

**Opinion No. 53****State Prison—Prisoners—Paroles—Suspended Sentence, Effect of—  
Conviction, What Constitutes.**

**Held:** 1. An inmate of the State Prison, who had been convicted of a felony other than the one for which he is now serving time, but received a suspended sentence after the first conviction and served no time with respect to such conviction is not eligible for parole under the provisions of Section 12264, Revised Codes of Montana, 1935, since he had previously been convicted of a felony other than the one for which he is serving time.

2. An inmate who was convicted of a felony and then received a suspended sentence and who then commits another felony may be eligible for parole if he is now committed to the State Prison under his original sentence, the suspended sentence having been revoked. However, if he is convicted of and sentenced under the second felony, then he is not eligible for parole as he would then be serving time for one felony and would have been previously convicted of another felony.

September 12, 1949.

Mr. Lou C. Boedecker, Warden  
Montana State Prison  
Deer Lodge, Montana

Dear Mr. Boedecker:

You have presented the following question for my opinion:

1. Is an inmate who has been convicted of a felony, but was placed on a bench parole or a suspended sentence, and fulfilled the requirements of the suspended sentence, considered as a loser or is he subject to parole under the terms of the law? The inmate referred to has never served any time in a penal institution.

2. Is a man who is convicted of violation of a suspended sentence within the State of Montana, eligible for parole? Second felony had been committed in this instance, to cause the suspended sentence to be revoked, and the judge of the District Court had the alternative of sentencing the subject on the new charge or for violation of the original suspended sentence.

Section 12264, Revised Codes of Montana, 1935, prescribed the procedure to be followed and the regulations pertaining to the granting of paroles to prisoners held in the Montana State Prison. The portion of this section which is pertinent to the above questions is as follows:

"The Governor may recommend and the State Board of Prison Commissioners may parole any inmate of the State Prison, under such reasonable conditions and regulations as may be deemed expedient, and adopted by such State Board, providing, however,

1. That no convict shall be paroled who has been previously convicted of a felony other than the one for which he is serving sentence, either in this state or elsewhere. . . ."

I have no difficulty in answering your first question by saying that such an inmate is not eligible to receive a parole. Subdivision 1 of Section 12264, *supra*, provides that no convict shall be paroled who has been previously convicted of a felony. A person convicted of a felony and who then receives a suspended sentence has come under the ban of subdivision 1, i. e., he was convicted. It is immaterial that the sentence was suspended, the conviction stands and it is the controlling element. This precise point was raised in the case of *Lewis v. Carter*, 220 N. Y. 8, 115 N. E. 19, wherein the court held:

"One who has been adjudged guilty of the crime of burglary in the third degree, which is punishable by imprisonment in a state prison, but is given suspended sentence, is one "Convicted" of a crime within Prison Law, Consol. Laws, c. 43, Section 211, entitling every person to a parole who is under sentence for a definite term for felony who has never before been convicted of a crime punishable by imprisonment in the state prison."

Your second question presents a somewhat different problem. Section 12078, Revised Codes of Montana, 1935, as amended by Chapter 184, Laws of 1937, specifies in what instances the Judge may suspend sentence and provides that the Judge "is authorized thereafter in his discretion, during the period of such suspended sentence to revoke such suspension and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the State Board of Prison Commissioners as provided by law, or retain such jurisdiction with his court as is authorized by him or his successor."

Although you do not advise me in your statement of the facts, I assume that in the situation which prompts your second question the Judge retained jurisdiction of the person placed upon suspended sentence and did not order such person placed under the jurisdiction of the State Board of Prison Commissioners. If the Judge did release the jurisdiction of the suspended prisoner to the State Board of Prison Commissioners, he would lose jurisdiction for all purposes and could no longer revoke the suspension and order the prisoner committed. *State ex rel. Foot v. District Court*, 72 Mont. 374, 233 Pac. 957.

The answer to your second question depends upon whether the Judge revoked the suspended sentence and committed the prisoner to confinement under the original sentence or whether the inmate was convicted of the second felony and sentenced to the State Prison under this second conviction. Subdivision 1 of Section 12264, *supra*, provides that no convict shall be paroled who has been previously convicted of a felony other than the one for which he is serving sentence. Now, if the inmate is only serving out his suspended sentence and was not convicted, and sentenced for the second felony, he is serving time for the original felony and may be eligible for parole. If convicted and

sentenced for the second felony he is not eligible for parole since he shall have been "previously convicted of a felony other than the one for which he is serving time."

In interpreting subdivision 1 of Section 12264, *supra*, it would be well bear in mind the commonly accepted definition of "convicted" or "conviction." The general rule is that a plea of guilty stands upon the same footing as a conviction by jury and is a "conviction" as the term is used in the statutes. *Rowland v. State*, 72 Ga. App. 793, 35 S. E. (2d) 372; *People v. Dail*, 22 Cal. (2d) 642, 140 Pac. (2d) 828; *U. S. v. Fox*, 130 Fed. (2d) 56. Thus I take it to be the rule that a convict now serving a sentence in the State Prison who had previously entered a plea of guilty to another felony is not eligible for parole under the provisions of Section 12264.

Therefore it is my opinion that an inmate of the State Prison, who had been convicted of a felony other than the one for which he is now serving time, but who received a suspended sentence after the first conviction and served no time with respect to such conviction, is not eligible for parole as he had previously been convicted of a felony other than the one for which he is serving time.

An inmate who was convicted of a felony and then received a suspended sentence and who then commits another felony may be eligible for parole if he is now committed to the prison under his original sentence, the suspended sentence having been revoked. However, if he is convicted of, and sentenced under the second felony, then he is not eligible for parole as he would then be serving time for one felony and would have been previously convicted of another felony.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.