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August 22, 1979

ATTORNEY GENERAL OPINION NO. 79- 183

Devon F. Knoll
Director
Kansas Adult Authority
535 Kansas Avenue - 4th Floor
Topeka, Kansas 66603

Re: Criminal Procedure -- Release Procedures --
Parole Authority and Procedure.

Synopsis: The Kansas Adult Authority may not validly release an inmate on parole to detainer absent the inmate's agreement to the parole contract.

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Dear Mr. Knoll:

You inquire whether the Kansas Adult Authority may release an inmate on parole to detainer or for deportation purposes when the inmate refuses to sign the parole agreement. The authority of the Kansas Adult Authority and the procedures for parole release are set out in K.S.A. 1978 Supp. 22-3717 which provides, in part:

"(1) Subject to the provisions of this section, the Kansas adult authority shall have power to release on parole those persons confined in institutions who are eligible for parole when, in the opinion of the authority, there is reasonable probability that such persons can be released without detriment to the community or to themselves.

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"(4) Before ordering the parole of any inmate, the Kansas adult authority shall have the inmate appear before it and shall interview the inmate unless impractical because of the inmate's physical or mental condition or absence from the institution. A parole shall be ordered only for the best interest of the inmate and not as an award of clemency. Parole shall not be considered a reduction of sentence or a pardon. An inmate shall be placed on parole only when the Kansas adult authority believes that the inmate is able and willing to fulfill the obligations of a law-abiding citizen or that the inmate should be released for hospitalization, deportation or to answer the warrant or other process of a court."
(Emphasis supplied.)

Although it is arguable that the emphasized language in the foregoing statute infers that the Kansas Adult Authority may order the release of an inmate on parole without the inmate's consent, it is our opinion that such a release would exceed the power vested in the Adult Authority and would be contrary to Kansas decisional law in the area of parole.

In reaching this conclusion we have first considered the actual nature of the release. Although couched in the language of "parole," we question whether release under such circumstances would constitute a release on parole. In construing an order of release, the Supreme Court of Kansas has indicated that the actual nature of the act, rather than the language of the order, is determinative. In re Jones, 154 Kan. 589 (1942). In Jones the court considered an order of release which was claimed to be an executive "reprieve" and stated:

"The real nature of an act of clemency is not changed by what it is called. Its effect is determined by what it is. (In re C. H. Charles and Louis Howard, Petitioners, 115 Kan. 323, 328, 222 Pac. 606.) Appellee had in nowise participated in the executive order of release. He had agreed to perform no conditions of any kind or character with respect to his release from the custody of Louisiana officials. Clearly the order of release did not constitute a parole. (46 C.J. 1183, §6.) He therefore violated no conditions of a parole." 154 Kan. at 595.

In light of the foregoing, it is necessary to determine whether a release on parole to detainer without the inmate's consent in actuality constitutes

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a parole. We believe it does not. The statutory definition of "parole" is set out in K.S.A. 21-4603(4) which provides, in part:

" 'Parole' is the release of a prisoner to the community by the Kansas adult authority prior to the expiration of his term, subject to conditions imposed by the authority and to the secretary of correction's supervision. . . . Where a court or other authority has filed a warrant against the prisoner, the authority or paroling court may release him on parole to answer the warrant of such court or authority."

Although the preceding definition indicates that a release on parole may be effected either to the community or to an outstanding detainer, we believe that the language contemplates that the release is subject to agreed conditions in either event. Although our research has failed to reveal any Kansas case law directly on point, a considerable number of jurisdictions which have passed on the issue have held that acceptance by the inmate is a necessary element for release on parole. 67A C.J.S. Pardon and Parole §54. In that respect, an inmate may either accept the conditions of parole and secure his release or reject the conditions and forego release. Under the circumstances you have described it is our opinion that releasing an inmate on parole to detainer who has refused to sign the parole agreement would not constitute a bona fide release on parole.

Having determined that the release would not constitute a release on parole, we must determine the actual nature of the release. In our opinion such a release would in substance constitute a pardon or commutation of sentence for which exclusive authority is vested in the governor by K.S.A. 22-3701 et seq. Further, such a release procedure would, in our opinion, not be authorized as a reduction of sentence which is a function of the court pursuant to K.S.A. 1978 Supp. 21-4603(2). In Bernatzki v. Hand, 190 Kan. 444 (1962) the court, in applying the predecessor of K.S.A. 22-3701, stated:

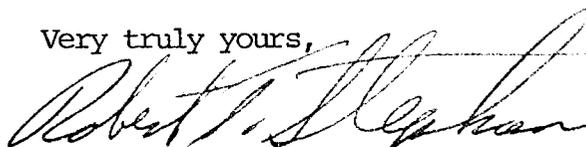
"Any power granted to the board of probation and parole does not extend to pardons and commutations because the governor, and he alone, has such power under our statutes. . . . The probation and parole board, having no power, authority, or jurisdiction to pardon petitioner or commute his sentence, could not have done what he claims it did."
190 Kan. at 445.

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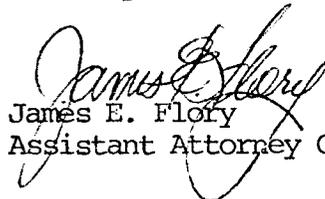
The foregoing discussion should not be construed to prohibit release on parole to detainer when the inmate has consented to the release and signed the parole contract or agreement. Such releases are a valid exercise of the Adult Authority's power as set out in the applicable statutes and supported in Kansas decisional law.. Townsend v. Crouse, 191 Kan. 692 (1963); Hunt v. Hand, 186 Kan. 670 (1960).

In conclusion, it is our opinion that a release on parole to detainer absent the inmate's consent would constitute a release by pardon or commutation of sentence rather than parole. Consequently, such a release would not be a valid exercise of authority by the Kansas Adult Authority.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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RTS:TDH:JEF:may