

Opinion No. 39-3273

September 11, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. John B. McManus, Superintendent, New Mexico State Penitentiary, Santa Fe, New Mexico.

{*103} In your letter of September 9 you inquire whether you may release a prisoner who was committed to the penitentiary upon a commitment dated August 24, 1939, and who has been confined in the penitentiary since that date, upon an order of court now entered suspending that sentence.

It is my opinion that a sentence may not be suspended by a district judge after commitment. The power of district judges to suspend sentence under Section 130-163, 1929 Compilation, was upheld in *ex parte Bates* 20 N.M. 542, but it was pointed out in the opinion that the suspension in that case was a part of the judgment itself, and that "it was not an attempt to suspend a judgment previously imposed."

Assuming that there is a period during which the court has power to change its judgment and that that period has not expired, there is considerable question as to the right of the court even at such time to set aside or modify its original judgment after commitment has issued. The Supreme Court of this state has not had occasion to pass on that question. However, without adjudication of that question in the Supreme Court to the contrary, it is my opinion that no such right exists after commitment has issued and the prisoner has begun to serve his sentence in the penitentiary. See *Emerson vs. Boyles*, 280 S.W. 1005 44 A.L.R. 1193, and annotation 44 A.L.R. 1203; 16 C.J. 1314.

In the above case, as in New Mexico, there was a statute authorizing suspension of sentence but the court held:

"When the court rendered a judgment sentencing the defendant to a term in the state penitentiary, and issued its commitment directing the sheriff to transport the defendant to the penitentiary for the purpose of serving his sentence, and when the defendant had served a part of the sentence, the court lost jurisdiction over the case and could not even at the same term set aside its original sentence and postpone the pronouncement {*104} of sentence under the act of 1923 just referred to."

Of course, there are courts which have held, as in the Federal court, that such recall and modification of the original judgment may be made so long as the modification does not result in an increase of punishment.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.