

## Opinion No. 42-4072

April 21, 1942

**BY:** EDWARD P. CHASE, Attorney General

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

{\*184} This will acknowledge receipt of your letter of April 18 wherein you request our opinion upon the following three questions:

"1. Where a defendant has been sentenced on three different counts and sentences are as follows:

1 to 1 year and costs on first count, 1 to 1 year and costs on second count, and 1 to 1 year and costs on the third count, said sentences to run consecutively and is unable to pay the fines or costs. Does such defendant have to serve thirty days for each said fine or costs or thirty days for all three fines or costs?

"2. Where a defendant has been transferred from the New Mexico Industrial School to the State Penitentiary because he is an improper subject for reformation and instruction at said school, commitment reading, he be transferred to penitentiary and confined therein until he reaches the age of twenty-one years unless sooner released by order of the court. Does said court still maintain jurisdiction over defendant once he has been transferred to this institution?

"3. What are the time limits of a sentencing judge in regard to modifying a sentence of imprisonment after said sentence has been imposed?"

In connection with your first question, we turn to the provisions of Section 130-173, New Mexico Statutes Annotated, 1929 Compilation, which reads as follows, to-wit:

"All convicts sentenced to the state penitentiary who have a fine or costs or both attached to such sentence shall not be required to serve more than thirty days for such fine or costs."

From the facts submitted under question 1, I assume that the sentence on all three counts arose out of one trial and conviction. This being true, I am of the opinion that the defendant would, under our statute, only be compelled to serve one thirty-day period. True, the law on this question is not as clear as it might be, but until the Legislature sees fit to clear up the matter, it is my belief that the doubt should be resolved in favor of the inmate. The court from which the defendant is sentenced may, if it sees fit to do so at the time of sentence, impose additional time to take care of this situation.

In view of the facts submitted, your second question causes us considerable concern and is difficult to dogmatically answer. As you are aware, there are two classes of individuals who may be committed to the New Mexico Industrial School: first, any boy under eighteen (18) years of age who is convicted of any offense less than murder or manslaughter, and, second, any boy under eighteen (18) years of age who is adjudged to be a juvenile delinquent.

{\*185} As to the first class, by reason of the provisions of Article V, Section 6, of the New Mexico Constitution, I conclude that the Court is entirely without authority to parole or release an inmate of the New Mexico Industrial School whether said inmate has been removed to the State Penitentiary or not and it is necessary for such an inmate to complete his sentence in either institution unless pardoned by the Governor.

This ruling may be subject to question but this office, in Opinion No. 3170, rendered in 1939, made a similar ruling and we see no reason at this time to overrule the same.

As to the second class of inmates, i. e., those adjudged to be juvenile delinquents, I believe a different ruling to apply. Such a youth is specifically made a ward of the Court, Section 35-4105, 1929 Code, and this section of the law further provides:

"In no case shall an order adjudging a person to be a ward of the juvenile court be deemed to be a conviction of crime."

Section 130-601, 1929 Code, in speaking of when the Court may commit a boy under eighteen (18) for juvenile delinquency to the New Mexico Industrial School, we find this language:

"The Court may \* \* \* order him committed to said School until he shall attain the age of twenty-one (21) years, or until he shall sooner be paroled, released or removed by order of the court."

Your attention is also directed to Section 35-4109, New Mexico Statutes Annotated, 1929 Compilation, which gives the court further supervision and powers over juvenile delinquents.

Section 130-604 of the 1929 Code grants unto the court the power to order certain inmates of the New Mexico Industrial School to be transferred from said school under certain circumstances and be incarcerated in the State Penitentiary.

Reading this latter section alone, it might appear at first blush that once the court did this, he then lost the powers of any further supervision over such an inmate. Taking into consideration, however, the fact that when a boy under eighteen (18) is adjudged to be a juvenile delinquent, the statute specifically declares that such a youth shall not be deemed to have been convicted of a crime, I do not believe it was the intent of the Legislature, when they enacted Section 130-604, 1929 Code, to unequivocally divest the juvenile court of all further supervision over the juvenile delinquent. It occurs to me

that in some instances a juvenile delinquent who is committed to the State Penitentiary, which no doubt invokes more severe discipline than the New Mexico Industrial School, that a short time in the State Penitentiary would be sufficient to reform such a juvenile delinquent or, in any event, make him a fit subject to be returned to the New Mexico Industrial School. In any event, it is my opinion that your question should be answered in the affirmative, as to the second class of inmates.

As to your third question, this office has heretofore ruled that the sentencing judge may not modify a sentence of imprisonment in the State Penitentiary after commitment has issued. I enclose copy of Attorney General's Opinion No. 3273.

Trusting that the foregoing sufficiently answers your inquiry, I am

By HOWARD F. HOUK,

Asst. Atty. General