

BD. OF PROBATION &  
PAROLE

(1)

: Board of Probation & Parole has authority under the law  
: (Sec. 8992.39, Laws of Mo. 1945) to parole (release upon  
condition) an inmate of a correctional institution of the  
State of Mo., to the custody of the warden of a penal insti-  
tution in another State or to the warden of a U.S. Peniten-  
tiary; (2) If an inmate is paroled to a detainer said in-  
mate could be returned to the Missouri Penitentiary for a  
parole violation which occurred after his release from the  
out-of-state institution and  
before the expiration of the  
Missouri sentence.

May 7, 1948

Honorable Donald W. Bunker  
Executive Secretary  
Board of Probation and Parole  
Jefferson City, Missouri

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Dear Mr. Bunker:

Your opinion request of recent date reads as follows:

"The members of the Board of Probation and Parole should appreciate your opinion relative to their legal authority in the following situation:

"An inmate of the Missouri Penitentiary with a 'hold' or detainer placed against him by the warden of a penal institution in another State, or by the warden of a U.S. Penitentiary, is considered by the board to qualify for parole. The question: Does the Board of Probation and Parole have authority under the law to parole an inmate to the custody of the warden of a penal institution in another State, or to the warden of a U.S. Penitentiary?

"We note under Section 39, page 736, Laws of Missouri 1945, 'Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the Board of Probation and Parole'.

"Another question relative to the same situation: If it is your opinion that an inmate may be paroled to a detainer; is it also your opinion that he could be returned to the Missouri Penitentiary

for a parole violation which occurred after his release from the out-of-state institution, and before the expiration of the Missouri sentence?"

Since you request the answer to two questions, they will be treated separately.

1) Your first question requests an interpretation of a recent enactment by the Missouri Legislature. Said question reads as follows:

"Does the Board of Probation and Parole have authority under the law to parole an inmate to the custody of the warden of a penal institution in another State, or to the warden of a U.S. Penitentiary?"

We deem it pertinent to review certain general law in regard to paroles, their purpose, extent and effect. Prior to 1945, Section 9160, R.S. Mo. 1939, was a general statute then in effect, relative to the Board and its authority to recommend paroles, commutation of sentence or pardon to the Governor.

In 1945, the Missouri Legislature enacted a new statute, Laws of Missouri, 1945, page 734, Section 35, now known as Section 8992.35, Mo. R.S.A., which created a new Board of Probation and Parole as required by the Constitution of Missouri, 1945. Section 8992.39, Laws of Missouri, 1945, R.S.A., page 54, Cumulative Annual Pocket Part, delineates the powers of this new board and its authority to release on parole any person confined in any correctional institution in this State. Said Section reads as follows:

"Authority in paroles--rules and regulations.-- The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. Inmates shall be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and con-

sider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again in the custody of the proper correctional institution. Said board may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote."

(Underscoring ours.)

The complete schism between the Governor's present authority relative to paroles and the authority of the present Board of Probation and Parole is further evidenced in the Constitution of Missouri, 1945, Article IV, Section 7, where it expressly provides a limitation upon the Governor's powers. Said Section reads as follows:

"Reprieves, Commutations and Pardons--  
Limitations on Power.--The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

We further consider it well to define some legal terms for the purpose of clarification and to understand the narrow limits of your question. The distinction between "pardon", "parole", "reprieve", and "commutation of sentence" has often been transgressed, or at least impinged upon, which results in no distinct or precise conception of these legal powers. Evidence of this is found in Words and Phrases, Volume 31, Cumulative Annual Pocket Part, pages 30, 31, "Parole". Referring to Missouri definitions of the above stated legal powers and for our purposes considering them as concise and final definitions, we cite the following cases:

"A 'pardon' is a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime, or an act of grace proceeding from the power intrusted with execution of laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.--Lime v. Blagg, 131 S.W. 2d 583, 345 Mo. 1."

"Generally, a 'pardon' is an act of grace which exempts individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.--Hughes v. State Board of Health, 159 S.W. 2d 277, 348 Mo. 1236."

"A 'reprieve' is the withdrawing of a sentence for an interval of time whereby the execution is suspended, and it does not annul the sentence but merely postpones it.--Lime v. Blagg, 131 S.W. 2d 583, 345 Mo. 1."

"A 'commutation of sentence' is the change of a punishment to which a person has been condemned to a less severe punishment by authority of law.--Lime v. Blagg, 131 S.W. 2d 583, 345 Mo. 1."

"A 'parole' is not a 'conditional pardon', but rather a conditional release from confinement having as its objective rehabilitation of the prisoner. Mo. R.S.A. Secs. 4199-4207; Mo. R.S.A. Const. art. 4, Sec. 7,--State v. Brinkley, 193 S.W. 2d 49, 354 Mo. 1051."

Pursuant to the statute, and under the above definitions, the Board of Probation and Parole has only the authority to parole, and this authority should not be confused with the power to "pardon", "reprieve" or "commute sentence". Since Section 8992.39, supra, expressly provides that every person on parole shall remain in the legal custody of the institution from which he was released, the term "legal custody" has, we believe, special significance. In Corpus Juris, Volume 17, page 441, the definition of "custody" is found:

"The term in criminal law is the same thing as detention in civil law, and is synonymous with imprisonment, meaning the detention of a person contrary to his will; in actual confinement or the present means of enforcing it. The term implies physical force sufficient to restrain the prisoner from going at large."

(Underscoring ours.)

