PUBLIC WELFARE, DEPARTMENT OF: Paroles—circumstances under which extradition of parolee amounts to waivers of jurisdiction over him,—circumstances under which failure to return parolee amounts to waiver of declaration of delinquency.

March 13, 1944.

Opinion No. 28

Hon. T. A. Gottschalk, Administrator
Department of Public Welfare
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have your letter of Jan. 19th in regard to the rights and status of parolees and will endeavor to answer the questions propounded in the order mentioned in your letter, although it occurs to me that questions 1, 4, 5 and 6 raise substantially the same problem.

In considering the status of a parolee it is well to bear in mind two fundamental concepts of paroles. The first one is that the system of parole is humanitarian in purpose and is designed to rehabilitate rather than to punish. The second is that in Indiana as well as in most other states a prisoner or parolee is still in the legal custody of the state under proper penal authorities. For instance, Section 5 of Chapter 143 of the Acts of 1897 (13-248 Burns 1942 Replacement) dealing with parole of inmates of the state prison, provides that the prisoner may be parolled outside of the prison walls but is "to remain while so on parole, in the legal custody and under the control of the agent and warden of the state prison from which he is so paroled * * *." Section 11 of Chapter 53 of the Acts of 1897 (13-410 Burns' 1942 Replacement) provides that the parolee from the reformatory is "to remain, while on parole, in the legal custody and under control of the board of managers * * *." Thus, while on parole, since the prisoner is still in custody in contemplation of law his extradition might be refused to another state.

See

Carpenter v. Lord, 171 Pac. 577 (Oregon) (1918);
Hughes v. Pflanz, 138 Fed. 980.

Your first question is:

> "1. An offender was given an indeterminate sentence in the Indiana State Prison of 2 to 21 years and after 2½ years was ready for release on parole, but a request for his custody had been made by Ohio authorities and the prisoner was released on parole and immediately turned over to the authorities from Ohio, and was committed to an Ohio Prison.
>
> "(a) If the maximum period of his Indiana sentence has not expired, can he be continued under our parole supervision when discharged from his Ohio imprisonment?
>
> "(b) Would the release to the Ohio authorities be considered as an abandonment of the rights of Indiana over this prisoner, if when he was released to Ohio it was with the condition that Indiana would retain further supervision over him as a parolee at the termination of his Ohio imprisonment?"

The fact situation as propounded raises the question of whether the executive authority of the state in which a prisoner is under restraint may effectively waive any right to assert legal custody of that person. The most recent and illuminating case on that point is People v. Bartley, 50 N.E. (2d) 517 (Ill.). In that case the prisoner was in the Illinois State Penitentiary. He was granted a parole, but before the effective date of the parole a Governor's warrant issued to deliver the prisoner to an agent of the State of Wisconsin, to which state he was extradited and served a prison term. Upon his release from Wisconsin he went to Ohio where he was convicted and served another term. While in prison in Ohio the Illinois authorities served a detainer upon the Ohio penitentiary authorities for the detention of the prisoner at the expiration of his Ohio sentence. Extradition proceedings were instituted and upon his return to Illinois the prisoner filed suit for habeas corpus contending that Illinois had waived any right to return him to that state by the executive warrant which turned him over to Wisconsin authorities. That contention of the prisoner was sustained by the Illinois court without considering the effect of the parole because as of the date of the extradition to Wisconsin it had not become effective. The court said:

"When the requisition has been honored and the fugitive surrendered thereunder, such surrender will operate as a waiver of jurisdiction of the asylum state. * * *.

"* * *

"* * * The legal effect and logic of these cases convince us that the waiver of jurisdiction of a State over a fugitive is a prerogative of the Governor, and that his extradition warrant takes priority over all State process by which the fugitive is held; that a prisoner cannot be handed from one jurisdiction to another for the purpose of trial, conviction and service of a new sentence, before being returned to the asylum State for service of the unexpired sentence, without violating his constitutional rights."

See also:

Cozart v. Wolf, 185 Ind. 505.
State ex rel. v. Eberstein, 182 N.W. 500 (Neb.).
Hess v. Grimes, 48 Pac. 596 (Kan.).

Logically, if extradition of a parolee may be denied by the executive authority on the ground that the parolee is still in legal custody of the asylum state, then his extradition is as much a waiver of jurisdiction as though he were released from the prison itself for extradition purposes. See Annotation, 42 A.L.R. 585.

Therefore, in answer to question 1 (a) it is my opinion that having assumed jurisdiction over a person and having the right to continue that jurisdiction until the prisoner or parolee is legally discharged from custody, a release by executive warrant of a parolee to Ohio constitutes a waiver of jurisdiction by Indiana, which prevents the continuance of parole supervision upon his discharge by Ohio authorities.

Question 1 (b) raises the more difficult problem of whether there may be a waiver of jurisdiction with a right reserved to reassert jurisdiction. Upon that problem, in *In Re Guy,* 269 Pac. 782 at 784, it was held by the Oklahoma court that condition for the return could not be attached by the Governor to his extradition warrant. It was there stated that such a condition was beyond the power of the executive to make and was therefore a nullity. See also Jones v. Morrow, 121 Pac.

