Opinion No. 55-6156

May 6, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: E. B. Swope, Warden, New Mexico State Penitentiary and Wayne Collins, Secretary, New Mexico Board of Parole, P. O. Box 1059, Santa Fe, New Mexico

On April 11, 1955, this office received from Mr. Collins a request for opinion concerning certain matters touching upon the application and effect of the new Parole Act. On April 22, Mr. Collins, in a supplemental request, raised several other questions on the same subject. Mr. Swope, in an original request received April 22, 1955 and supplemental request received April 26, 1955, requested the opinion of this office on questions relating to the same matters. Since all of the questions raised are in connection with the new Parole Act and several other statutes touching upon release and parole of prisoners, I am taking the liberty of consolidating your requests for the purpose of this opinion.

The inquiries in your requests are summarized as follows:

1. Does the new Parole Act apply to all prisoners now in the Penitentiary?

2. Does the Parole Board, under the new Parole Act, have the authority to fix the sentence within the minimum and maximum imposed by the sentencing court?

3. Are the "good time" statutes still in effect, and, if so, what is their proper application in connection with the new Parole Act?

4. Is § 41-7-1, N.M.S.A., 1953, repealed by implication?

5. Is it necessary for the Parole Board, under the new Parole Act, to set all minimum dates for release?

6. Is the Penitentiary authorized to release an inmate when his minimum sentence has expired?

7. If "good time" is still in effect, may the Penitentiary release an inmate prior to the expiration of his minimum sentence?

8. If the Parole Board sets the minimum sentence, may the Penitentiary give the inmate credit for "good time" earned and release him prior to date set for Parole Board for release?

9. Since § 41-17-10, N.M.S.A., 1953, has been repealed, are those inmates who were sentenced when this statute was in effect and under that statute required to serve their maximum sentence eligible for parole under the new Act?

Before answering the questions presented, it may be helpful to examine prior practices in connection with parole and discharge of inmates. It is my understanding that prior to the passage of the new Parole Act, Chapter 232, Laws of 1955, which took effect March 26, 1955, inmates upon entering the Penitentiary were given tentative release dates. This date was fixed by computation in advance of all "good time" which could possible be earned by him and this time subtracted from the minimum of the sentence imposed. This fixed the time at which an inmate could be released on parole. This, as I understand, had been the policy of the Parole Board for many years. The only exceptions, it seems, were made where inmates had twice previously served terms, and for that reason these were ineligible for parole under the now repealed § 41-17-10, N.M.S.A., 1953. Further, I understand that in many cases where a sentence prescribing a minimum and maximum term of imprisonment was imposed, the minimum was commuted, i.e. made shorter, by order of the Governor in order to advance the eligible date for parole.

It is further helpful at this point to examine the policies above in connection with the statutes on "good time", "indeterminate sentencing" statutes, and parole statutes in existence prior to the passage of the new Parole Act.

In 1909, our first "good time" statute was passed. This statute is now § 42-1-54, N.M.S.A., 1953. The second "good time" statute was passed in 1913. This is now § 42-1-55, N.M.S.A., 1953. The latter permits additional deductions to inmates engaged in certain occupations. These two statutes read as follows:

"42-1-54. Deduction from sentence for good behavior. -- Every convict imprisoned in the penitentiary and who has (performed) or shall perform faithfully the duties assigned to him during his or her imprisonment therein, and shall during the whole of said time have been of uniform good behavior and complied with the rules and regulations of the penitentiary, shall be entitled to a deduction from the time of his sentence for the respective years thereof, and proportionately for any part of a year, to-wit: For the first year, one (1) month; for the second year, two (2) months; for the third year, three (3) months; for the fourth year, four (4) months; for the fifth year, five (5) months; for the sixth year and each succeeding year, six (6) months."

"42-1-55. Additional deductions. -- All state convicts confined in the state penitentiary who are of good conduct who work as mechanics, foremen, assistant storekeepers, trusties, and others who work outside the walls of the penitentiary, shall receive in addition to the regular good time, ten (10) days per month additional while working as mechanics, foremen, assistant storekeeper, or trusty or while working outside the walls of the penitentiary."

