Opinion No. 61-59

July 12, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Warden Harold A. Cox, P. O. Box 1059, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. When a person has been sentenced to two terms of life imprisonment must he serve twenty years before becoming eligible for a parole hearing?

2. When two consecutive sentences have been imposed, the total minimum of which exceeds thirty years, does the person have to serve fourteen years prior to becoming eligible for a parole hearing?

3. If a life sentence is supplemented by one or more sentences with definite minimums, when is the person eligible for a parole hearing?

CONCLUSIONS

1. No.

2. No.

3. See Analysis.

OPINION

ANALYSIS

The questions which you pose necessitate a study of various legislative enactments to determine if they can be harmonized - particularly the consecutive sentence statute (42-1-59), the indeterminate sentence and parole provisions (specifically 41-17-24) and the "in custody" parole statute (4--17-24.1).

Since the time of enactment of these pertinent statutes varies from 1889 to 1959, it is difficult, and in part impossible, to give full effect to each. Nonetheless, to the extent that it is possible to do so, the provisions of each must be complied with. **State ex rel. Rives v. Herring,** 57 N.M. 600, 261 P. 2d 442.

Your first inquiry is whether a person who has been assessed two life sentences must serve twenty years prior to being eligible for a parole hearing. The answer is no.

The first statutory provision to be considered is Section 42-1-59, N.M.S.A., 1953 Compilation, which provides as follows:

"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."

The next pertinent statute is Section 41-17-24 (4), N.M.S.A., 1953 Compilation (P.S.), which provides that "prisoners sentenced to life imprisonment shall become eligible to appear before the parole board after they have served ten years." Now, no matter how many life sentences have been imposed upon an individual, he is still a "prisoner sentenced to life imprisonment." Consequently he is eligible to appear before the Parole Board after serving ten years. There is no statutory basis for holding that such person must serve twenty years before being so eligible.

While, as will be discussed in more detail subsequently, Section 42-1-59, supra, does contemplate adding minimum sentences for purposes of determining the parole eligibility date, still the minimum sentence in the case of two life terms is not twenty years. It is life.

Yet if a person who had been committed under two life sentences were eligible for an "outside" parole after ten years, violence would be done to the mandate of Section 42-1-59, supra.

Our belief is that one reason for the 1959 enactment of Section 41-17-24.1, N.M.S.A., 1953 Compilation (P.S.) was to cover this particular situation. This Section provides for "in custody" paroles in the penitentiary so that a prisoner can **begin to serve another sentence.** Thus while a person who has been assessed two life sentences is eligible for a parole hearing after ten years, it is our opinion that the only parole contemplated is an "in custody" parole. If granted, the prisoner begins service of his other life sentence. Admittedly at that point he is serving his two sentences concurrently rather than consecutively, this because while on parole he is still serving his first sentence and yet he has also begun "to serve another sentence within the penitentiary." To this slight extent Section 42-1-59 cannot be complied with.

As a practical matter a person committed under two life sentences cannot be granted an "outside" parole until he has served twenty years but he can be granted an "in custody" parole after serving ten years.

Your second inquiry relates to a situation where a person is committed under two separate sentences, each of which has a minimum and the total of the minimums equals or exceeds thirty years. Specifically, your question is whether such person must

serve fourteen years before becoming eligible for a parole hearing. Our opinion is in the negative.

While compliance with Section 42-1-59, supra, does necessitate the addition of minimum sentences in order to establish a parole hearing eligibility date, still, under the fact situation that you pose the prisoner would be eligible for a parole hearing after seven years.

We arrive at this conclusion because Section 41-17-24 (3), N.M.S.A., 1953 Compilation (P.S.) provides that persons sentenced to a minimum of thirty years are eligible to appear before the parole board after having served seven years.

Now after adding the minimum sentences to get a total minimum sentence of thirty years, the statute does not contemplate that the seven years be doubled to establish a parole hearing eligibility date.

Parole hearing eligibility dates are always determined by the statutory formula set forth in Section 41-17-24, supra, and in situations where the sentence contains both a minimum and a maximum, the eligibility date is contingent upon service of a specified portion of the minimum sentence.

We believe that when a person is committed under separate sentences each of which has a minimum term and maximum term, the minimum terms should be added together in establishing the parole hearing eligibility date. This procedure is the only rational method of reconciling Sections 42-1-59, supra, and 41-17-24, supra.

The only other way that the provisions of each of these two statutes could be applied would be to treat the minimum sentences separately. And if this were done, a person committed under two sentences would be eligible for parole on the first sentence at a specified time, and if paroled, he would then serve the remainder of the first sentence on parole. At that point he would then have to be returned to the penitentiary to begin service of the second sentence. As we read the applicable statutes, this was never the intention of the legislature.

Your third question asks when a person who has been sentenced to life imprisonment and who also has received a sentence with a minimum and a maximum is eligible for a parole hearing.

The answer is much the same as that given in response to question 1. However, the parole hearing eligibility date in this situation depends upon which sentence he is to serve first. And this in turn must be determined from the commitment order. If his minimum sentence is ten years on one conviction, and life imprisonment on the other, and he is first to serve the sentence which has a ten year minimum, he is eligible for a parole hearing after serving one-third of ten years. Section 41-17-24 (2), supra. At that point he can be granted an "in custody" parole to begin service of the life sentence. Ten years thereafter he is eligible for an "outside" parole. Section 41-17-24 (4), supra.

Conversely, if he he is to serve the life sentence first, he is eligible for a parole hearing after the service of ten years. He can be granted an "in custody" parole to begin service of the sentence which carries a ten year minimum. Three and a third years thereafter he is eligible for an "outside" parole.