**Opinion No. 55-6304**

October 25, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** E. B. Swope, Warden, Penitentiary of New Mexico, P. O. Box 1059, Santa Fe, New Mexico

We have your letter of October 6, 1955, in which you requested an opinion from this office upon the following facts:

(a) Homer C. Kelley sentenced seventy to ninety-nine years from Lea County on December 22, 1949.

(b) On March 8, 1952, the Santa Fe District Court released Kelley on Writ of Habeas Corpus to sheriff of Lea County.

(c) The State appealed the decision to the Supreme Court and the District Court was reversed February 11, 1953.

(d) The District Court pursuant to the Mandate of the Supreme Court issued an order remanding the Petitioner Kelley to the custody of the penitentiary and authorizing the taking of Kelley into custody.

(e) That from October 1952 until June 6, 1955 Kelley was confined in the Mental Hospital at Las Vegas, New Mexico.

(f) On April 19, 1955 the Mental Hospital notified the penitentiary that Kelley was being therein confined and was to be returned to the penitentiary under the order of the District Court of Santa Fe County pursuant to the Mandate of the Supreme Court reversing the Habeas Corpus case.

(g) On June 6, 1955 Kelley was returned to the penitentiary.

Your question is whether the time from the granting of the Writ of Habeas Corpus to the date Kelley was returned to your custody should be counted as time served on the sentence.

We are of the opinion that none of the time from the date the Writ of Habeas Corpus was issued until the date Kelley was actually returned should be counted as time served on the sentence. During this time the penitentiary did not exercise any control over Kelley. From the date the Writ of Habeas Corpus was issued until the order was issued by the District Court returning Kelley to the control and custody of the penitentiary, the penitentiary had no right to exercise its authority over Kelley. As to this time he was a

free man so far as the penitentiary was concerned. Certainly this time could not be considered as time served on the sentence.

At the time this District Court order was issued directing Kelley's return to the penitentiary, he was under a commitment to the State Mental Hospital at Las Vegas. Unless he was in such a condition as to entitle him to release from that institution, the penitentiary could not have taken custody of Kelley. All that could have been done was place a hold order on Kelley so that the order from the District Court of Santa Fe County could have been executed upon Kelley's release from the State Mental Hospital. The penitentiary still could not exercise control over the person of Kelley or take him into custody.

The situation you present is much like a prisoner on parole where there has been a parole violation. The law prior to Chapter 232, Laws 1955, being Section 41-17-9, N.M.S.A., 1953, reads as follows:

"If any prisoner shall violate the conditions of his parole or release as fixed by the prison board, he shall be declared a delinquent, and shall thereafter be treated as an escaped prisoner owing service to the state and shall be liable, when arrested, to serve out the unexpired term of his maximum, possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any portion or part of the time served . ."

It is to be noted that from the time of the declared delinquency to the time of arrest this time does not count as service of sentence. This is much the same as Kelley's situation inasmuch as the time from the release on Habeas Corpus to the time of his arrest and return to custody is like the time which did not count under the terms of this statute.

It is further to be noted that that under Section 17, Chapter 232, Laws 1955, whether this time from the issuance of a warrant for violation of the parole to the date of arrest of the parole violator is to be counted as time served is to be determined by the Parole Board.

Another analogous situation is where after conviction, but prior to sentence, the defendant becomes insane. Under Common Law punishment cannot be imposed. See In Re Smith 25 N.M. 48. After recovery the sentence is pronounced, however, it could not be contended that the time during which the party was insane was to be counted as part of the sentence.

For the reasons herein stated, we are of the opinion that the time from the issuance of the Writ of Habeas Corpus releasing Kelley until he was returned to your custody should not be counted as time served on his sentence.

By: Paul L. Billhymer

Assistant Attorney General