PENAL INSTITUTIONS: Convicted, sentenced, incarcerated, paroled. While at large on parole, committed second felony, and again convicted, sentenced, incarcerated. Served total time on first sentence, and paroled as to second one. First sentence must be served first.

PRISONER RELEASED WHEN:

August 15, 1940

8-21

FILED
17

Mr. 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:

"On June 14, 1940, the Supreme Court ordered Harry Herring, No. 28512, released from the Penitentiary on his appeal for a writ of habeas corpus.

Herring originally had been received at the Penitentiary in 1925 to serve a sentence of fifteen years. He was paroled from this sentence in 1930. In 1933, he was again received at the Penitentiary to serve another sentenceof ten years, and the parole on his original sentence was revoked.

After serving approximately seven-twelfths of his second sentence, he was discharged from the second sentence under a conditional commutation, and was held to complete the remainder of his original sentence, upon which he had been given no credit on our records until his discharge from the second sentence.

The Court held that, in compliance with Sec. 12969, R. S. Mo. 1929, Herring should have been booked to serve the remainder of his first sentence when delivered to prison under the second commitment, and that since

he had complied with the terms of the first sentence in that he had completed nine-twelfths of fifteen years, he was entitled to his release. The Court also recognized as valid the conditional commutation issued him on the second sentence and ruled that, having complied with the first sentence and having in his possession a discharge from the second sentence, he could no longer be legally imprisoned.

We have at present in the Penitentiary about forty inmates whose cases are identical to Herring's, and who could without doubt appeal for release as successfully as he did. Will it, in your opinion, be necessary for each of these inmates to appeal to the Court for release, or may the Warden discharge them on the basis of Herring's case, thus permitting their release without individual recourse to the Court?"

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 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."

In your letter dated June 18, 1940, 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 that opinion, which was filed on August 3, 1940, was sent to you with our opinion dated August 12, 1940 (Our No. 253). That opinion is authority for this one.

Said Section 12969 is applicable to the sentences to be served by one who commits a second felony while at large under a parole by the governor. It was so ruled, under the statute containing the same provisions as said Section 12969, in Lee vs. Gilvan 229 S. W. 1045, 287 Mo. 231, in Ex parte Green 17 S. W. (2nd) 939, 322 Mo. 857 and in Ex parte Herring vs. Scott, where the court in part said:

> "There is no doubt about the fact that the statute applies to the petitioner. He did commit the second crime of robbery in Jackson County while under sentence for the first crime of robbery. The fact that he was out on parole when the second offense was committed, did not make him any the less 'under sentence' for the first offense."

When the prisoner in this case was convicted of the charge of having committed the second felony as aforesaid, the revocation of his parole as to his first sentence then became effective. In Ex parte Green 17 S. W. (2nd) 939, l.c. 940, 322 Mo. 857, the Supreme Court said:

> "The revocation of the parole became effective upon the petitioner's conviction and sentence in said court. That was a judicial determination that he had violated one of the conditions of his parole. Ex parte Strauss (Mo. Sup.) 7 S. W. (2d) 1000."

After the second conviction and when the prisoner was incarcerated in the penitentiary for the second time, he then commenced to serve the remainder of his first sentence. As a matter of law, he must serve all of the first sentence before he can commence to serve the second one. In Ex parte Herring vs. Scott, supra, it was further 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. (2nd) 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.
> * * * * * * * * * * * * * * * * * * * *
> They (the legislators) were contemplating a situation where a convict under sentence for one felony commits another perhaps of a different kind and at a remotely later time. They saw fit to require that in event of conviction of the latter, the sentence therefor should not commence to run until the convict had fully paid his debt to the State for the first. Having so declared in a solemn legislative act, we are not at liberty to amend it by construction. The Green case so rules the question directly."

Before the expiration of the time required to be served

under the first sentence as aforesaid, this prisoner received the governor's conditional commutation parole as to his second sentence. When the first sentence did expire as aforesaid, there remained no legal authority for his imprisonment. Section 648 R. S. 1929, Mo. St. Ann. page 4896 provides:

> "No person's body shall be imprisoned or restrained unless by authority of law."

There being no legal authority, under the foregoing Supreme Court decisions, and statutes, for the imprisonment of the prisoner whose case is stated above, he and all prisoners whose cases are identical with his should be released. The warden should release said prisoners without waiting for them to resort to the courts.

For the reasons stated above, a prisoner to whose sentences said Section 12969 is applicable should be released even though he has not been paroled as to his second sentence, if he has been incarcerated for a period of time equal to the total cumulative periods of time required by law to be served under both sentences.

CONCLUSION

A prisoner should be released where the following facts exist. He was convicted, sentenced, incarcerated in the penitentiary and paroled by the governor. While at large on parole, he committed a second felony, was convicted on that charge, sentenced and again incarcerated in the penitentiary. He has served the period of time required by law to be served under the first sentence, and has been given the governor's conditional commutation parole as to the second sentence.

Also, a prisoner should be released after he has served the total cumulative periods of time required by law to be served under both sentences, without a parole as to the second one.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

EH:RT