At the same time that the first of our present "good time" statutes was passed, 1909, § 41-17-1, N.M.S.A., 1953, was also enacted, and reads as follows:

"Penitentiary sentence -- Length -- Release -- Suspension of sentence -- Breach of conditions. -- Every person who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, if judgment be not suspended or a new trial granted, shall be sentenced to the penitentiary. The court in imposing such sentence shall fix the maximum and minimum duration of the same. The term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term fixed by the court. The release of such person shall be determined as hereinafter provided: Provided, that the court may, in its discretion, suspend any sentence imposed upon any person convicted of a felony involving a specific criminal intent, unless such person has previously been convicted of a felony involving a specific criminal intent, upon such terms and conditions as it shall deem proper, and such sentence shall go into effect upon order of the court upon a breach of any of such terms or conditions by the person convicted."

This statute is one of the several forms of "indeterminate sentencing" laws. This statute, it has been held by our Supreme Court, invested the courts with the discretion to impose a sentence with minimums and maximums different than those prescribed by the penalty sections of the statutes defining particular crimes so long as the minimum and maximum imposed were within the limits prescribed in each statute, for example, where the penalty prescribed for a particular crime is one to three years, the Court, under § 41-17-1 as now written, may sentence for a period of one to two years, two to three years, or even not less than three nor more than three years, or any other combination between one and three years. State v. Davisson, 28 N.M. 653, 217 P. 240.

Section 41-17-1, N.M.S.A., 1953, was amended at the last session of our Legislature and as amended will take effect June 10, 1955. It reads:

"Penitentiary sentence -- Length -- Release -- Suspension of Sentence -- Breach of conditions: -- Every person who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, if judgment be not suspended or a new trial granted, shall be sentenced to the penitentiary. The court in imposing such sentence shall sentence the person for the term as prescribed by law for the particular crime of which he was convicted. The term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term fixed by law. The release of such person shall be as provided by law: Provided, that the court may, in its discretion, suspend any sentence imposed upon any person convicted of a felony involving a specific criminal intent, unless such person has previously been convicted of a felony involving a specific criminal intent, upon such terms and conditions as it shall deem proper, and such sentence shall go into effect upon order of the court upon a breach of such terms or conditions by the person convicted."

Section 41-17-6 and 41-17-10, N.M.S.A., 1953, were passed at the same time that the first "good time" statute was passed, 1909. These provided that inmates could be

paroled after service of their minimum sentences. Thus, we have "good time" statutes, so-called "indeterminate sentencing" and parole statutes being administered together. The practices indicated above have not, in the opinion of this office, conformed in all details to law.

Under the law, this system required administration as follows:

An inmate, as a matter of right, is allowed to earn time which must be deducted, if not forfeited under § 42-1-57, N.M.S.A., 1953, from his sentence. That the "good time" may be earned as a matter of right is apparent from the wording of the statutes. See Orme v. Rogers, (Ariz.) 260 P. 199; Beaty v. Shute, 54 Ariz. 339, 95 P. 2d 563.

Although in some jurisdictions it has been determined that "good time" statutes and "indeterminate sentencing" laws are incompatible and therefore the passage of "indeterminate sentencing" laws repeals by implication "good time" statutes, State v. Kinnear, (Wash.) 261 P. 795; McCoy v. Reid, (Ind.) 83 N.E. 1086, nevertheless, in New Mexico the Attorney General ruled in 1910 that our form of "indeterminate sentencing" statute was compatible with the then existing "good time" statute. Attorney General's Opinions 1909-1912, page 147. This opinion is lent further support by the passage of § 42-1-55, N.M.S.A., 1953, the second "good time" statute, in 1913.

The view that "good behavior" statutes and "indeterminate sentencing" laws are compatible is also supported by authority in other jurisdictions. Orme v. Rogers, supra.

