

Opinion No. 45-4792

September 17, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Howell Gage Warden State Penitentiary Santa Fe, New Mexico

{*133} I have your letter of August 29, 1945, wherein you request an opinion of this office in connection with the following fact situation:

A person was convicted of a felony and sentenced to the New Mexico State Penitentiary for a period of years. Prior to the expiration of this sentence, upon request of the United States District Attorney for the Northern District of Texas, the convict was released to the United States in order that he could be {*134} tried for a federal offense. It was agreed at the time that if the person should be convicted that he would serve his federal sentence and then be returned to complete his sentence in New Mexico. It was further agreed that if he should not be convicted he would forthwith be returned to the State Penitentiary to complete his sentence. The person was convicted in the Federal Court of a felony and served seven years in the Federal Penitentiary. He has now completed this sentence and has been returned to New Mexico to finish the prior New Mexico sentence.

In view of the foregoing facts, you request an opinion of this office concerning whether the federal and state sentences ran concurrently and, therefore, whether or not the person is entitled to credit on his New Mexico sentence for the seven years spent in a Federal Penitentiary. This question was originally submitted to you by the attorney representing the particular convict who has cited to this office, in support of his contention that the two sentences should run concurrently, an annotation in 5 A.L.R. 380 and 53 A.L.R. 625.

It is noted that the various cases cited in these annotations support contentions made, which contentions are further supported by other cases cited by this attorney. We do not attempt to determine whether as a general matter the rules as determined by the cases would justify the contention that the sentences should run concurrently for the reason that Section 45-159 of the 1941 Compilation seems to definitely determine this matter in New Mexico.

It is further noted that none of the cases contained in the foregoing annotations considered a statutory provision such as we have here in New Mexico, and therefore such cases cannot be considered in point in determining our question. Section 45-159 provides:

"Whenever any convict shall have been committed under several convictions with separate sentences, they shall be construed as one continuous sentence for the full length of all the sentences combined."

In view of the foregoing provision of the statute, it is our opinion that the person involved is not entitled to any credit on his New Mexico sentence by reason of time served in a federal penitentiary under a different sentence.

By HARRY L. BIGBEE,

Asst. Atty. General