

Opinion No. 55-6091

January 31, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Morris Abram, Warden, New Mexico State Penitentiary, P. O. Box 1059, Santa Fe, New Mexico

This office has received your request for an opinion on a parole matter arising out of the following fact situation: Subject was convicted on October 21, 1952 and sentenced to serve in the penitentiary an indeterminate term of four to five years. Subsequently, on November 21, 1952, subject, who was already serving the above sentence in the penitentiary, was ordered returned to Las Cruces to stand trial for another offense. This trial resulted in conviction and another indeterminate sentence of from fifty to ninety years was imposed.

As I understand it, two register numbers have been issued prisoner, 14,267 under the first commitment, and 14,301 on the second commitment. Further, subject became eligible for parole on first sentence on December 9, 1954, if the second sentence is not an impediment to grant of parole.

This raises the question upon which you desire our opinion, namely: In these circumstances, may subject be paroled on first sentence so that he may start service on his second sentence?

I am assuming that the second sentence does not prescribe that it is to be served concurrently with the first.

In order that this opinion may not in the future be misconstrued and applied to a situation very similar to this one, but actually different, I will first discuss briefly the circumstances contemplated by § 42-1-59, N.M.S.A., 1953, which statute reads:

"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."

Were the above section applicable here, the prisoner would be serving one sentence of from 54 to 95 years, the obvious manner in which indeterminate sentences are cumulated being the addition of the minimum and maximum sentences. See Pennsylvania, Act of June 25, 1937, P.L. 2093, 19 P.S. § 897, and New Jersey Revised Statutes, § 30: 4-123.10. The New Jersey and Pennsylvania statutes are in different language than the New Mexico statute above, but I believe the substance of all three is the same.

The statutes in New Jersey and Pennsylvania have been construed to apply solely to indeterminate sentences rendered in the same court and at the same time. Ex Parte Fitzpatrick, 9 N.J. Super. 511, 75 A. 2d 636. Thus, in the situation before us, the sentences being rendered at different times, the statute in New Mexico, upon the above authority, does not apply.

Thus, the sentences imposed upon subject are to be served consecutively. However, the fact that a second sentence is yet to be served does not preclude a prisoner from being eligible for parole upon the first sentence. See Commonwealth ex rel. Lynch v. Ashe, 182 A. 229; Commonwealth ex rel. Lewis v. Ashe, 7 A. 2d 296; Ex Parte Fitzpatrick, supra. In fact, if subject, after becoming eligible for parole on first sentence and before serving the maximum term thereunder, is to start serving second sentence, he **must** secure parole from the first sentence, else until the maximum of the first sentence is served he cannot begin serving his second sentence. Commonwealth ex rel. Lynch v. Ashe, supra; Commonwealth ex rel. Lewis v. Ashe, supra; Ex Parte Fitzpatrick, supra.

It should further be stated that § 41-17-10, N.M.S.A., 1953, will not preclude, in my opinion, the parole of subject herein. This statute is applicable to one who has already served two terms. I believe this statute prohibits parole of one who is serving his third term and has completed service on two other terms, but not one who is serving his second term.

It is therefore, the opinion of this office that subject mentioned in your letter may be paroled, if he otherwise qualifies and approval of the Prison Board is secured, on his first sentence and start serving his second sentence.

I trust that this answers your inquiry satisfactorily.

By Santiago E. Campos

Assistant Attorney General