



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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May 16, 1973

Honorable Bob Hendricks
Chairman, House Committee
Criminal Jurisprudence
House of Representatives
P. O. Box 2910
Austin, Texas 78767

Letter Advisory No. 38

Re: Constitutionality of Committee Amendment No. 1 to H. B. 447, providing that court may resentence person convicted of an offense involving the use of marijuana.

Dear Representative Hendricks:

The House Committee on Criminal Jurisprudence has requested an opinion of this office concerning the constitutionality of that portion of amended H. B. 447 which reads as follows:

"Section 4.09. RESENTENCING. (a) Any person who has been convicted of an offense involving a substance defined as marijuana by this Act prior to the effective date of this Act may petition the court in which he was convicted for resentencing in accordance with the provisions of Section 4.03 of this Act whether he is presently serving a sentence, is on probation or parole, or has been discharged from the sentence.

"(b) On receipt of the petition, the court shall notify the appropriate prosecuting official and shall set the matter for a hearing within ninety days.

"(c) At the hearing the court shall review the record of the prior conviction. The court shall resentence the petitioner in accordance with the appropriate provision of Section 4.03 and shall grant him credit for all time served on the original sentence prior to the resentencing hearing."

Section 11, Article 6, of the Texas Constitution places the power to grant commutations of punishment and pardons in all criminal cases except

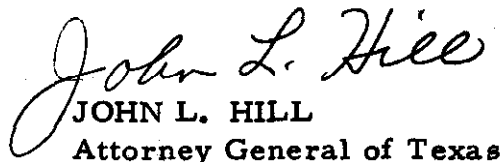
treason and impeachment in the hands of the Governor, on recommendation of the Board of Pardons and Paroles. It is beyond the power of the Legislature to infringe upon that power, and if "re-sentencing" would result in the commuting of punishments, then it would be unconstitutional.

The proposed Section 4.09 would authorize the courts, upon petition by persons already convicted, to reconsider the evidence against such persons, and to impose upon them a sentence less severe than they received when originally convicted. Such action, though denominated "resentencing," in fact would constitute a commutation of punishment, or a partial pardon.

The change of an assessed punishment to one less severe is a "commutation." A partial pardon, on the other hand, is a remission of a portion of the punishment or some legal consequence of the conviction. To "resentence" for a lesser term would be to commute; to "resentence" for a misdemeanor where the original conviction was for a felony would be to partially pardon. It is therefore our opinion that the proposed resentencing provision is unconstitutional insofar as it attempts to confer upon the courts the power to commute sentences or to grant pardons.

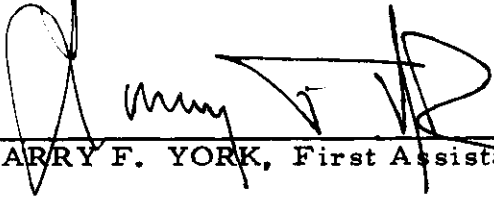
Our opinion is supported by the following authorities: Underwood v. State, 12 S. W. 2d 206 (Tex. Crim. 1928); In re Hunt, 13 S. W. 145 (Tex. App., 1890); Snodgrass v. State, 150 S. W. 162 (Tex. Crim. App. 1912); Baker v. State, 158 S. W. 998 (Tex. Crim. 1913); Jones v. Cupp, 452 F. 2d 1091 (1971); Ex parte Le Fors, 303 S. W. 2d 394 (Tex. Crim. App. 1957); Gilderbloom v. State, 272 S. W. 2d 106 (Tex. Crim. App. 1954); Ex parte Brown, 220 S. W. 2d 154 (Tex. Crim. App. 1949); Ex parte Anderson, 192 S. W. 2d 280 (Tex. Crim. App. 1946); Ex parte Miers, 64 S. W. 2d 778 (Tex. Crim. App. 1933); Ex parte Redwine, 236 S. W. 96 (Tex. Crim. App. 1922); Ex parte Rice, 162 S. W. 891 (Tex. Crim. App. 1914); Art. IV, Section 11, Texas Const.; Art. II, Section 1, Texas Const.; 44 Tex. Jur. 2d 3 et seq.

Very truly yours,



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APPROVED:



LARRY F. YORK, First Assistant



DAVID M. KENDALL, Chairman
Opinion Committee