

## Opinion No. 31-144

May 4, 1931

**BY:** Frank H. Patton, Assistant Attorney General

**TO:** Mr. E. B. Swope, Supt., State Penitentiary, Santa Fe, New Mexico.

{\*70} Your letter of May 1st presents a very interesting problem. We have this situation: Donald Myers was, by the Honorable Harry L. Patton, after having been found guilty of forgery, sentenced to the State Penitentiary to serve a term of not less than four and not more than five years. The Warrant or Commitment was issued as of April 1st, Myers was received by you and since that time has been serving his sentence. On April 29th, the Court entered an order setting aside or vacating the sentence aforesaid, notified you of it and said order further provided that you, as Superintendent of the Penitentiary, should hold him as a county prisoner of Quay County subject to the further order of the Court. You request an opinion as to your position.

It is our opinion, that when Myers was committed and commenced serving his sentence, the Court sentencing him lost all jurisdiction in the matter, and his order vacating the sentence is void. It follows therefore that said Myers stands regularly committed, is an inmate of the penitentiary and must so remain until sentence is completely served or until paroled or pardoned by the power to so do vested in the Governor of New Mexico.

It is true that the rule is that: "During the term and before sentence is put into execution, it may be modified or vacated by the Court." Standard Encyclopedia of Procedure, Vol. 23 Page 465, and {\*71} supported by almost unanimous authority.

There is a limit, also, to the time when such power exists.

"No power to modify or set aside the sentence exists after it has become final by lapse of time, or after term has expired, or the sentence gone into effect." 23 Standard Encyclopedia of Procedure 466, Supported by cases from U. S. Supreme Court, Colorado, Georgia, Iowa, Illinois, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee and Texas.

In the present case we need not concern ourselves as to whether time has lapsed or whether the term of Court had expired, nor need we consider the 30 day power of Courts in this State over their judgments as given by Section 105-805 of the 1929 Code, for latter only applies to nonjury cases, as the facts are that Myers has begun to serve his sentence putting the same into effect. That brings us squarely within the rule hereinabove set forth, forcing us to the conclusion set forth in the second paragraph of this letter.

If the power of courts over sentences were not limited, they would encroach upon the power of another branch of our government, the Executive branch, in which solely is vested the power of pardon or reprieve. Courts have no such power in this State, as we view it.