In § 41-17-6, N.M.S.A., 1953, one of the parole statutes which has now been repealed, it was provided that the Parole Board could establish such rules under which inmates ". . . . may be allowed to go upon parole outside the penitentiary building and enclosure (one of which shall be the total abstinence from alcoholic liquors as a beverage), after having served the minimum term of his sentence, but to remain while on parole in the legal custody and under the control of the prison board and subject at any time to be taken back within the enclosures of said penitentiary; . . . .". Clearly, it was a completely discretionary matter with the Parole Board as to whether or not an inmate should be paroled. Parole upon service of the minimum time was thus a matter of grace. Inmates could not demand it as a matter of right. Where then did the "good time" earned by an inmate as a matter of right fit into this framework? The only conclusion is that such deduction from "good time" could be made against the maximum of his sentence. Prior to this release upon parole after service of the minimum was a matter of grace. Upon reaching of his maximum, less "good time" given by the statute, he was entitled to not merely release on parole, but full and complete discharge by virtue of complete service of his sentence.

The above result and reasoning is lent support by authority in Arizona where the "indeterminate sentencing" laws, "good time" statutes and parole system closely resemble ours. A portion of the opinion in Orme v. Rogers, supra, is at this point helpful:

"In view of the course of legislation in the state of Arizona above recited, as examined in the light of the general history of criminology and the theories applying thereto, we are fully convinced that when the rule for good conduct time was first laid down it was given to the prisoner as a matter of **absolute right,** to be applied only in cancellation of the **definite debt he was held to owe the state,** and that such rule has never been changed. We are of the opinion that counsel for petitioner has been misled by the erroneous view that the so-called 'minimum sentence' is, as a matter of law, a period fixed at which some portion of the debt which the law assumes the prisoner owes to the state is canceled. As we have pointed out, this is not true. Under the Indeterminate Sentence Law, the only time at which the prisoner could ever claim his debt to the state is satisfied as of right is the expiration of the maximum period fixed by his sentence, less such good conduct time as may be given by the statute. The so-called 'minimum sentence' is, and has been since its inception, merely a period at which, and not before, as a matter of grace and not of right, the prisoner may be allowed to serve the balance of his sentence outside the walls of the penitentiary under such circumstances and conditions as the authorities may provide, or be discharged, but that the only **right** which such minimum period gives him is the right to **request** from the proper authorities such mitigation of his sentence."

That heretofore prisoners upon completion of their minimum sentence less "good time" have been released upon parole does not change our opinion here. Parole Board policy does not change the law, and although it is difficult for this office to understand upon what grounds prisoners were released on expiration of their minimum less "good time" earned, nevertheless since, under the new Parole Act, eligibility for parole is clearly defined I do not undertake to examine further this practice.

With the above in mind, we turn now to your inquiries.

QUESTION NO. 1: This question is answered in the affirmative. As will be shown later the statutes on "good time" have not been repealed and are still in effect. The only possible argument against application of the new Parole Act to those inmates convicted and sentenced prior to its enactment would be that it had an **ex post facto** effect. Under the construction placed upon it here and the "good time" statutes, it is impossible for me to see how any inmate could be prejudiced thereby. Parole, as mentioned above, is a matter of grace accorded by the State upon such terms and conditions as it sees fit. It is a privilege granted to an inmate to serve his sentence outside of prison. See Ex parte Vigil, 24 N.M. 640, 175 P. 713. If then there be no vested right in parole, then certainly the procedure by which it is granted may be changed by the State at its pleasure. This is exactly what our Legislature has done. The new Parole Act merely changes the manner in which parole is to be granted. If anything, the new Parole Act makes it easier for those worthy of parole to secure it. Those prisoners having served two prior terms are not eligible for parole under the now repealed § 41-17-10 are now eligible for parole as any other inmate. Certainly this group cannot complain. As stated above, those who have served their maximum terms less "good time" were entitled to final discharge as a matter of right. It is the opinion of this office that the same situation exists under the new Parole Act as to this particular group. This group, therefore, also cannot complain.

Further, the provisions in the new Act shortens the period at the end of which an inmate becomes eligible for parole. Where before, service of the minimum legally was essential, under the new Act, eligibility to request parole is granted upon service of a fraction of that minimum.

QUESTION NO. 2: Strictly speaking, the Parole Board under the new Act does not have the authority to fix the sentence in advance within the minimum and the maximum terms imposed by the court, although under certain circumstances the Parole Board may finally discharge a paroled inmate. Chapter 232, § 19, Laws of 1955, provides, in part:

". . . . When a prisoner on parole has performed the obligations of his release for such time as shall satisfy the board that his final release is not incompatible with his welfare and that of society, the board may make a final order of discharge and issue a certificate of discharge to the prisoner; but no such order of discharge shall be made in any case within a period of less than one year after the date of release except where the sentence expires earlier thereto."