(2d) 219 Kan., and State v. Sanders, 232 S. W. 973 Mo. The court in People v. Bartley, supra, questioned the decision of the Oklahoma court in that regard, and there is other authority to the effect that the Governor of State A may surrender one in the custody of State A to State B, reserving the right to retake that person from State B after trial or punishment in State B. See King v. Mount, Sheriff, 26 S.E. (2d) 419, Georgia. It does seem to me, however, that the Georgia court, and the decisions upon which it relies, failed to place sufficient emphasis upon the question of executive waiver. Those cases are more concerned with the question of whether the person who is extradited to State B is actually a fugitive from justice in State A within the meaning of the Federal and State extradition statutes. It is not my intention to express any opinion herein concerning the proper interpretation of the words "fugitive from justice." Disregarding that aspect of extradition, it seems to me that the Oklahoma decision *In Re Guy* is the more logical application of the doctrine of executive waiver. A state having jurisdiction of a parolee has a right to continue that jurisdiction until completion of the maximum sentence or discharge and that jurisdiction must necessarily be exclusive. It is difficult to see how one state may relinquish complete jurisdiction of a parolee to another state and at the same time retain a sort of inchoate jurisdiction which ripens upon discharge in the other state. I am, therefore, of the opinion that the answer to question 1 (b) should be in the affirmative.

Your second question is:

> "2. (a) When a parolee is under detention and custody of the authorities of another state and we send to such authority a detainer, with a request that he be held for return to the proper authority in Indiana, when released from the custody of the foreign state, and notice is received that he will be released from such custody at a certain time and to have an officer present at that time to receive such prisoner, but it is concluded by the Indiana authorities that it would not be justifiable to send for him at that time and do not send for him, can the Indiana authorities, before his maximum period of imprisonment has expired, later take him in custody as a parole violator?

"(b) Would your answer be the same if the parolee was in a foreign state and information had been given to the Indiana authorities where this parolee could be found and the Indiana authorities refuse or fail to go after him after receiving such information?

"(c) Would the failure to send for this parolee, under the conditions stated in 2 (a) or 2 (b), be considered an abandonment of the rights of Indiana over him and thereby terminate his sentence in Indiana for the crime in question?"

This situation also raises a question of waiver. It is assumed in considering it that in all cases the parolee has already been declared delinquent or his parole revoked by Indiana authorities. Here, too, it is well to bear in mind that the purpose of parole is to rehabilitate and not to harass. Upon notification that a parolee who has been declared delinquent or whose parole has been revoked is now available for return to Indiana and failure of the Indiana authorities to take advantage of the opportunity to return him, what should be the effect of that failure? It could not be a waiver of jurisdiction over the parolee since the parolee by the statement of your question is already in the custody and under the jurisdiction of the authorities of another state. The failure or mere perfunctory attempt of the Indiana authorities to return the parolee to Indiana must be considered as a waiver of the particular declaration of delinquency or revocation only upon which the parolee is sought. It should be emphasized at this point that the effect of a declaration of delinquency or revocation is to stop the running of time upon the sentence of a parolee and the effect of a waiver of a particular declaration of delinquency or revocation is only to continue the running of his time as though there had been no declaration of delinquency or revocation. Such a waiver can have no effect upon the substantive right of such authorities subsequently to revoke the parole or declare the parolee delinquent. Although the answer to question 2 (b) is not as clear, it seems to me that in view of the purpose of parole and that *all* the facts concerning waiver are in the hands of the executive authority, the refusal or failure to return a delinquent parolee upon notification must also be considered as a

waiver of that declaration of delinquency or revocation of parole.

In answer to question 2 (c), in order to abandon rights over a parolee the state must have had jurisdiction and waived that jurisdiction. In neither question 2 (a) nor 2 (b) does it appear that the State of Indiana surrendered jurisdiction of a parolee to another state.

Your third question is:

> "3. (a) A man on parole from an Indiana prison, while in the state of Ohio, commits a crime in Ohio and is given an indeterminate sentence in an Ohio institution. A warrant is issued by the board of trustees of the Indiana institution and the prisoner is declared delinquent because of his imprisonment in Ohio. When released from the Ohio institution, Indiana determines he should not be returned to Indiana, but is to be reinstated on parole and be permitted to remain in Ohio, subject to parole supervision by the Ohio parole authorities, as agents of the Indiana parole authorities. Under such circumstances, would it be considered an abandonment by the Indiana authorities if he is not brought back to Indiana when released from the Ohio penal institution?"

The same general conditions would apply in the answer to this question. If a prisoner may be reinstated on parole by waiver as in your second question, it must follow that he may be reinstated by express action of the parole board. Under those circumstances the fact that he is permitted to remain under jurisdiction of Indiana but supervised by Ohio authorities in accordance with Chapter 289 of the Acts of 1935, would not constitute an abandonment of jurisdiction by Indiana.

