PARDONS AND PAROLES: Parole violated during its term, may be revoked after end of such term, regardless when sentence would have expired.

July 8, 1942

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26

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Mr. Robert C. Edson
Director
Board of Probation and Parole
State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated July 1, 1942, which is in the following terms:

> "The above named subject pled guilty to the charge of larceny of an automobile in the Circuit Court of Cape Girardeau County and was assessed a sentence of two years. He was received in the Missouri State Penitentiary November 29, 1932. On October 7, 1933 Hon. Guy B. Park granted the subject a conditional commutation of sentence up to August 5, 1934. I am enclosing a copy of the original order of Governor Park.
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> "According to a statement of facts dated May 26, 1924, S. P. Dalton, then Prosecuting Attorney of Cape Girardeau County, stated that, quote, 'on October 28, 1933, shortly after the above named defendant had been released from your institution . . . . . he came to Cape Girardeau where he met with several people. The group promptly formed a plan to steal an automobile and hold up some places and get some easy money . . . . ." This is sufficient informa-

tion I believe for you to understand that the new offense was committed October 28, 1933. The subject pled guilty to the charge of robbery in the Circuit Court of Cape Girardeau County and on May 17, 1934, was assessed a sentence of 15 (fifteen) years in the Penitentiary. On May 29, 1934, former Governor Guy B. Park revoked the subject's conditional commutation issued under #42002. Our records now show that upon his return to the penitentiary that he was required to serve the remaining portion of his sentence up to three-fourths of his time before he began serving his new sentence.

"Since three-fourths of the subjects sentence under #42002 had expired before the actual order of revocation by the Governor had been made we would appreciate knowing whether the Governor had the power to revoke the subject's conditional commutation.

"In order to clarify the situation further may we assume the hypothetical situation that in the Governor's original order of commutation the conditions of commutation were to be enforced until March 3, 1934, instead of August 5, 1934. All other conditions being the same would we have the authority to recommend revocation of the subject's conditional commutation? In other words does the Governor have the authority upon the recommendation of the Board to revoke the conditional release of an inmate of the Penitentiary after three-fourths of the subject's sentence has expired even though an act of violation was committed prior to the expiration of three-fourths of the subject's sentence? Assuring you your cooperation will be greatly appreciated, I am,"

Section 9086, R. S. Missouri, 1939, in part, 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 attorney 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."

Your first question is, May the Governor revoke a parole for violation of its conditions, committed during the parole term, where the revocation occurs after the date when three-fourths of the sentence would have expired, except for the parole?

The parole referred to in your letter contained the condition that the convict was to be on parole and subject to the terms of the parole up to August 5, 1934. On the ground of the violation of the conditions of the parole during its term, the revoation lawfully could be made,

regardless of when the sentence would have expired had the convict remained in the penitentiary. This was the effect of our opinion addressed to you, and dated June 24, 1942. The general rule is stated in these terms, in 39 American Jurisprudence, pp. 566, 567, Section 74:

> "* * * In accordance with these principles, it is well settled that where a prisoner is conditionally pardoned, upon breach of the condition the time he was at liberty under the pardon is not to be considered as time served on the original sentence, and he may be compelled to serve out the term which remained unserved at the time the pardon was granted and accepted. By breach or nonperformance of the conditions the pardon becomes void, and the status of the prisoner is the same as it was before the pardon was granted; or, as is sometimes said, the position of the prisoner on a violation of the conditions of his pardon is similar to that of an escaped convict. He cannot complain of the interruption of the execution of the sentence during the time he enjoyed his liberty, for it was secured by him by his acceptance of the conditional pardon.
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> "A condition in a pardon that the convict shall be required to serve out the unserved portion of the term of his original sentence if he violates the terms of the pardon does not terminate with the expiration of the original term of sentence. Accordingly, the rule is laid down by many courts that a convict who has violated the conditions of a pardon may be compelled to serve out the unexpired term of his original sentence, even though the breach occurred after the date upon which his sentence as fixed by the court which sentenced him would have expired. * * * * *."

46 Corpus Juris, pp. 1202, 1203, states:

> "A breach of the condition of a pardon avoids and annuls it. Execution of the original sentence may then be enforced. This is true, although the term for which the convict was sentenced has expired unless the application of a different rule is required, by operation of a statute, or by the pardon itself, or because it is held that no conditions can be attached to a pardon that are to extend after the expiration of the term for which the prisoner was sentenced."

There is in Missouri, no statute or rule of decision which would prevent this action. The parole authorizes it.

The same volume, at p. 1209, Section 79, further states:

> "In a number of jurisdictions a parole may be revoked at any time, even after the expiration of the time for which the prisoner was sentenced, the time during which the prisoner is out on parole not being regarded as imprisonment. Under some statutes a parole which has not previously been discharged may be terminated after the expiration of the time for which the prisoner has been sentenced, for so long a period as the parole is operative by law, or where the parole has been violated before the expiration of the time for which the prisoner was sentenced, it may be revoked after the expiration of such time if the prisoner has not been discharged from the terms of the parole. * * * * * * * * * *."

Your other question is, May the Governor revoke a parole for violation of its conditions, committed during

the parole term, where the revocation occurs after the end of such term?

The parole in the instant case, and all forms of parole which we have seen, contain the reservation that the revocation may be made, "at any time." That alone would appear to authorize the revocation in the circumstances stated by your question.

It is to be considered that a violation of a parole during its term, may not be discovered until after expiration of such term. Frequently, even when the violation has been discovered, the Governor wisely defers revocation until the fact of the violation of the parole (commission of a crime) has been finally determined by a court in a criminal prosecution. Such delay is favorable to the interests of the convict, because acquittal in court might prompt the Governor to withhold his revocation. The whole theory of executive clemency based on obedience to conditions of good conduct, would be destroyed if the revocation could only be made during the term of the parole. No rule of law, and nothing in the parole would require such an illogical result. For all of these reasons we believe that if the violation occurs during the term of the parole, the revocation may lawfully be made after the end of such term.

We have found only one case exactly in point, In re Eddinger, 211 N. W. 54, 55, 236 Mich. 668, where the court said:

> "* * * On June 12, 1923, he was placed on parole for the period of one year. * * * * * * * * On July 7, 1924, after the parole period had expired, the Governor signed an absolute discharge, and caused it to be forwarded to H. S. Williams for delivery to Eddinger. Previous to this Eddinger had violated his parole and fled to California. The discharge was returned for cancellation. A warrant was issued. * * * * * * * * * * *.

> "* * * Inasmuch as there was no delivery, the Governor had the power to revoke the discharge and cause the prisoner, who had violated his parole, to be apprehended and returned to prison to serve the balance of his sentence.
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> "The contention that the prisoner cannot be required to serve the balance of his sentence because no proceedings were taken to return him to prison before the parole period had expired is so wholly without merit that it requires no discussion."

CONCLUSION.

In view of the above authorities, it is our opinion that where a parole having a definite term, is violated during such term, it may be revoked after the end of the term, regardless of when the sentence would have expired had the convict remained in the penitentiary.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

Approved:

VANE C. THURLO
(Acting) Attorney-General

EH/rv