The power to finally discharge is thus given the Parole Board when the above conditions are present. This, however, is quite different from saying that the Parole Board has the general authority to set or fix a definite sentence in advance within the minimum and maximum of the sentence imposed. The Parole Board cannot know in advance whether or not the "obligations of his release" are going to be complied with. In a given case "such time as shall satisfy the board that his final release is not incompatible with his welfare and that of society" may be longer or shorter than that in another case. In advance of this period, the Parole Board cannot foretell whether or not a discharge will be finally granted.

QUESTION NO. 3: The "good time" statutes are still in effect. As shown above, this and other states have administered "indeterminate sentencing" statutes, "good behavior" statutes and parole laws together. Since no express repeal of §§ 42-1-54 and 42-1-55, N.M.S.A., 1953, is contained in Chapter 232, Laws of 1955, the new Parole Act, and since repeals by implication are not favored, State v. Davisson, supra, it is the opinion of this office that these two sections are still in effect. As under the "indeterminate sentencing" statute, before amendment, and the parole statutes which have been repealed, it is the opinion of this office that the "good time" statutes can be administered together with the new Parole Act and the "indeterminate sentencing" statute, as amended. "Good time" earned under these statutes, as before, may only be deducted from the maximum and not the minimum of the sentence.

QUESTION NO. 4: Section 41-17-1, N.M.S.A., 1953, is not repealed by implication or otherwise. That section has been amended as indicated above and will, as amended, be effective June 10, 1955.

QUESTION NO. 5: It is not necessary for the Parole Board to set minimum dates of release under the new Parole Act. I can find nothing in the new Parole Act which would require that this be done. It may perhaps be that as a matter of policy the Parole Board

may deem it advisable to set tentative dates for release on parole, and possibly even set tentative dates for final discharges after an inmate has gone on parole. From the standpoint of morale, this probably would be good policy. Further, I cannot see why a prisoner could not be given the tentative date at which he is eligible for final discharge after service of his maximum less "good time" which inmate can earn, but here also I see no obligation upon either the Parole Board or the Penitentiary to set these dates.

QUESTION NO. 6: Without action of the Parole Board the Penitentiary may not release an inmate upon the expiration of his minimum sentence. As indicated in answer to Question No. 1 above, the Penitentiary without the action of the Parole Board can release only upon expiration of the maximum sentence less "good time". This release, however, is a final discharge. Prior to this a prisoner can go on parole, but only by action of the Parole Board. The only other manner in which a prisoner could be released would be through executive pardon.

QUESTION NO. 7: The "good time" is still in effect but, as already noted, it is to be applied only for purposes of final discharge and only as a deduction from the maximum sentence. Release, therefore, may be only upon parole and upon action of the Parole Board. Parole, as indicated by Chapter 232, § 13, Laws of 1955, may be granted even prior to service of the minimum sentence.

QUESTION NO. 8: The Parole Board does not set the minimum sentence. The sentence is prescribed by the court in which the inmate was convicted. As noted in the answer to Question No. 5, the Parole Board may, but does not have to, set tentative dates for release upon parole. However, "good time" may not be deducted from tentative parole release date so as to allow inmate release on parole prior to the time the Parole Board actually grants it.

QUESTION NO. 9: Section 41-17-10, N.M.S.A., 1953, has been expressly repealed by Chapter 232, § 25, Laws of 1955. The repealed section provided, among other things, that inmates who had served two previous terms were not eligible for parole under the old parole statutes. There is nothing in Chapter 232, Laws of 1955, which now prohibits the parole of this class of prisoners. They are now eligible for parole as any other inmate. That they may have served other terms of imprisonment may be taken into consideration by the Parole Board as to whether or not a parole would be granted in a particular case, but they are eligible to appear before the Board in conformity with Chapter 232, § 13, Laws of 1955.

I trust that this helps to answer your inquiries.

By Santiago E. Campos

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