

INTERMEDIATE REFORMATORY

*Final:*

The court cannot lawfully assess concurrent sentences for burglary and larceny where a person is charged both offenses in same count.

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Honorable V. Don Hudson  
Superintendent  
Intermediate Reformatory for Young Men  
Jefferson City, Missouri

Dear Mr. Hudson:

Under date of March 27th you wrote the Attorney General requesting advice upon the following questions:

"Re: James H. Smith, Our #5322

"The above named subject was tried and convicted on charges of Burglary and Larceny in the Circuit Court of Monroe County February 2, 1945, sentenced to this institution, and received sentences of Three Years on each charge to run concurrently. On March 18, 1945 he escaped and was returned to this institution the same day. I am interested in knowing whether or not the transferring of this subject to the Penitentiary would necessitate his serving these sentences consecutively. I suggest that you see State vs. Huff, 181 S. W. (2d) Vol. 3, p. 513.

"I am also interested in knowing whether or not a boy sent to Algoa under sentences of Burglary and Larceny is compelled to serve his sentences consecutively when neither of the words are used in stating the sentences on the Commitment paper."

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The law establishing the Intermediate Reformatory is found in Article 6, Chapter 48, R. S. Mo. 1939. Section 9117 of this article provides what persons shall be sentenced to the institution, as follows:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

The sections of the penal code fixing the limits of punishment for offenses generally, refer to imprisonment in the penitentiary, as, when the majority of these sections were enacted, no Intermediate Reformatory existed. For that reason, when a court assesses a punishment of imprisonment in the Intermediate Reformatory, it necessarily has to be within the limits fixed for imprisonment in the penitentiary. This situation in the law creates some particularly difficult problems. For example, in the case of Anthony v. Kaiser, 350 Mo. 748, the Supreme Court held that the portion of Section 9226, R. S. Mo. 1939, relating to punishment of convicts for offenses committed while under sentence to the penitentiary, did not apply to convicts who had been originally sentenced to the Intermediate Reformatory.

In your letter you state that the person received concurrent sentences of three years each to the Intermediate Reformatory, escaped, was captured, and now is subject to be transferred to the penitentiary. Section 9118, R. S. Mo. 1939.

You further call attention to the case of State v. Huff, 181 S. W. (2d) 513. In this case the Supreme Court had

before it the question of construing and applying Section 4849, R. S. Mo. 1939, to the case of a person who had been convicted of burglary and larceny charged together in one count of the indictment or information (this method of prosecution for burglary and larceny is authorized by statute, Section 4448, R. S. Mo. 1939).

The Supreme Court held that under the situation existing in that case the trial court had no authority to assess concurrent sentences and corrected the error by correcting the sentences so that they would be cumulative.

Your letter does not state whether the person mentioned as receiving concurrent sentences for burglary and larceny had been charged in one count or in one information or indictment containing two counts for both offenses. But it is assumed that he was so charged and tried, for persons are generally charged in that manner for these two offenses. However, if the person was not so charged, then what is said herein would not be applicable.

In the case of Anthony v. Kaiser, supra, while discussing sentences to the Intermediate Reformatory and to the Penitentiary, the court pointed out that after the transfer the sentence should in legal contemplation be treated as if it had originally been to the Penitentiary.

Under the facts stated in your letter, the situation as it now stands is that the person has been given concurrent sentences to the Intermediate Reformatory for burglary and larceny, and it is extremely doubtful if the court had the power to do this, for the court could not have lawfully sentenced the person to concurrent sentences in the Penitentiary for two offenses. Now, if he is transferred to the Penitentiary, it would be the same as if he had originally been sentenced to the Penitentiary.

Warden Whitecotton is familiar with the Huff case heretofore mentioned, as about a week ago this office, at his request, furnished him with a copy. In all probability, if a person were transferred to the Penitentiary, the Warden, being familiar with the Huff case and knowing that concurrent sentences cannot be lawfully imposed for these two offenses, upon the transfer would cause the Penitentiary records to carry

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the sentences as cumulative. If this occurred, at the end of the two-year period the person could bring a habeas corpus proceeding and see what the Supreme Court would do about it.

In regard to your second question, sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. *Anthony v. Kaiser*, 350 Mo. 748; *United States v. Daugherty*, 70 L. Ed. 309; see also annotations 70 A. L. R. at page 1521. Also, the general rule is that in the absence of an applicable statute making terms successive, or a direction to that effect, in the sentence or commitment, terms imposed by the same court to the same institution are to be regarded as concurrent. *McCracken v. Kaiser*, 179 S. W. (2d) 470; *State ex rel. Meininger v. Breuer*, 304 Mo. 381. The Supreme Court has said that when a person is charged with burglary and larceny in one count and convicted of both before sentence is pronounced for either offense the person cannot legally be given concurrent sentences.

The Superintendent of the Intermediate Reformatory is presumed to know the law and where the record in a case of this nature is silent as to whether the sentences are to be concurrent or consecutive, the Superintendent should apply the statute as he knows it to exist and as the courts have held it to apply, and enter the sentences as cumulative.

Respectfully submitted,

W. O. JACKSON  
Assistant Attorney General

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APPROVED:

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J. E. TAYLOR  
Attorney General