

Opinion No. 15-1502

April 23, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Hon. Wm. C. McDonald, Governor of New Mexico, Santa Fe, N. Mex.

Power of governor to change punishment of a convict from imprisonment to a fine.

OPINION

{*86} Mr. E. P. Davies, counsel for a person convicted of crime and sentenced to imprisonment in the penitentiary, has called on me to know whether a punishment cannot be changed from imprisonment to a fine, and in addition to this, suggested the idea of a conditional pardon, a subject concerning which you and I had occasion to confer in the case of another person some months since.

In a recent letter which I wrote to you on April 17, 1915, in response to an inquiry from you as to whether you could commute the punishment of imprisonment to the payment of a fine, I took the position that this was not properly within your power as it would be an invasion of the jurisdiction of the court as to fixing the nature of punishment, but the idea of accomplishing practically the same result by a conditional pardon was not suggested by your question, nor did it occur to my mind, although perhaps I ought to have thought of it.

On the authority of the case of *Ex parte Wells*, 18 Howard, 308, I believe that you have the power to extend to the convict in question a conditional pardon, the condition being that he shall submit to a punishment different from that imposed by the court. In the case of *Wells*, it appears that he was convicted of murder and sentenced to be hanged and that President Fillmore granted him a conditional pardon, the condition being that he be imprisoned during his natural life. Afterwards he sought to be released upon habeas corpus and it was contended on his behalf that the pardon was valid to remit entirely the sentence of the court for his execution, and that the condition annexed was illegal because the President, in granting such a pardon, legislated a new punishment into existence and sentenced the convict to suffer it. The court, however, held against this contention and in an opinion of considerable length, reviewed the pardoning power at common law as well as in the United States and supported the validity of the condition imposed, accepted by *Wells*.

{*87} In the light of this case, I am of opinion that you could properly give to a convict sentenced to imprisonment, a pardon to which should be annexed a condition that he should make a fine to the State of New Mexico, and, upon the payment of that fine, he could be discharged.