PARDON AND PAROLE: Six questions regarding authori[illegible] of the Governor, Board of Probation and Parole, and Board of Penal Commissioners to issue commutations, paroles, or pardons to inmates at the Missouri Training School for Boys, Industrial Home for Girls, and Industrial Home for Negro Girls.

December 13, 1945

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Honorable Phil M. Donnelly
Executive Office
Jefferson City, Missouri

Dear Governor Donnelly:

Receipt of your request for an opinion is hereby acknowledged. Your request reads as follows:

"I would appreciate your giving me an informal opinion on the following questions:

"1. Does the Governor have any authority to issue a commutation, parole or pardon to an inmate at the Missouri Training School for Boys, at Boonville, the Industrial Home for Negro Girls, at Tipton, and the Industrial Home for Girls, at Chillicothe? Should the question of their release from these Institutions be submitted to the Governor for approval or rejection?

"2. Under what authority does the Board of Probation and Parole release inmates of these three Institutions on commutation or parole?

"3. Is it necessary for an inmate at these three Institutions to have to earn a certain number of credits or merits before he or she is eligible for consideration for commutation or parole, or has the Board of Probation and Parole the authority to issue a commutation or grant a parole regardless of

> the number of credits or merits that an inmate has earned?
>
> "4. Does the Board of Penal Commissioners have anything to do with the granting of a commutation or parole to an inmate of either of these three Institutions? Does the Board of Penal Commissioners have anything to do with the making of the rules and regulations for the release on commutation or parole of an inmate at these three Institutions?"

With respect to the first question presented, the Constitution of Missouri of 1945, in Article IV, Section 7, provides:

> "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."

With reference to the Governor's authority to parole, we note the last sentence in this section in particular to determine what its effect may be. A parole is defined in 46 C. J. 1183, Sec. 6, as:

> " * * * the conditional release of a convict, before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole."

Prior to the adoption of the new Constitution of Missouri in 1945, the power to pardon included the power to parole. It is held in the case of State v. Asher, 246 S. W. 911, l. c. 913:

> "In the case of Fuller v. State, 122 Ala. 32, loc. cit. 37, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1, the court had before it a similar question. The Constitution of Alabama provides that 'the Governor shall have

power * * * after conviction, to grant * * * pardons.' The court said:

"'It is the settled law that this grant includes power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature so long as it is not illegal, immoral, or impossible of performance; and that a breach of the condition avoids and annuls the pardon.'

"To the same effect was the holding in Kennedy's Case, 155 Mass. 48. Chief Justice Marshall in the case of U. S. v. Wilson, 7 Pet. (U.S.) 160, 8 L. Ed. 640, defined a pardon as:

"'An act of grace, proceeding from the power invested with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.'

"The power to pardon includes the power to parole (In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L.R.A. 658.

"It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested in him by the Constitution and statute with respect to the issuance of conditional pardons. * * * "

A commutation is defined in 46 C. J. 1182, Sec. 4, as

" * * * the change of a punishment to which a person has been condemned to a less severe one."

It is held in the case of Ex Parte Webbe, 30 S. W. (2d) 612, l. c. 615 (Mo.):

" * * * Section 8 art. 5, of the Missouri Constitution, empowers him (the governor) to grant commutations 'upon such condition and with such restrictions and limitations as he may think proper.' Relative to commutations, in 20 R.C.L. at page 530, it is said:

> "'A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this respect it differs from a pardon to the validity of which acceptance is essential. The power to commute a sentence is a part of the pardoning power and may be exercised under a general grant of that power.'
>
> "See Biddle, Warden v. Perovich, 274 U. S. 480, 47 S. Ct. 664, 71 L. Ed. 1161, 52 A. L. R. 832. Also commutation is thus defined in Black's Law Dictionary: 'Commutation of a punishment is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit.'"

Concerning a conditional pardon, 46 C. J. 1182, Sec. 3, states:

> "A pardon is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event transpires."

For all intents and purposes, therefore, it is our notion that what could have been accomplished by paroles may also be accomplished at the present time by commutations or pardons, conditional or otherwise.

