

PENAL INSTITUTIONS: 3/4s rule: Under the present statute, a convict WHEN IT APPLIES: confined in the penitentiary cannot be deprived of the benefit of the three-fourths rule established by Section 8442 R. S. 1929 on the ground that he previously, while confined in the Intermediate Reformatory at Algoa, was incorrigible or escaped. A person confined in the Intermediate Reformatory may be held there for the full period of his sentence.

August 31, 1940 1/6

Honorable T. M. Scott, Warden
Missouri State Penitentiary
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for our opinion by your letter dated August 10, 1940, which is in the following terms:

"On May 25, 1938, the Penal Board issued an order directing that transfers from the Intermediate Reformatory to the Penitentiary should be held to serve the full term of their sentences if the cause of transfer included incorrigibility at or escape from the Reformatory.

Sec. 8475(b) R. S. 1929 says in part, 'Each person so transferred to the penitentiary shall be held therein, and subject to all the rules and discipline thereof until he becomes eligible for release, . . .'. This might be construed as giving all transfers the benefit of the three-fourths rule (Sec. 8442).

Will you please tell us if in your opinion the Board's order mentioned above violates Sec. 8475(b)?"

Section 8475(b) R. S. 1929, Mo. St. Ann. Sections 6225, 6226, does not necessarily give the benefit of the three-fourths rule (created by Section 8442 R. S. 1929, Mo. St. Ann. page 6214, as amended Laws 1939, Section 1,

pages 585, 596,) to persons transferred from the Intermediate Reformatory for Young Men at Alcoa to the Penitentiary. Section 8475(b), supra, provides they shall be subject to certain "rules and discipline". That refers to rules made and discipline enforced by the Department of Penal Institutions (created by Section 8316 R. S. 1929, Mo. St. Ann. page 6174, and referred to in your letter dated August 10, 1940, as the Penal Board) and does not refer to statutory provisions. Other statutory provisions themselves give the benefit of the "3/4 rule" to convicts confined in the penitentiary. Said Section 8442 provides:

"Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship: Provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the commission, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof: Provided further, that nothing herein shall be construed as repealing Section 12971, R. S. 1929."

It follows that the above quoted order of the Department of Penal Institutions does not necessarily violate said Section 8475(b). It does violate the provisions of of said Section 8442 by depriving a person of the benefit of the three-fourths rule without authority of law. That section authorizes the department to deprive a person of the benefit of three-fourths rule for a failure to "serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of same recorded against such convict * * *." A person who has been incorrigible in or escaped from Algoa has failed to serve three-fourths of his sentence in an orderly and peaceable manner, but has not committed an infraction of any rule of the prison, and can have none recorded against him. The prison is the separate and distinct institution in Jefferson City created and governed by Article V, Chapter 44, R. S. 1929. The Intermediate Reformatory at Algoa is a different institution created by Section 8466, R. S. 1929, Mo. St. Ann. page 6223, and Section 8467, R. S. 1929, Mo. St. Ann. page 6223 provides that the Intermediate Reformatory "shall be established separate and apart from the Missouri Penitentiary . . ." Escape from or incorrigible conduct in the Intermediate Reformatory by one there confined is not an infraction of any rule applicable to the prison, and under said Section 8442 does not authorize anyone to deprive a convict later confined in the penitentiary of the benefit of the three-fourths rule.

Said Section 8442 applies only to a convict confined in the penitentiary, and acts done by him. At the outset, it refers to, "any convict who is now or may hereafter be confined in the penitentiary * *" and refers to acts done by him.

As stated above, the two institutions are separate, and this provision cannot apply to a convict confined in the Intermediate Reformatory and acts done by him. The persons considered in this opinion did not become convicts confined in the penitentiary until after the escape or the incorrigible conduct occurred.

In State vs. Carney 122 S. W. (2nd) 888, l. c. 889, the Supreme Court of Missouri held that a person convicted of an infraction of law while at large on parole cannot be deprived of the benefit of the three-fourths rule, and it in part said:

"Giving literal meaning to its unambiguous language, we think it consonant with the legislative intent to say that the statute is not susceptible to the construction that a parolee, because of his subsequent conviction while at large under parole, is to be denied the benefits of the three-fourths rule and required to serve the full term for which he was sentenced. The evident purpose of enacting the statute was to stimulate and encourage a willingness on the part of convicts to voluntarily comply with the rules of the institution while undergoing punishment. Their own conduct, as reflected by the official records of the prison, is the measure by which there is either bestowed or withheld a fixed and predetermined reward for co-operation in promoting the orderly administration of prison discipline."

Neither a person outside the penitentiary at large on parole, nor a person outside the prison while in the Intermediate Reformatory is "confined in the penitentiary" within the meaning of said Section 8442, and neither is within its terms.

In an opinion dated March 9, 1938, addressed to Honorable Carl F. Wymore, Prosecuting Attorney of Cole County (No. 99), of which a copy is hereto attached, the Attorney General has heretofore ruled that an inmate of the Intermediate Reformatory is not "confined in the penitentiary." For that reason it was there held that the statute making it a felony for certain persons "confined in the penitentiary" to escape (Section 3913 R. S. 1929, Mo. St. Ann. page 2751), does not apply to persons confined in the Intermediate Reformatory.

Section 648 R. S. 1929, Mo. St. Ann. page 4896, provides:

"No person's body shall be imprisoned or restrained unless by authority of law."

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Because of all the foregoing, the order mentioned in your letter dated August 10, 1940, is in conflict with Section 8442. It is true that the Department of Penal Institutions has power to "make and enforce such by-laws, rules or regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board" (Section 8338 R. S. 1929, Mo. St. Ann. page 6181, as amended Laws 1939, page 571, Section 1). But, of course, such rules, when in conflict with the statutes, cannot prevail and cannot legally be enforced.

It necessarily follows what has been said above that a person confined in the Intermediate Reformatory may be there held for the full period of his sentence because the present said Section 8442 does not apply to him.

This opinion does not involve the cases of convicts who have escaped from prison farms as contradistinguished from farms of the Intermediate Reformatory.

CONCLUSION

Under present statutes, a convict confined in the penitentiary cannot be deprived of the benefit of the three-fourths rule established by Section 8442 R. S. 1929 on the ground that he previously, while confined in the Intermediate Reformatory at Alcoa, was incorrigible or escaped. A person confined in the Intermediate Reformatory may be held there for the full period of his sentence.

Respectfully submitted,

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APPROVED:

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Enc.