

CRIMINAL LAW: Sentence to hang should be modified to conform to present punishment for death. Any delay in executing death sentence against Barbata from 1944-1957 does not prevent executing sentence at this time.  
PUNISHMENT:  
GOVERNOR:



April 26, 1957

Honorable James T. Blair, Jr.  
Governor, State of Missouri  
Jefferson City, Missouri

Dear Governor Blair:

This will acknowledge receipt of your request relative to the case of Paul Barbata who was convicted in the Circuit Court of St. Louis and sentenced to hang. This sentence was affirmed by the Supreme Court on appeal and his execution was stayed by Governor Guy D. Park. Thereafter, in 1935, Governor Park suspended the execution for the reason that Barbata had become insane and such suspension of the execution was declared to be in full force and effect until restored to reason. He was placed in State Hospital No. 1 in Fulton, Missouri. Thereafter, on March 22, 1957, your office was informed by the Superintendent of said Hospital that Barbata was of sound mind.

You request an opinion on the following:

"(1) How, at this late date, and in what court, can the sentence to death by hanging be modified so as to order death in the lethal gas chamber?

"(2) Does the dereliction of the authorities of this State in not exacting execution of the sentence during the period 1944-1957, elapsing since Barbata's restoration to sanity, preclude execution of the sentence at this time?"

This Department, under date of October 18, 1941, rendered a very comprehensive opinion to Honorable Michael W. O'Hern, Prosecuting Attorney of Jackson County, Missouri, relative to a similar situation wherein Ferdinand Brockington's conviction and sentence were suspended for similar reasons. He was also sentenced to hang. However, during his recovery, the law providing the death penalty by hanging was repealed and a statute enacted in lieu thereof providing that when the

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death penalty is assessed the convicted prisoner shall be executed by lethal gas. We are enclosing a copy of this opinion which holds in part that a motion to modify the original judgment in the Supreme Court shall be filed by this Department, that the circuit judge must resentence said defendant upon receipt of the mandate of the Supreme Court.

Thereafter, on September 8, 1944, this Department rendered an opinion to Forrest C. Donnell, Governor of the State of Missouri, on the particular manner of executing the death sentence against this same Barbata, a copy of which we are enclosing. Said opinion holds in part that the Governor should issue a warrant specifying the time of execution pursuant to such modified sentence as the circuit court of the City of St. Louis or the Supreme Court may order; that the prosecuting attorney of the City of St. Louis should thereupon proceed under the provisions of Sections 4110 and 4111, RSMo 1939 (546.700 and 546.710, RSMo 1949) to have the prisoner brought before one of the courts named in Section 4110, RSMo 1939; that such court thereupon shall issue a warrant to the warden of the State of Missouri for execution of the prisoner; that such court would have to modify the judgment and sentence so that said warrant would direct the execution of the death sentence in accordance with Sections 4112 and 4113, RSMo 1939 (546.720 and 546.730, RSMo 1949).

We are of the opinion that the foregoing conclusion reached in said opinion is still the law and in full force and effect, with this one exception that under Section 56.450, RSMo 1949, the circuit attorney in the City of St. Louis is required to conduct all criminal cases in which the circuit court of the City of St. Louis shall have jurisdiction. Therefore, in view of the fact this involves a felony it becomes the duty of the circuit attorney to proceed in this matter instead of the prosecuting attorney as held in the attached opinion.

We shall now consider your second inquiry. Your request does not indicate the nature of the dereliction of the authorities of this State in not exacting execution of the sentence against Barbata from 1944 to 1957. However, subsequent to the receipt of your request you submitted a photostatic copy of a letter addressed to you under date of March 22, 1957, from the Superintendent of State Hospital No. 1 in Fulton, Missouri, wherein Barbata has been placed for treatment, which letter clearly indicates that the Hospital record since 1944 is replete with reference made to the fact that Barbata is fully sane; that the Superintendent of said Hospital did on two occasions request Barbata be discharged from the Hospital; that on April 20, 1956, one of the psychiatric consultants

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at the Hospital examined Barbata and the diagnosis showed no mental disease. The Superintendent of the Hospital, in said communication, recommends that Barbata be discharged as set forth at the time of commitment twenty-two years ago.