The constitutional provision does not make reference to any particular institution in which a convict may be incarcerated in order to be eligible to receive a "commutation, parole, or pardon," although it does state that there must have been a "conviction." In that event, it does not follow that the Governor has the authority to issue a commutation, pardon, or conditional pardon to an inmate at a training or industrial school where one was committed for juvenile delinquency, since a judgment of delinquency is a civil judgment and not a conviction of crime. The case of State v. Trimble, 63 S. W. (2d) 37, l. c.39, 333 Mo. 888, holds:

> "Section 14136 R. S. Mo. 1929 (Mo. St. Ann. Sec. 14136) provides: 'Any disposition of any delinquent child under this article, or

> any evidence given in such cases shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this article.'
>
> "This proviso clearly indicates that any disposition of a case in a juvenile court shall not be considered a conviction of crime. It protects the child, in that the adjudication of delinquency cannot be later referred to in any proceeding, either civil or criminal, except in a subsequent case in the juvenile court. A conviction of crime under the law may always be used against a person in either civil or criminal cases. This court in banc in State ex rel. v. Buckner, supra, 300 Mo. 359, 254 S. W. loc. cit. 181 (3,3) said: 'A proceeding under the act, the aim of which, as in this case, is the exertion of the state's power, parens patriae, for the reformation of a child and not for his punishment under the criminal law, is not a criminal case, and the constitutional guaranties respecting defendants in criminal cases do not apply. This is obviously true and is the rule of the decisions.' (Italics ours.)"

However, with regard to those persons who are convicted of crime and committed to one of these institutions referred to, the Governor is granted authority to issue a commutation or pardon, conditional or otherwise.

Regarding the second question presented in paragraph 1 of your letter, Section 9160, R. S. Mo. 1939, provides:

> "The Board of Probation and Parole shall have authority and it shall be its duty to study prisoners committed to State correctional and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; to provide for applications for paroles, commutations of sentence, and pardons; to investigate the merits of such application; to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; to recommend conditions deemed by them advisable

> in the case of prisoners whose release on parole, commutation of sentence, or conditional pardon is recommended; to provide for the supervision of persons released on parole or conditional pardon; and to recommend to the Governor the revocation of paroles or conditional pardons when their conditions have been violated. Said Board shall keep and preserve complete files, and records of all prisoners held in or released from state penal and correctional institutions and the recommendations made by them relative to such prisoners. The Board may adopt rules and regulations relative to the eligibility of prisoners for parole. The Board of Probation and Parole may, at the written request of the judge or judges of a court named in Section 1 of this Act, or a board of parole authorized to serve such court, authorize parole officers appointed by said Board to act as probation officers for such court or board of parole."

Under this section, the Board of Probation and Parole has the authority and duty to study and select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon. At the same time, however, it does not appear that the Governor has the exclusive power of parole, commutation of sentence, or pardon.

In support of this, which also answers the question presented in paragraph 2 of your letter, we submit that the authority under which the Board of Probation and Parole releases inmates of these three institutions on commutation or parole is Section 9157, R. S. Mo. 1939, which provides:

> "There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Article. Said Board shall be deemed a continuation of the Department of Penal Institutions and the Intermediate Reformatory Parole Board in so far as the Commissioners of that Department and the Intermediate Reformatory

> Parole Board are empowered to act in relation to investigations, paroles, commutations of sentence, and pardons, and all matters pending before such Commissioners and the Intermediate Reformatory Parole Board in connection with paroles, commutations of sentence, and pardons shall be carried on and completed by the Board created in this Article."

While the statutes vesting the powers of parole and commutation in the Department of Penal Institutions were not reenacted when the present Parole Board was created, they are nevertheless still effective because of the language of Section 9157, R. S. Mo. 1939, supra, and are as follows:

Section 8353, R. S. Mo. 1929, provides:

> "Said board shall have power to permit any person committed to said institution to return to his home and to release him temporarily from confinement in said institution, but not from its control and supervision; but such permit shall be conditioned upon his continued good conduct during the remainder of the term for which he was committed to such institution. Such person shall under rules adopted by said board report to said board from time to time during the term for which he was sent to said institution, and said board shall have power to cause the return of any person to serve the time for which he was committed whenever his conduct during his permit shall make it necessary or proper in the opinion of said board to do so. The superintendent or any other officer of the institution shall have authority to apprehend and return to said institution any person whom the board may direct to be so returned. No parole shall be granted by the court or judge thereof to any person committed by such court to such institution after he shall have been received into the Missouri reformatory."

Section 8369, R. S. Mo. 1929, provides:

> "Said board may, whenever they deem any of the inmates of said home, who have been so far reformed as to justify her discharge, liberate

> such inmate by dismissal, upon parole, or release her to any suitable person who will bind her in household work or in some proper art or trade, or said board may return said girl to her parents or other guardian, if they are of good moral character, or said board may place any such girl in the charge and care of any resident of this state, who is the head of a family and of good moral character, on such conditions and on such terms as the board may prescribe."

Section 8382, R. S. Mo. 1929, provides:

> "The said board may, whenever they deem any of the inmates of said home, who have been so far reformed as to justify her discharge, liberate such inmate by dismissal, upon parole, or release her to any suitable person who will bind themselves in a suitable written instrument to educate said girl and instruct her in household work or in some proper art or trade, or said board may return said girl to her parents or other guardian, if they are of good moral character, or said board may place any such girl in the charge and care of any resident of this state who is the head of a family and of good moral character, on such conditions and on such terms as the board may prescribe."

