

PENAL INSTITUTIONS: Sentences are cumulative and not concurrent where prisoner, while at large on parole from the penitentiary, commits a second felony, is convicted on that charge and sentenced to the penitentiary. The first sentence must be served first. Incorrect prison records should be changed in such manner as to show the serving of sentences in the order of sequence required by law.

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Honorable Grover C. Clevenger
Director, Department of Penal
Institutions
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for our opinion by your letter dated June 18, 1940, which is in the following terms:

"More than 150 inmates at the Penitentiary are parole or commutation violators whose paroles or commutations have been revoked because of subsequent convictions.

It has been customary to record a violator as serving his second sentence from the time he re-enters the Penitentiary, giving him a discharge when the (second) sentence expires. He is then held in custody to serve the balance of the original (revoked) sentence.

According to a recent decision of the Supreme Court (Ex parte Herring vs. T. M. Scott) it would seem that such a manner of arranging our records does not comply with Sec. 12969, R. S. Mo., 1929.

In cases where Penitentiary records show that an inmate has been booked to serve the second sentence before completing the unexpired portion of the original term, will it be permissible to change our records to conform

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with the statute and court decision by the following procedure:

(a) Replace the inmate under his original sentence, giving him credit for all time served by him from the date upon which he entered the Penitentiary the second time.

(b) Upon the expiration of the original sentence mark him as beginning service on the second sentence, computing his time anew from the day following the final expiration of his first sentence.

Please advise us if this way of amending our records to conform with the statute will, in your opinion, entitle an inmate to claim credit for the time he was erroneously booked under the second sentence while he should have been shown by the records to be completing his original term."

Section 12969 R. S. Mo. 1929, Mo. St. Ann. page 1973 provides:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence

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to run until the expiration of the sentence under which he may be held; Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Your attention is directed to an opinion of the Attorney General dated July 1, 1940, and addressed to you, which deals with points closely related to this opinion. As we stated in that opinion in Ex parte Green 17 S. W. (2d) 939, l.c. 940, 322 Mo. 857, the Supreme Court said:

"The Warden is mistaken when he states in his return that the petitioner when again confined in the penitentiary first served his sentence under the (second) commitment issued by the circuit court of Lafayette county.

When the petitioner was returned to the penitentiary, he was there under commitments from the circuit courts of both St. Charles and Lafayette counties. The warden and other officials were without authority to determine the order in which the sentences should be served. That question is determined by section 2292, R. S. 1919."

This rule applies to one who, while at large on parole from the penitentiary, commits a second felony and is convicted on that charge and again sentenced to the penitentiary. According to that rule, as a matter of law, all of the time required by law to be served under the first sentence must be served before the time so required to be served under the second sentence can commence. If the penitentiary records purport to show the serving of sentences in any other order of sequence, then the records are incorrect and should be changed in such manner as to

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conform to the law as above stated. It follows that the amendment of the penitentiary records in the manner suggested in your said letter dated June 18, 1940, is proper.

In your letter, you ask whether such amendment will "entitle an inmate to claim credit for the time he was erroneously booked under the second sentence while he should have been shown by the records to be completing his original term." It will not entitle any prisoner to claim credit as to both sentences at the same time for any of the time served, because the two sentences are cumulative and not concurrent. It was so ruled in *Ex parte Green*, supra, and in *Lee vs. Gilvan* 229 S. W. 1045, 287 Mo. 231, where the court said:

"Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative.

This was the conclusion reached in *Ex parte Allen*, 196 Mo. 226, 95 S. W. 415."

In your letter of June 18th, you referred to the case of *Ex parte Herring vs. Scott*. That case was heard in the Supreme Court and the petitioner was ordered discharged on June 14, 1940. A copy of the opinion of the Court, which was filed on August 3, 1940, is hereto attached. That opinion is authority for this one, and regarding the points here considered, the Court there said:

"Furthermore, the *Lee* case was decided by Division 2 of this court in 1921, and the question was reconsidered by the court en banc in 1929, *Ex parte Green*, 322 Mo. 857, 17 S. W. (2d) 939. There the court held unanimously (without mentioning the *Lee* case, it is true) that the prison officials were without authority

to determine the order in which the sentences should be served, and that the requirement of the statute is controlling. * * * * *

But we are not to be understood as meaning that the convict can eat his cake and have it too - in other words, that if the petitioner's second parole should be legally revoked, he will be entitled to time with which he has been mistakenly credited on his second sentence, and which by this proceeding is being transferred to his first sentence in satisfaction thereon. We do not rule that such time can be counted on both sentences. That question is not presented in this case, but we make the statement to clarify the opinion."

CONCLUSION

Sentences are cumulative and not concurrent where prisoner, while at large on parole from the penitentiary, commits a second felony, is convicted on that charge and sentenced to the penitentiary. The first sentence must be served first. Incorrect prison records should be changed in such manner as to show the serving of sentences in the order of sequence required by law.

Respectfully submitted,

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