Why Barbata has not heretofore been discharged and the original sentence executed is not at this time a matter for determination by this office. This was a matter within the discretion of the respective governors of the State. It would be possible that they were not satisfied as to Barbata's complete recovery. As stated in the enclosed opinion rendered in 1944, the law is absolutely silent as to how the Governor shall determine when such persons regain sanity. We do not have any knowledge as to whether any further examinations were made to determine Barbata's recovery, or, if made, what they contained. However, We do believe that any failure to discharge Barbata, and execution of his sentence under the law, when declared by the Superintendent of the Hospital that he was no longer mentally ill, does not bar the execution of this sentence at this time.

Barbata's sentence was suspended by the Governor under and by virtue of Article V, Section 8, Constitution of Missouri, and Section 549.049, RSMo 1949. The foregoing statute provides in part that if the sentence is suspended by the Governor it shall be executed upon him after such period of suspension has expired. There is nothing to indicate that the execution is barred if he is not executed immediately upon recovery.

The St. Louis Court of Appeals in *Weber v. Mosley*, 242 S.W. 2d. 273, in a very exhaustive opinion, cites and discusses at great length numerous appellate court decisions in this and other jurisdictions on this particular question of law. In the above case, the court held that the essence of the judgment is the kind and amount of punishment inflicted and the judgment is satisfied only by undergoing the punishment inflicted in the absence of a remitter by the sovereign or absolved by death, and that the expiration of time alone without incarceration is not tantamount to the execution of the sentence. The court further held that estoppel cannot apply against the State as a result of lapse of time after commitment has issued and before it is actually executed by reason of a remiss of the duty of a ministerial officer any more than any other holding would permit such officers to thwart and nullify the judgments of courts. We believe the same reasoning is applicable to all officers and not only ministerial officers. In so holding the court said:

"(16,17) There is no statute of limitations on the enforcement of criminal judgments imposing jail sentences. *Ex parte Bugg*, supra. Nor can any estoppel work against the state as a result of the lapse of time after a commitment has issued and before it is actually executed

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by reason of the fact that a ministerial officer has been remiss in his duty. Any other holding under the facts in the case at bar would permit ministerial officers to thwart and nullify the judgment of courts.

"The relief for the hapless person described by the writer of the opinion in *Ex parte Bugg*, supra, 145 S.W., loc Cit. 832, is an appeal to the department of government which has the power to grant clemency. It is not for this court to usurp that power."

In the enclosed opinion relative to this particular case, will be found a citation from *Lime v. Blagg*, 131 S.W. 2d. 583, l.c. 585, holding that a mere reprieve by the governor, as in the case at bar, merely postpones sentences and cannot defeat the ultimate execution of the judgment of the court, but merely delays it.

There are several authorities cited in Volume 34, A.L.R. 314-317 as well as Volume 49 A.L.R. 805-813 that discusses the proper procedure for suspending sentences and holding that the postponement or suspension of sentences does not discharge the defendant. Furthermore, that the failure of the sheriff or other officials in carrying out the death sentence on a fixed day, whether due to forgetfulness, inadvertence or wilful negligence of duty, does not discharge the defendant, that a new day may be set for an execution.

Apparently Barbata at no time subsequent to the time of his sentence and his confinement at the hospital, personally made any appeal to the proper authorities disclosing the fact that he was now sane and requesting that he be discharged from said Hospital. It would seem absurd to contemplate that he would do so for the reason that this would most certainly have brought the matter to a head and the judgment of death forthwith satisfied. We mention this merely for the reason that there are decisions indicating that if defendant makes a request to have a judgment satisfied and this is denied, that it might amount to the satisfaction of the judgment. However, needless to say none of these decisions are death cases.

It certainly cannot be argued that by reason of the delay in his execution that he has been harmed. Had the suspension been revoked by the Governor upon finding that he was restored to sanity, then he would have been executed without any further delay.

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In view of the foregoing, assuming for the sake of this opinion only, that there was dereliction of the authorities in failing to exact execution of the sentence, we still believe this does not preclude execution of the sentence at this time.

CONCLUSION

It is the opinion of this department that a motion to modify the original sentence against Barbata should be filed by this department in the Circuit Court of St. Louis or the Supreme Court of Missouri.

It is the further opinion of this department that any failure to exact the execution of the sentence against Barbata from 1944-1957, does not preclude the execution of the sentence at this time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton  
Attorney General

Enc. (2)

ARH:bi/mw