Your fourth question is:

> "4. If the parolee was released to federal authorities in Indiana, to serve 90 days on an uncompleted federal sentence, would it be considered the same as a release to a foreign state and such release thereby terminate the right of the Indiana authorities to take over the supervision of such parolee after the release of the prisoner by the federal authorities?"

The jurisdiction of the federal government over a prisoner is as exclusive as that of a foreign state. As stated in Taylor v. Taintor, 16 Wall. 366, 370:

> "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; * * *."

Thus, the same reasoning would apply in the answer to this question as in the answer to question number 1 and the surrender of jurisdiction to the federal authorities by the State of Indiana must be deemed to have been complete. After his release the Indiana authorities would have no right to supervise such parolee. It should be noted, however, that no opinion is expressed herein concerning the right of the State of Indiana, for instance, to permit the trial only of a prisoner in its custody by a federal court in the same state since, conceivably, such a trial could be allowed without a complete surrender of jurisdiction over the prisoner or parolee. See *Ex* Parte Lovingood, 53 Pac. (2d) 290, Oklahoma; Ponzi v. Fessenden, 258 U. S. 254.

Your fifth question is:

> "5. If a parolee from the Indiana Reformatory had committed a crime in Illinois and had returned to Indiana, and was surrendered to the Illinois authorities for possible action on such crime and the Supervisor of Paroles at the time had knowledge of such criminal violation of his parole and of such surrender to Illinois; would this be considered an abandonment of the right to any further Indiana action against the parolee, in case he was not punished by the Illinois authorities?"

It occurs to me that the surrender of jurisdiction or waiver thereof becomes complete at the time that custody over the parolee is relinquished to another state. Thus, although the other state may fail to punish the parolee or he may be acquitted upon trial in a foreign state, the waiver having become complete so far as Indiana is concerned, he can not be subjected to any further action in Indiana upon the same parole.

The case of *In Re Whittington,* 167 Pac. 404, California, is directly in point upon this question:

Your sixth question is:

> "6. If a prisoner while on parole from an Indiana Prison be extradited to a foreign state, with or without knowledge by the Governor that such person was a parolee; could he be returned later to Indiana, for parole supervision, when released by the foreign state, if the maximum period of his Indiana imprisonment had not expired?"

So far as I am able to ascertain this question raises the identical question answered under 1 (a) except that the element of actual knowledge by the Governor is injected. I am of the opinion that the state must be charged with knowledge of those persons who are on parole and the issuance of a warrant for extradition by the Governor constitutes a waiver as much as though he had actual knowledge.

A view contrary to those expressed in this opinion must necessarily result, not only in hardship upon the parolee, but in a general demoralization of the rehabilitation functions of the parole system. For example: A young man violates the law, is sentenced to a Reformatory for a period of ten years and is released on parole. Thereafter he violates the law in another state; is convicted and sentenced. This violation of parole is well-known to the authorities of the State of Indiana and the parolee is declared a delinquent. For reasons of their own the authorities see fit not to return him to this state. He later marries, raises a family, and in all respects indicates that he has fully and completely rehabilitated himself. Later in life, long after his probation period has passed if it was not for the fact that he had been declared a delinquent, he becomes embroiled in a controversial, civil or political matter and his opposition reminds the authorities of the state of his record, to wit: parolee, violator of his parole, and a declared delinquent. Can it be said that it would be conducive to this man's future well being or serve any useful social purpose of the state to force him back into the prison, to serve the unexpired term from the time of his declared delinquency? Further, can it be said that it is conducive to this man's future rehabilitation if the authorities are permitted to hold such a

threat over this individual during the remainder of his natural life? I am inclined to think not.

In expressing the opinions herein it is not my intention to express any opinion conflicting with Chapter 289 of the Acts of 1935 (9-3001 *et seq.* Burns' 1942 Replacement). That act was to make provision for interstate contacts whereby a parolee of Indiana might be subjected to supervision in Ohio. Except for the fact that extradition is not necessary in those cases, the same general considerations would apply.

STATE CHEMIST: Advertising on package of Vitamin B1 tablets is not false or misleading; license to sell in Indiana may not be refused on that ground.

March 14, 1944.

Opinion No. 29

Hon. F. W. Quackenbush,
State Chemist,
c/o Purdue University,
Lafayette, Indiana.

Dear Sir:

Your letter of February 23, 1944, received requesting an official opinion as to the legality of your refusal to issue a permit to sell X-Vitamin B1 tablets in the State of Indiana which authority you exercise pursuant to Chapter 281, Acts of 1937, same being Section 15-1901, *et seq.*, Burns' 1943 Supplement.

Your letter states that you have conducted extensive experiments with this product, which is sold for the purpose of stimulating plant growth, and failed to obtain any favorable results from such experiments. Such experiments are, in my opinion, contemplated by Sections 4 and 5 of said statute, same being Sections 15-1904 and 15-1905, Burns' 1943 Supplement.

Enclosed with your official request you have furnished me with an original package of X-Vitamin B1 tablets which shows, among other things, the following: (1) On the front of the envelope is found the following statement: "For Flowers, Plants, Trees, Shrubs, Lawns, Vegetables, etc., etc.";