One other statute to be considered in its general application to your question was enacted, Laws of Missouri, 1945, page 737, Section 46, and now found as Section 8992.46,

page 55, Cumulative Annual Pocket Part, R.S.A., which provides that this State may enter into compacts with other States affecting persons on probation or released on parole. Said Section provides:

"The governor is hereby authorized and directed to enter into a compact on behalf of the state of Missouri with any and all other states of the United States legally joining therein and pursuant to the provisions of an act of the congress of the United States of America granting the consent of congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes, which compact shall have as its objective the permitting of persons placed on probation or released on parole to reside in any other state signatory to the compact assuming the duties of visitation and supervision over such probationers and parolees; permitting the extradition and transportation without interference of prisoners, being re-taken, through any and all states signatory to said compact under such terms, conditions, rules and regulations, and for such duration as in the opinion of the governor of this state shall be necessary and proper."

With these statutes and general law in mind, we will apply them to your precise question. However, it must be borne in mind that there have been no judicial interpretation of this section regarding your particular question. With the definition of "parole" in mind as being a conditional release from confinement we believe that the Board of Probation and Parole has authority to parole (keeping in mind that narrow authority) an inmate to the custody of the warden of the penal institution in another state, or to the warden of a United States Penitentiary. As the paroling of an inmate is a "conditional release", the Board of

Probation and Parole is undoubtedly authorized to attach to, and condition a parole upon any grounds other than those grounds that are illegal, immoral or impossible of performance: Ex parte Webbe, 30 S.W. (2d) 612. This construction of conditions was also applied to a commutation of sentence by the Governor in the case of Silvey vs. Kaiser, 173 S.W. (2d) 63. We are unable to perceive any legal or moral objection to the granting of a parole by the Board of Probation and Parole of Missouri to an inmate of a correctional institution in this State, on the condition that he surrender himself to out-state authority for the purpose of facing charges or serving a sentence in said other State. The election to accept said parole, and its accompanying condition resides in the inmate to be paroled. If the inmate to be paroled accepts such a condition he does so of his own free will, and the only restrictions on said condition are found in the Webbe case, supra. We see nothing illegal, immoral or any impossibility of performance in a condition by the Board of Probation and Parole that an inmate of a correctional institution in Missouri will be offered a parole therefrom, on the condition that he surrender to the custody of the warden of a penal institution in another State, or to the warden of a United States Penitentiary.

In regard to the legal custody of the parolee we believe that, in the event Missouri and the detaining State had entered into a compact pursuant to the provisions of Section 8992.46, supra, that Missouri would, according to the definition from Corpus Juris, supra, have the present means of enforcing the conditions of the parole. That pursuant to such compact with the State to whom the inmate was paroled, said parolee, for all practical purposes, would still be in the legal custody of Missouri, and amenable to the orders of the Board of Probation and Parole. Compacts pursuant to Section 8992.46, supra, have been held to be constitutional and enforceable.

In the case of Ex parte Tenner, 128 Pa. (2d) 338, in regard to the authority of a State, a party to such a compact, to cross State lines, the Court said:

"The administration of parole is an integral part of criminal justice, having as its object the rehabilitation

of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. It is apparent, however, that the success of such out-of-state transfers requires adequate control and intelligent supervision of parolees during the period of their readjustment to civil life. And from the standpoint of the protection of society, there is sound reason for an agreement between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check upon any inclination to violate parole.

"The compact represents the social policy of both California and Washington in this regard. It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation and therefore does not violate the prohibition of the Constitution concerning compacts between states."

(Underscoring ours.)

In the event an inmate of a correctional institution of the State of Missouri is paroled to a State with whom Missouri has no compact pursuant to Section 8992.46, supra, the legal custody would, in the view of this Department, be surrendered at the moment the parolee crossed the intervening State line. In the Tenner case, supra, recognition of this situation is found in the following statement:

"The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. \* \* \*".

In answer to your first question stated above, we believe that the Board of Probation and Parole does have authority under the law to parole an inmate on condition that said inmate accept the custody of the warden of a penal institution in another State, or the warden of a United States Penitentiary. As long as the conditions attached to the release (parole) are not illegal, immoral or impossible of performance, any condition may be attached to said parole. Pursuant to the Tenner case, supra, if Missouri is a party to a compact under Section 8992.46, supra, with the other State, for all practical purposes, we believe Missouri to have legal custody in sufficient substance to enforce the conditions of its parole. If no compact exists between Missouri and the other State then the Federal right of extradition exists, and is sufficient to provide for enforcing the conditions of the parole.

2) Your second question reads as follows:

"If it is your opinion that an inmate may be paroled to a detainer; is it also your opinion that he could be returned to the Missouri Penitentiary for a parole violation which occurred after his release from the out-of-state institution, and before the expiration of the Missouri sentence?"

We believe that, under the reasoning and authority cited above, your second question is, for all purposes, answered.

Briefly, if an inmate is paroled to a State which has filed a "hold" or "detainer" order against him in this State, and he is subsequently paroled to said demanding State where he serves a sentence and is released by the out-of-state institution, and then violates the conditions of the Missouri parole before its expiration, Missouri may resort to the enforcement of its parole (conditional release) under its compact with said other State, or to the Federal remedy of extradition.

CONCLUSION.

1) It is the view of this Department that the Board of Probation and Parole does have authority under the law (Section 8992.39, Laws of Missouri, 1945), to parole (release upon condition), an inmate of a correctional institution of the State of Missouri, to the custody of the warden of a penal institution in another State or to the warden of a United States Penitentiary.

2) It is also the opinion of this Department that, if an inmate is paroled to a detainer, said inmate could be returned to the Missouri Penitentiary for a parole violation which occurred after his release from the out-of-state institution, and before the expiration of the Missouri sentence.

Respectfully submitted,

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APPROVED:

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