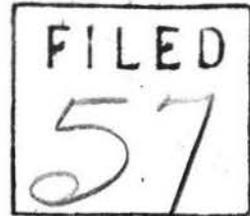


PAROLES: Time remaining to be served under a parole where there is a second conviction during such time.

June 9, 1938.

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Honorable J. E. Matthews, Director,  
Department of Penal Institutions,  
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office as to whether one John Hughes, convict No. 35135, now confined in the Missouri State Penitentiary, is entitled to a discharge therefrom based upon the facts set forth in a letter from the Penal Board to you, which you attach to your letter, and which facts, so far as pertinent to the question here, we quote as follows:

"Hughes was sentenced May 8, 1929, from Jackson County, to serve 5 years for Grand Larceny, and was paroled by Governor Caulfield September 20, 1930. Under the law his full time would have expired May 7, 1934, and, under the terms of his parole he was subject to re-incarceration for any violation of same up to the expiration of the full time of his sentence. His three-fourths time under this sentence expired February 12, 1933.

"On March 24, 1933, he was again convicted of Burglary and Larceny and was sentenced to serve 5 years from that date. He served the 7/12 of this sentence, under Reg. #42734, and was then required to begin serving the remainder of his term under #35135, and this time has not expired.

"It may be of interest to note that at the time he was paroled the requirements of the Board in cases of broken paroles was that full time should be served. About June, 1934, the Board changed the parole requirement from full time to three-fourths time, and since that time if one has not violated his parole prior to the expiration of the three-fourths time he is automatically released. If this rule had been in force when Hughes was paroled he would not now be serving.

"The only question involved here seems to be the authority of the Board to fix the terms of a parole, with the consent of the Governor, at full time instead of three-fourths time."

In addition to the above facts, there appears from a notation attached to your correspondence the following:

"Parole revoked 6-16-33. Returned under #42734" (Hughes' number under the second or last conviction).

It further appears from our investigation of the parole files in the office of the Secretary of State that one of the conditions of the Governor's parole was that the parole was without benefit of the provisions of the three-fourths law.

Under the Constitution and statutes of this state, the Governor is the only one given the power to pardon and prescribe the conditions of a parole granted by him to anyone who is confined in the penitentiary at the time.

The Supreme Court of this state in the case of State v. Asher, 246 S. W. 1. c. 193, has held that the term or word "pardon" as used in the Constitution and statutes comprehends and is to be construed as including the term "parole". Hence, the Governor of this state is authorized to parole with such conditions and under such

restrictions as he may think proper. One of the conditions attached to the parole in question is that Hughes was deprived of the benefit of the three-fourths rule provided for under Section 8442 of the 1929 statutes.

The authority of the Prison Board under the 1929 statutes and the Board of Probation and Paroles as created out of the 1937 Act is limited to making recommendations to the Governor concerning a parole, and the Governor is the only one authorized to grant and fix the terms. Hence, any rules made by the Board which might conflict either with the Constitution or statutory power of the Governor to grant a parole and fix the conditions thereof would be invalid.

From the two concluding paragraphs in the above quoted letter, we believe the writer thereof misconceives the question at issue here. In our judgment, in view of the valid conditions attached to Hughes' parole, the question is merely, has John Hughes served the time for the Larceny conviction for which he was sentenced on May 8, 1929? It is shown by the facts above that up to the time Hughes was paroled under the first sentence he had served one year, four months and twelve days, for which he is entitled to credit on his five-year term, thus leaving three years, seven months and eighteen days remaining of the five-year term to be served by reason of the conditions of his parole.

In our opinion, the following two cases are controlling here. In the case of *Ex parte Jacobs v. Crawford*, 308 Mo. 302, among the questions presented was the Governor's authority to prescribe the conditions of the parole and the alleged right of the paroled person to have deducted from his sentence the elapsed time between the granting of the parole and its revocation. The court said (l. c. 305-306) as follows:

"The power of the Governor in respect to pardons and paroles is declared in Section 8, Article V, of our Constitution. The first sentence of said section reads as follows: 'The Governor shall have power to grant reprieves, commutations

and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.'

"It will thus be seen that the Governor has the right to fix the conditions when he paroles a convicted person. All the power that the General Assembly has in the matter is to legislate concerning the manner of applying for pardons. Section 4144, Revised Statutes 1919, merely reiterates the language of the Constitution concerning the power of the Governor to grant pardons upon such conditions and under such restrictions as he may think proper."

The case of Ex Parte Lee, 287 Mo. 231, presents facts which are strikingly similar to the facts in question here, the facts in the Lee case (page 232) being as follows:

"The petitioner states that he is unlawfully detained in the Penitentiary; that he was convicted of a felony in the Circuit Court of Jackson County, August 2, 1915, and sentenced to a term of five years in the Penitentiary; that on April 24, 1917, he was paroled by the Governor; that on October 8, 1917, he was convicted of a felony in the Circuit Court of Jasper County and sentenced to a term of five years in the Penitentiary and was received there on November 13, 1917; that on November 20, 1917, the Governor revoked his parole; that on December 28, 1920, the prison authorities discharged him under the merit system from the Jasper County sentence, but are now illegally restraining him under the Jackson County sentence,

aforesaid; that upon the revocation of his parole said sentences became concurrent and he is now entitled to his discharge."

In the above case the petitioner's contention that his sentences, upon revocation of his parole, became concurrent was answered by the court (page 233-234) as follows:

"By Section 12543, Revised Statutes 1919, the Governor is authorized to grant commutations, paroles and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of Section 2292, and having been charged, tried and convicted of another offense while so at large 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

Hence, in the instant case, Hughes being convicted of a second offense while at large under his parole, the unserved part of his five-year term under the first offense did not commence to run until his discharge under the second offense.

In passing, we note that your records show that Hughes was required to serve the unexpired part of his first sentence commencing at the time of his discharge under the second conviction. In this we believe you are in error. That is to say, Hughes' second sentence should have been held in abeyance until he served his sentence under the first conviction. The same situation arose in the case of Ex Parte Lee, supra, wherein the court said as follows (page 234):

"It seems, however, that the Board of Prison Control made its records show that the petitioner was held under the conviction and sentence of the Jasper County Circuit Court from the time he was received under that sentence; that after the

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time he was entitled to his discharge from that sentence, the prison records show that he has been held under his first conviction to serve out the remainder of his term, dating from his parole. Under the provisions of Section 2292, the sentence for the conviction in the Circuit Court of Jasper County began at the expiration of the first sentence. The petitioner, however, has not been prejudiced by the mistaken views of the Board of Prison Control and can take no advantage of their erroneous system of bookkeeping. The law fixes the sequence of the terms of imprisonment. (Ex parte Jackson, 96 Mo. 116, 120.)"

Section 2292, referred to above, is now Section 12969, R. S. Mo. 1929, and you will see by this section that a second sentence, pronounced during the unexpired part of the first sentence, should be held in abeyance until the first sentence is fully complied with. We give you this for future reference.

CONCLUSION.

In view of the fact that at the time Hughes was discharged from the second conviction, to-wit, on or about February 24, 1936, there remained three years, seven months and eighteen days, or approximately such time, to be served by Hughes under his first sentence, he will not have complied with such first sentence until on or about the 12th day of October, 1939, and hence he is not at this time entitled to a discharge.

Yours very truly,

J. W. BUFFINGTON,  
Assistant Attorney General.

APPROVED:

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J. E. TAYLOR,  
(Acting) Attorney General.

JWB:HR