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September 28, 1979

Mr. Robert L. Araza, Chairman  
Arizona Board of Pardons & Paroles  
Suite 202  
1812 West Monroe  
Phoenix, AZ 85007

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ARIZONA ATTORNEY GENERAL

RE: I79-239

(R79-187)

Dear Mr. Araza:

In Ariz.Att'yGen.Op. No. 77-213, we concluded that a prisoner cannot be paroled to an Immigration and Naturalization Service (INS) detainer. You have requested our opinion as to whether the 1978 amendment to A.R.S. § 31-412 would change the conclusion expressed therein. Although the recent amendment has no bearing on the detainer issue,<sup>1</sup> we have reviewed our prior opinion and now feel that its underlying assumptions were erroneous. We therefore now conclude that an inmate who has satisfied all of the criteria for parole eligibility may be paroled even though he is subject to an INS detainer.

Pursuant to A.R.S. § 13-412.A, the Board of Pardons and Paroles must apply the following standards when deciding whether a person shall be released on parole:

1. In Ch. 164, § 15, Session Laws 1978, subsection B of A.R.S. § 31-412 was added, providing in pertinent part:

. . . [A]ny prisoner . . . may be certified by the director as eligible for parole for the sole purpose of parole to the custody of any other jurisdiction to serve a term of imprisonment imposed by such jurisdiction or parole to the custody of the department of corrections to serve any consecutive term imposed on such prisoner. . . .

This subsection concerns a parole only for the purposes of serving a consecutive prison term or a prison term in another jurisdiction. As we shall discuss in the text of the opinion, a detainer does not fit into either category, and so it is not covered by the provision.

§ 31-412. Criterion for release on parole;  
release; custody of parolee

A. If a prisoner is certified as eligible for parole . . . the board of pardons and paroles shall authorize the release of the applicant upon parole, unless it appears to the board, in their sole discretion, that there is substantial probability that the applicant will not remain at liberty without violating the law. The applicant shall thereupon be allowed to go upon parole in the legal custody and under the control of the department of corrections, until expiration of the term specified in his sentence or until his absolute discharge. (Emphasis added.)

We said in our earlier opinion that parole to an INS detainer is not permissible because it is a parole to another form of incarceration, in violation of Mileham v. Arizona Board of Pardons and Paroles, 110 Ariz. 470, 520 P.2d 840 (1974)<sup>2/</sup>. This statement was not an accurate description of the INS detainer process which is, in fact, in the nature of a civil administrative proceeding<sup>3/</sup>. Thus, insofar as we relied on the Mileham case as authority for denying parole to an INS detainer, that reliance was misplaced<sup>4/</sup>.

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2. The Mileham case held that a prisoner could not be paroled to another form of incarceration. The Legislature, in response, added A.R.S. § 31-412.B which specifically allows parole under those circumstances.

3. The standard form detainer used by the United States Department of Justice, Bureau of Immigration and Naturalization Service (INS), informs the Department of Corrections that action by the INS is pending against the inmate. The detainer states that an investigation regarding deportation has been initiated, that an order to show cause setting out the basis for deportation has been filed and that an administrative warrant for arrest has been issued. The detainer requests that INS be given 30 days notice prior to release of the prisoner. The INS also requests notice of death or transfer of the prisoner.

If INS exercises its detainer, the prisoner is taken into immediate custody upon release from the Arizona facility. The person is taken to El Centro, California, where an administrative hearing on the deportation matter is held.

Another reason that was advanced for denying parole was that there was separate provisions governing detainers. A.R.S. §§ 31-481 et seq. However, the fact that these provisions exist has no bearing on whether an otherwise eligible parole candidate should be denied parole simply because the detainer exists. The INS detainer may be adjudicated while a prisoner is incarcerated, but there is no requirement that it be resolved before parole.

The Board has the duty to grant parole unless "there is a substantial probability that the applicant will not remain at liberty without violating the law."<sup>5/</sup> The fact that a civil INS detainer may be pending is not relevant to the Board's decision. It is our conclusion, therefore, that an otherwise eligible inmate may be paroled to an INS detainer. In so concluding, we are not implying that inmates subject to a detainer should be paroled. The Board must examine the individual circumstances of each inmate as to eligibility for parole pursuant to the statutory standard and cannot use this method of parole as a subterfuge to reduce the prison population.

Sincerely,



BOB CORBIN  
Attorney General

BC:MP:brf

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Although the deportation action may be based on the prior criminal conduct, the deportation action is an administrative proceeding. Fleming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367 (1960). Proceedings for deportation under the immigration laws are classified as civil actions. Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512 (1952). Deportation is not a prosecution for conviction of crime; Fleming, supra; nor punishment, Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525 (1952); nor a banishment as punishment, Fong Yue Ting v. United States, 148 U.S. 1698, 13 S.Ct. 1016 (1803).

4. Our earlier opinion also relied on the fact that, since parole as a detainer is incarceration, a prisoner could not live "at liberty" as required by A.R.S. § 31-412 (and also A.R.S. § 31-414, relating to discharge). It is clear, however, from

Footnotes (Cont'd.)

reading these statutes that the phrase "at liberty" does not impose a condition to the grant of parole separate from the condition to the grant imposed by the immediately succeeding phrase "without violating the law." What the Legislature intended in using those two phrases is the unitary requirement that the board be satisfied, before granting parole, that the parole applicant not have a propensity to commit criminal acts once released upon parole. If the Legislature desired to impose the additional condition to the grant of parole that the parole applicant remain at liberty following the grant, it would be totally inconsistent for it to have enacted A.R.S. § 31-412.B, which permits parole to incarceration under a difference sentence.

5. We do not construe the phrase "violating the law" to include possible violations of laws such as federal immigration laws, the penalties for which are civil in nature.