction and sentence were rendered and filed.
2. The failure to file a warrant of commutation with the clerk of the court of common pleas in whose office the sentence is recorded, does not render a warrant invalid.