PENAL INSTITUTIONS: The Record Clerk of the penitentiary must follow the law in classifying the prisoner for service of two sentences, one of which was for the conviction on a case while a convict.

September 13, 1939

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Hon. Lamkin James
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. James:

This department acknowledges receipt of your letter of some time ago, wherein you requested an opinion based upon certain facts. Your letter is as follows:

"On October 11, 1938, at the September Term of the Circuit Court of Saline County, Missouri, one A was convicted of grand larceny and immediately thereafter paroled by the Circuit Judge. A short time thereafter and before the completion of his parole, he was charged with robbery from the person and, upon ascertaining that the prosecuting witness was reluctant to testify, I, as prosecuting attorney, agreed with the attorney for A that upon a plea of guilty I would recommend to the Circuit Judge a sentence of three (3) years on the robbery charge, and would recommend that the same run concurrently with the grand larceny charge of which he was theretofore convicted. The matter was handled in that manner and upon my recommendation the Circuit Judge made an order ordering the two sentences to run concurrently. This was done at the January Term, 1939, and a commitment was ordered by the Circuit Judge in which commitment it was specifically set out that the three year sentence was to run con-

currently with the two year sentence. A was received by the warden of the penitentiary under that commitment of January 19, 1939.

"Thereafter I was informed by one R. J. Mitchell, Record Clerk of the penitentiary, that the concurrent portion of the commitment was disregarded by the warden and that A's term was fixed at a term of five (5) years and that he was registered to serve two terms consecutively rather than concurrently.

"Under date of July 18th I addressed a letter to the Record Clerk of the penitentiary relating to this matter and in response thereto on July 20th he wrote me that the action of the penitentiary in disregarding the concurrent portion of the commitment was based upon an opinion from your office under date of June 9, 1938, written by Mr. Buffington, I am thoroughly of the opinion that Mr. Buffington's opinion does not cover this set of facts and is not applicable. My thought is that irrespective of the right of the Circuit Judge to make an order ordering terms to run concurrently, that that matter can only be questioned and raised by the attorney for the state, and that irrespective of whether there would be any authority by the state to question the commitment and the Circuit Court's order, the warden of the penitentiary, being purely a ministerial officer, would have no authority to disregard the terms of the commitment."

We are enclosing two opinions which cover the main points involved in your request. One of the opinions was addressed to the Board of Probation and Parole, dated August 24th, 1939, the other opinion was rendered to Hon. J. E. Matthews, Director, Department of Penal Institutions, and was dated June 9th, 1938. The only question

not passed on in the two opinions is, whether or not the Record Clerk had the power to change the commitment of the prisoner so as to make two sentences run consecutively.

In the two above opinions this office has held that under Section 12969, R. S. Mo. 1929, which applies to a person sentenced, and while under sentence was convicted and sentenced under another crime, it is mandatory that the convictions shall run consecutively, and that the sentence of the convict under the second charge shall not commence to run until the expiration of the sentence under which he may be held, or, in other words, the first conviction.

This Section, 12969, supra, was passed upon in Ex parte Green, 17 S. W. 2d 939, where the court in discussing the warden's power, 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 commitment issued by the circuit court of Lafayette county.
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> "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, as follows:
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> "'* * * And if any convict shall commit any crime in the penitentiary, or in any county in 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.'"

In that case the warden of the penitentiary saw fit to change the time of the beginning of the two consecutive sentences, which was in conflict with the order of serving sentence, as set out in Section 12969, supra. This power of the warden, of course, was governed by the law as set out in said Section 12969, and the court held in that case that the warden had no authority to change the order of the serving of the two consecutive sentences, in violation of said section.

Your case bears solely upon Section 12969, and the court had no authority to cause the sentences to run concurrently. The Record Clerk in your case received two commitments; one of them committing the defendant to the penitentiary for a term of two years in the state penitentiary on a charge of grand larceny, and also a separate commitment for a term of three years, on a charge of robbery from the person. The commitment for a period of two years on a charge of grand larceny on its face would show that he had been paroled and that the parole had been revoked, and at the time of the commitment of the robbery from the person, he was a convict in accordance with Section 12969 and it was mandatory on the part of the court to sentence him on both charges to run consecutively, and it was mandatory on the part of the warden of the penitentiary to have the sentences run consecutively, and the order of the court stating that the sentences should run concurrently was of no effect but did not invalidate the two separate commitments.

We of course realize that a grave injustice has been done the defendant who plead guilty on the recommendation of the prosecuting attorney and the trial court, that the sentences did run concurrently; but, under the law it is mandatory that they run consecutively and under the statement of facts, as set out in your request, I believe it is too late at this time to file a motion to set aside the plea of guilty for the reason that the term has passed.

That it was mandatory upon the court, and mandatory for the defendant to serve the two separate terms consecutively, was also upheld in the case of Ex parte Simpson, 300 S. W. 491, where the court said:

> "Petitioner had been convicted of grand larceny in Jackson county and, while at large in Jackson County under bond pending disposition of his appeal, was convicted of the crime of burglary. The circuit court of that county had the power, and indeed it was its duty, to make his term of imprisonment for the burglary commence at the expiration of his term of imprisonment in the grand larceny case. Section 2292, R. S. 1919; Ex parte Allen, 196 Mo. l.c. cit. 233, 95 S. W. 415; State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1; Ex parte Brunding, 47 Mo. 255."

