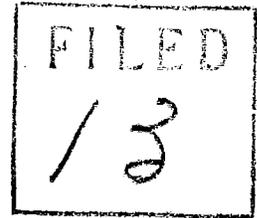


PAROLE: Parolee not allowed time while on parole as against
Prison Term; Prison authorities cannot
RULES OF PENITENTIARY: make rules to defeat the three-fourths
statute.



February 4, 1947

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

Dear Mr. Bunker:

Your letter of recent date, requesting an opinion of this department, reads as follows:

"The Board of Probation and Parole should appreciate your interpretation of Section 8992.39 Mo. RSA with respect to the following questions:

"1) When a parole is revoked or terminated, on order of the Board of Probation and Parole, will the time that the parolee was out on parole, and prior to it's revocation, be deducted from the total sentence? This question may be stated in another way; Is parole time to be credited to the Prison or Reformatory term?

"2) With reference to Section 9086 RS Mo. 1939, and Section 8992.39 Mo. RSA, may the rules of the Prison and Reformatory include a rule to the effect that the benefit of the 9/12ths Statute will be lost in the event of a revocation of a parole, and a prisoner held to serve the maximum or 12/12ths sentence? (The inmate on parole is amenable to the orders of the Board of Probation and Parole until the expiration of the maximum sentence)."

This request presents two questions, and, for convenience we will consider them in the order presented.

1.

Section 8992.39, Laws 1945, p. _____, S.C.S.S.B. No. 347, Sec. 39, which is applicable to release on parole, reads as follows:

"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 consider 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 corectional 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."

(Emphasis ours.)

This section provides that the board of probation and parole is authorized to release on parole any person confined in the state correctional institution, except persons under sentence of death. It further provides that a parole shall not be considered to be a reduction of the sentence, or a pardon.

In the case of *Ex parte Jacobs v. Crawford*, 308 Mo. 302, the court, at l. c. 307 and 308, said:

"When Governor Major paroled petitioner, it was upon the express condition that if petitioner failed to observe the conditions of his parole or the Governor ordered his arrest and return to the penitentiary, petitioner should 'serve out the remainder of his sentence.' Was such remainder a term lessening from day to day, as petitioner continued to observe the conditions of his parole while remaining at large thereunder, or was it a fixed term? That it was intended to be a fixed term, not subject to diminution during the existence of the parole, is apparent from the fact that it was specified in the order granting the parole that petitioner was 'granted a commutation of sentence for the purpose of parole, without the benefit of the three-fourths law.' That simply meant that without waiting for the application of the

three-fourths law, the remainder of petitioner's sentence was conditionally commuted or wiped out, as of that date. There was therefore no remainder of his sentence to be served, if he observed the conditions of his parole. The term fixed for the expiration of petitioner's parole was January 1, 1919, as provided in the order paroling him. The term of ten years' imprisonment was commuted to the time already served, plus a parole, until January 1, 1919. Had the term not been commuted it would not have expired, solely under the application of the three-fourths law, until January 15, 1922. The penalty for failure to observe the conditions of the parole was that petitioner should serve the remainder of his sentence, which in effect meant that, the order commuting his sentence being conditional, it could be set aside and the then existing remainder of the sentence must be served.

"It is apparent that the Governor intended to impose, as one of the conditions of the parole, that the full unexpired sentence of petitioner should hang over him as a 'Sword of Damocles' to keep him faithful to the end of the period of parole. If the unexpired sentence conditionally commuted lessens from day to day while a paroled convict is at large under parole, one of the very greatest inducements to persuade such convict to remain a law-abiding citizen becomes less of an inducement from day to day, and he may arrive at a point where he will calculate supposed benefits accruing from his failure to remain a law-abiding citizen against the diminishing penalty for failure to live such a life.

"We think that Governor Major undoubtedly intended to impose no such daily weakening restraint. Petitioner was not entitled to a parole as a matter of right. The granting thereof was a matter of grace upon the part of the Governor. Petitioner accepted it, burdened with the condition that, if he did not

keep his parole, it might be revoked and that he would be compelled to 'serve out the remainder of his sentence.' Such condition was neither illegal, immoral nor impossible of performance. The condition was stated in the order granting the parole and petitioner is bound thereby.

"Having failed to observe the conditions of his parole, petitioner was arrested and returned to the penitentiary to serve out the remainder of his sentence. As the remainder of such sentence has not been served because petitioner is not entitled to have the time that he was at large under his parole and prior to its revocation deducted from the remainder of his sentence, his imprisonment was legal when our writ was issued and has not since become illegal."

From the foregoing it is our theory that the time spent by an inmate while outside of the penitentiary under conditional commutation or parole, and prior to the revocation of the same, does not count as a part of his sentence which he is to serve in the penitentiary.

2.

The question presented here, in short, is: Can the prison authorities make and enforce a rule which would defeat the provisions of a statute?

Section 9086, R. S. Mo. 1939, the three-fourths rule statute, reads as follows:

"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."

The inmate is entitled to the benefit of this statute if he earns the same according to the provisions thereof.

Section 8992.39, Laws 1945, supra, provides: "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."

Such a situation presented a question to the court in the case of *Ex parte Carney*, 122 S.W. (2d) 888, wherein the court said, at 1. c. 888 and 890:

"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 stim-

ulate 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 cooperation in promoting the orderly administration of prison discipline. Infractions of law while on parole carry their own punishment, as witness the second sentence of petitioner, and the resultant revocation of his parole. The provisions of the statute under scrutiny and the conditions of the parole under which petitioner was at large when convicted in Lewis County are in no sense related or interdependent."

(Emphasis ours.)

CONCLUSION

Therefore, it is the opinion of this department, that (1) the time of a parolee while out on parole is not deductible from his sentence; in other words, such time cannot be credited as a part of his prison term.

Further, it is the opinion of this department that (2) the rules of the penitentiary or reformatory cannot include a rule to forfeit the benefit of the three-fourths statute because an inmate violates his parole.

Respectfully submitted,

APPROVED:

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GPW:CP