Section 9157, R. S. Mo. 1939, supra, was adopted June 24, 1937, at which time the "powers and duties relative to paroles, commutations of sentence, pardons, and reprieves," with respect to the three institutions involved, were transferred to the present Board of Probation and Parole. Sections 8353 and 8382, R. S. Mo. 1929, supra, were repealed May 12, 1939, and Section 8369, R. S. Mo. 1929, supra, was repealed May 11, 1939. It was these sections which prescribed the powers formerly held by the Commissioners of the Department of Penal Institutions. The effect of such action is found in 59 C. J. 937, Sec. 548, where it is stated:

> "A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute. In such case, the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal."

In the case of Crohn v. Telephone Co., 131 Mo. App. 313, l. c. 320, it is stated:

> " * * * In Endlich on Interpretation of Statutes, section 85, it is said: 'An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized. (Sutherland on Statutory Construction, section 257; 26 Am. and Eng. Ency. of Law (2 Ed.), 714; Postal Tel. Co. v. Railroad, 89 Fed. 190; Jones v. Dexter, 8 Fla. 276; Culver v. People, 161 Ill. 96; 43 N. E. 812; Darmstaeter v. Maloney, 45 Mich. 621, 8 N. W. R. 574; Matter of Main Street, 98 N. Y. 454; Commonwealth v. Kendall, 144 Mass. 357; Gaston v. Lamkin, 115 Mo. 20.) Further it is said by the same author (section 492): 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment.' * * * "

So it may be seen that although these sections were repealed, they still are effective in determining the authority of the present Board of Probation and Parole. Therefore, in answer to the second question in paragraph 1, it is our opinion that the question of the release of an inmate need not be submitted to the Governor for his approval or rejection if the Board itself undertakes to release an inmate from either of these three institutions. Further, with regard to the question presented in paragraph 2, the authority of the Board of Probation and Parole is found in Section 9157, R. S. Mo. 1939, as outlined above.

With regard to the questions presented in paragraph 3, the only statutory provision which may be classified as a condition precedent to the parole or release of inmates of the State Industrial Home for Girls is found in Section 8369, R. S. Mo. 1929, supra, and of the State Industrial Home for Negro Girls is found in Section 8382, R. S. Mo. 1929, supra, both provisions being identical, and reading as follows:

> " * * * whenever they (the Board) deem any of the inmates of said home, who have been so far reformed as to justify her discharge, * * *." (Emphasis ours.)

There is no such restriction with regard to the Missouri Training School for Boys. If the Board of Probation and Parole has established such a scheme of credits or merits, the scheme would be ineffectual against the authority of the Governor to issue a commutation or pardon, and the Board could also alter or do away with such scheme in the event it so desired.

We can find no constitutional or statutory provision which would require an inmate to have to earn any number of merits or credits before being eligible for consideration for a commutation or parole.

The authority of the Board of Penal Commissioners to grant a commutation or parole to an inmate of either of these three institutions, anticipated by the fourth paragraph of your letter, was transferred by Section 9157, R. S. Mo. 1939, supra, to the Board of Probation and Parole, and, therefore, it no longer possesses such authority. The Board of Probation and Parole is vested with the powers and duties relative to paroles, commutations of sentence, pardons, and reprieves concerning these three institutions. There is no statutory provision which would grant to the Board of Penal Commissioners the authority to do anything with the making of the rules and regulations for the release on commutation or parole of an inmate at these three institutions.

CONCLUSION

It is, therefore, the opinion of this department that the Governor has authority to issue a commutation or pardon, conditional or otherwise, to an inmate at the Missouri Training School for Boys, the Industrial Home for Girls, and the

Industrial Home for Negro Girls, when such inmate is being held under a conviction of crime. Further, that the question of the release of an inmate may be submitted to the Governor for approval or rejection, although the submission of such question is not required by statutory or constitutional provision.

We are of the further opinion that the Board of Probation and Parole is authorized to release inmates of these three institutions on commutation or parole, by virtue of Section 9157, R. S. Mo. 1939.

We are of the further opinion that it is not necessary for an inmate at these three institutions to have to earn a certain number of credits or merits before he or she is eligible for consideration for commutation or parole, when the Governor exercises such authority, and that if such a scheme of credits or merits has been established by the Board of Probation and Parole, said Board may also alter or do away with such scheme in the event it so desires.

We are of the further opinion that the Board of Penal Commissioners has nothing to do with the granting of a commutation or parole to an inmate of either of these three institutions, nor does said Board of Penal Commissioners have anything to do with the making of the rules and regulations for the release on commutation or parole of an inmate at these three institutions.

Respectfully submitted,

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