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SUPREME COURT, STATE OF COLORADO

No. 85SA211

Appeal from the District Court of Fremont County  
Honorable PAUL J. KEOHANE, Judge

FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

OCT 22 1985

~~Mac V. Dunford, Clerk~~

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OPENING BRIEF OF PETITIONER-APPELLANT

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SIDNEY D. BARBER

Petitioner-Appellant

v.

THOMAS COOPER

Respondent-Appellee

---

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INTRODUCTION

Petitioner-Appellant was the defendant in the trial court and will be referred to by name or as Petitioner. Respondent-Appellee will be referred to as the Respondent. Numbers in parentheses refer to the volume numbers (Roman numerals) and page numbers (Arabic numbers) of the record on appeal.

STATEMENT OF THE ISSUE PRESENTED

Whether the trial court erred in refusing to grant credit on Mr. Barber's Colorado sentence of life imprisonment for the period of time he was incarcerated in a federal penitentiary serving a federal sentence?

STATEMENT OF THE CASE AND FACTS

On March 5, 1985 Sidney Barber filed his Petition for Writ of Habeas Corpus and/or Rule to Show Cause in the Fremont County District Court.(I, 4) In the Petition Mr. Barber alleges that on June 28, 1971, he was convicted in the El

Paso County District Court of the offense of first degree murder and was sentenced to life imprisonment;(I, 5; 19) that on July 12, 1974, he escaped from the penitentiary;(I, 5) that on April 20, 1975, he was arrested in California and charged in federal court there with bank robbery;(I, 6) that on June 15, 1975, he was convicted of bank robbery and a sentence of ten years was imposed;(I, 6) that in August of 1975, he was transferred from the McNeil Island federal penitentiary to the United States Marshal in Los Angeles for further transfer to the Colorado State prison;(I, 6; 30) however the Colorado Department of Institutions declined to take custody of him and on November 26, 1975, he was transferred instead to the federal prison at Leavenworth, Kansas;(I, 6) that on September 4, 1981, he was released from the federal penitentiary and was transferred to the custody of the sheriff of Leavenworth County where he was released on bond.(I, 6) that on February 23, 1983, he voluntarily returned to Colorado and turned himself in to prison officials at Canon City, Colorado;(I, 6) and that upon being received there, the Colorado Department of Corrections, in computing his parole eligibility date, refused to allow credit for the time he spent in federal custody.(I, 7)

In an order issued on April 29, 1985, the lower court denied Mr. Barber's Petition for Writ of Habeas Corpus and/or Rule to Show Cause.(I, 36-37) On May 16, 1985, Mr. Barber duly filed his Notice of Appeal, thereby perfecting this appeal.(I, 41-42)

#### SUMMARY OF THE ARGUMENT

Mr. Barber was convicted in 1971 of murder and sentenced to life imprisonment. He escaped in 1974 and was arrested in California in April of 1975 and charged with bank robbery. He was convicted of this charge in June of 1975. In August of 1975 federal officials sought to transfer Mr. Barber to Colorado to resume serving his sentence here. However, Colorado refused to accept him and

he completed serving his federal sentence and was released from federal custody on September 4, 1981. Because Colorado's refusal to accept Mr. Barber from federal authorities had the direct effect of depriving him of the ability to recommence serving his Colorado sentence, thereby extending his parole expiration date, he is entitled to credit on his Colorado sentence for the period of time he was in federal custody following the refusal of Colorado to accept his transfer from federal authorities.

### ARGUMENT

On August 8, 1975, an order was issued by the United States Penitentiary at McNeil Island, Washington, ordering the transfer of Mr. Barber to the United States Marshal in Los Angeles for further transfer to the Colorado State Prison.(I, 30) Accordingly an Order of Release to effectuate this transfer was issued on August 18, 1975.(I, 32) However, Mr. Barber contends, and the trial court found, that the State of Colorado declined to take custody of him at that time and he then served his federal sentence. Mr. Barber contends that the action of the State of Colorado in declining custody of him at that time had the effect of precluding him from serving his Colorado sentence here, thus depriving him of having that period of time count toward his parole eligibility.

In Alire v. People, 171 Colo. 78, 466 P.2d 78 (1970), the defendant was improperly released on an appeal bond on a Colorado conviction and immediately taken into custody by federal officers to serve a federal sentence. This Court recognized the concept of waiver, or forfeiture, of a state of its right to require a prisoner to complete a state sentence after relinquishing him to another sovereign jurisdiction to serve a sentence there. See Jones v. Rayborn, 346 S.W.2d 743 (Ky. 1961). In Alire, the Court denied relief because the defendant had been given full credit on the Colorado sentence for the time he spent in federal custody and


further judicial action was thus unnecessary. Mr. Barber contends that under the rationale of Alire he is entitled to credit on his Colorado sentence for the period of time he spent in federal custody following the State of Colorado's refusal to accept the federal transfer of him to Colorado. See also, United States v. Croft, 450 F.2d 1094 (6th Cir. 1971). Had Colorado accepted the transfer Mr. Barber would have been incarcerated here and that period of time would have been credited toward his parole eligibility.

The fact that Mr. Barber was serving a life sentence should not preclude him from obtaining credit on his parole eligibility. Section 39-18-7, Colorado Revised Statutes (1963), provides that a person serving a life sentence shall be eligible for parole after serving ten calendar years. Although Mr. Barber is not serving a determinate sentence, he nevertheless has a parole eligibility date which is an appropriate basis for applying for credit for the period of time he was in federal custody.

#### CONCLUSION

It is respectfully submitted that the trial court's order denying Mr. Barber's petition for writ of certiorari should be reversed.

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CERTIFICATE OF SERVICE

I certify that a copy of the Opening Brief of Petitioner-Appellant was served on Nathan B. Coats, Deputy Attorney General, by hand-delivery on October 22, 1985.

B. L. Ladd