A very analagous case was passed upon by the Supreme Court, which passed upon Section 4456 R. S. Missouri, 1929, which section held that sentences should be consecutively, and it was mandatory upon the court to have the sentences run consecutively, in cases where a person is convicted of two or more offenses before sentenced, and then when sentenced he should be sentenced on two or more terms to run consecutively. This case is State v. Harris, 336 Mo. 737, l.c. 743, where the court said:

> "The record certified here as a whole shows conclusively and it is conceded that defendant pleaded guilty to all five informations at the same time and before he was sentenced on either plea. The result is that under the statute, if we treat the judgments as being correctly shown by the transcripts of the record proper, the sentences are cumulative, i. e., they run successively, not concurrently, and the defendant has been sentenced to two hundred and fifty years' imprisonment. If, on the other hand, we were to disregard the transcripts of the record proper and treat the bill of

exceptions as correctly setting out the judgments, we think the same result follows, this because the statute appears to be mandatory in its terms, leaving to the court in situations falling within the express terms of the statute no authority to make the imprisonment to which defendant is sentenced on a second or other subsequent conviction commence before the termination of the imprisonment to which he is adjudged upon the prior conviction; in other words, it leaves the court no authority in such situation to make the sentences run concurrently. Such is the contention of the State and we believe it is the only possible construction of the statute without adding to it under the guise of construction further provisions or exceptions not contained in its language nor clearly appearing to have been within the intendment of the Legislature. This statute is discussed in State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1, where, after pointing out that it had evidently been taken from a New York statute, enacted at a time when it was generally held that courts had power to impose cumulative sentences but that in order to do so it was necessary for the subsequent sentence to contain a specific direction to that effect, the court said, 304 Mo. l.c. 404, 264 S. W. 1. c. 7:

"'Courts sometimes inadvertently omitted the direction and at other times did not make it sufficiently certain to be effective. This statute was devised to put an end to miscarriages of the kind in so far as situations described in the statute are concerned. The purpose of the statute was merely to provide that in the cases it covered the sentences should run successively by force of the statute itself and not be dependent for their cumulative character upon any action of the trial court specifically referable to that matter.'

"After discussing the origin and purpose of the New York statute from which ours was taken the court further said, 304 Mo. l.c. 405, 264 S.W. l.c. 7:

"'The statute did not purport to give the courts any power to impose cumulative sentences. It took from them the power, in certain cases, to impose any sentence other than a cumulative one. It did this by writing itself into every sentence, in the kind of cases it described, as a part of such sentence.' (See, also, Ex Parte Durbin, 102 Mo. 100, 14 S. W. 821; Ex parte Turner, 45 Mo. 331.)"

In the above case the Prosecuting Attorney of Jackson County, and the Judge of the Circuit Court of Jackson County, believed that upon accepting a plea of guilty on five different charges of robbery, and then sentencing the defendant to fifty years in the penitentiary on each separate charge, and having the commitment and record entry read that the sentences should run concurrently, that the defendant would only be sentenced to a period of fifty years in the penitentiary. The court ruled that the order stating the sentences were to run concurrently were in violation of the mandatory terms of Section 4456 R. S. Missouri, 1929. In their finding, the court held that under Section 4456, supra, the defendant had been sentenced to a term of two hundred and fifty years in the penitentiary, and not fifty years in the penitentiary. In that case, which is a very similar case to the one stated in your request, the attorney for the defendant in due time had filed a motion to set aside the plea of guilty which motion had been denied by the court. The Supreme Court of this state upon the appeal of the ruling to set aside the plea of guilty reversed and remanded the case on that point, where, I presume, a proper sentence was made. The proper way of pleading a defendant guilty to two charges to run concurrently (where he is not out on parole or is not a convict) would be to accept the plea of guilty on the first charge and then sentence

him, and then accept a plea of guilty to the second charge and then sentence him, to run concurrently with the first charge.

CONCLUSION

In view of the above two opinions, and other authorities herein cited, it is the opinion of this department that a person convicted of grand larceny, sentenced and paroled by the Circuit Judge, and then pleads guilty to a charge of robbery from the person and is sentenced on that charge, it is mandatory that the Circuit Judge issue the commitments and that under section 12969, supra, the sentence of the convict shall not commence to run on the second charge until the expiration of the sentence under the first charge.

It is further the opinion of this department that the warden of the penitentiary, through the Record Clerk, should follow the order of sentence as set out in Sec. 12969, supra, under the record as set out in the two separate commitments on the two separate sentences of the trial court. The fact that the trial court should state in the commitment that the sentences on the two different charges should run concurrent is of no effect, and in violation of Sec. 12969, supra, but that comment in the two commitments does not invalidate the two commitments in total. The two commitments on their face show that on the first charge that the defendant was a convict, and comes within Sec. 12969 on the commitment under the second charge.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

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