CONVITS--WARDEN: Imprisonment shall never be computed from a date in the judgment which is prior to the date of sentence.

February 20, 1935.

Honorable J. M.Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

Your request of February 8, 1935, for an opinion is as follows:

"On November 23, 1934, one Robert Lindsey, our register #45636, was sentenced by the Circuit Court of Pemiscot County, Mo., to serve two (2) years in this penitentiary from that county for the crime of Attempted Robbery, upon his plea of guilty to said charge on the aforementioned date. Accordingly a certified copy of the said sentence and judgment of said circuit court was issued by the Circuit Clerk of Pemiscot County and was placed in the hands of the Sheriff of said county. With this sentence and judgment in his possession, the said Sheriff delivered the said Lindsey to this prison on November 29, 1934. This proceeding was had at the November 1934 Term of said Circuit Court.

"Later, on December 31, 1934, the Judge of the said Pemiscot County Circuit Court, issued a duly certified copy of his order allowing the said Lindsey 241 days of time spent in the New Madrid and Pemiscot County jails prior to the date of sentence, the purpose being to apply this

time on the sentence previously imposed by the said Court. This order was also made at the said November 1934 Term, but no mention of the order was made in the original sentence and judgment, and the order for the allowance was not received by this prison until after the prisoner had already been delivered and his status fixed.

"It is the contention of this office that the Board is not bound to observe the requirements of the said order, and I would respectfully ask that you give a written opinion as to the validity of the order for allowance of the 241 days."

In State v. Gartrell, 71 S. W. 1045, 171 Mo. 489, l. c. 504, our Supreme Court said:

"It is the settled law of this State that during the whole of the term in which any judicial act is done, the proceedings are considered in fieri, and this applies even to adjourned sessions of the same term, and the record remains, so to speak, in the breast of the judge or judges of the court, and hence is subject to amendment or alteration as he or they may direct, but after the lapse of the term, or its final adjournment, the judge has no power to change the record further than by nunc pro tunc entries to make the record speak the exact truth of that which actually did occur during the term, and then only when there is sufficient record or minutes of the judge or clerk to authorize such amendment, as it has been repeatedly ruled by the court that such corrections can not be made 'from outside evidence or from facts existing alone in the breast of the judge, after the end of the term at which the final judgment was rendered' ".

There is no doubt but what the trial court could make an effective order changing the record of a judgment and sentence rendered during term time if the prisoner be not in custody of the warden, for this court said in Ex parte Simpson, 300 S. W. 491, l. c. 493:

> "The right of the circuit court at the same term to set aside its judgment of January 8, 1936, and to enter a new judgment, before petitioner was taken to the penitentiary, is not and could not well be questioned."

A judgment in pro tunc may be made in and after term time and in the absence of defendant.

In State v. Primm, 61 Mo. 166, l. c. 170 the Supreme Court said:

> "There is nothing in the argument that the judgment was written up after proceedings in the court, and during the absence of the accused. The formal judgments are usually transcribed by the clerks afterwards, and are taken from the minutes or docket entries made by the officers at the time; and if they are truly stated, they are not objectionable on that account."

In the case of Ex parte Meyers, 44 Mo. 279, l. c. 283, the Supreme Court said:

> "As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment;"

The above case is authority for computing punishment from day of sentence, but it does not touch on the problem of allowing jail time served before the date of sentence.

In the case of Ex parte Thornberry, 254 S. W. 1087, l. c. 1090; 300 Mo. 661, the Supreme Court said:

> "* * * *after sentence has been pronounced, the court has no power to indefinitely stay the execution of same, either in whole or in part, and any order made to that effect is void."

In R. C. L, page 248, Section 252, we find the law stated thus:

> "The power to suspend sentence and the power to grant reprieves and pardons, as understood when the constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power; the latter was always a part of the executive power. The framers of the federal and state constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments on the executive with full knowledge of the law on the subject, and the words of the constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. As this power was understood, it did not comprehend any part of the judicial functions to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate, or in any degree restrict, the exercise of that power in regard to their own judgments, that criminal courts had so long maintained. The two powers, so distinct and different in their nature and character, were still left separate and distinct, the one to be exercised by the executive, and

the other by the judicial department. The principal reason for the rule denying the power of a court to suspend a sentence indefinitely, as for the rule denying a court power to stay the execution of a sentence, is that to permit it to be done would be to allow the judicial department to exercise the power of commuting or pardoning which belongs to the executive branch of the government. This is on the theory that when a defendant is found guilty the duty of the court is to impose sentence, and that if, for considerations which can appeal only to the pardoning power, the court is permitted to suspend indefinitely the imposing of sentence the result or effect is the same as a pardon by the executive."

16 Corpus Juris at page 1372 states the law thus:

"The time imprisonment is to commence ordinarily is no part of the sentence; and where the judgment fixes the date that imprisonment shall begin, it should be construed to mean that the period of imprisonment shall begin from the date named unless the execution of the sentence is stayed for the time being in some of the ways provided by law, in which event it ought to be computed from the time the prisoner is actually incarcerated.

"According to the statutes in some jurisdictions the term of imprisonment commences on the day that sentence is pronounced.

"In the absence of a statute the time which defendant has spent in jail awaiting trial, or the time

> which he spends after conviction and before sentence awaiting a dedision on his plea in bar to another indictment forms no part of the term for which he is sentenced. However, the time defendant suffers imprisonment while awaiting trial is, under some statutes, credited upon the period fixed in the sentence.

Article V, Section 8, Missouri Constitution provides in part:

> "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.* * * *"

In the case of State v. Sloss, 25 Mo. 291, l. c. 293, the court said:

> "All the departments of our government are confined in their operations. They have prescribed limits, which they cannot transcend. The union of the legislative, executive and judicial functions of government in the same body, as shown by experience, had been productive of such injustice, cruelty and oppression that the framers of our constitution, as a safeguard against those evils, ordained that the powers of government should be divided into three distinct departments, and that no person charged with the exercise of powers properly belonging to one of these departments should exercise any powers properly belonging to either of the others, except in the instances expressly directed or per-

mitted by the constitution.

"Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offenses properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the state.

"There can be no question as to the nature of the act under consideration. It is as effectually a pardon as though it were one in form under the great seal of our state."

CONCLUSION.

Under the facts presented in your letter, Missouri has no statutes providing that the court may or shall state in the judgment or sentence the date when imprisonment must start or may be computed from. Missouri has such statutes applicable to other facts, but such statutes are not pertinent to the facts presented for this opinion.

There seems to be no question but what the first judgment and sentence rendered be sufficient in form and substance upon which to support incarceration in the penitentiary and by the terms of same, incarceration would date from the day of sentence, unless perchance this last order is to be given effect.

What you want to know is how does this subsequent order, which purports to start the date that imprisonment is to be computed from a date prior to the date of sentence, in fact at a date prior to the date of sentence starting on the date of original incarceration in jail where defendant was awaiting his day in court, effect the original judgment and sentence of the court?

The new order in short is an attempt on the part of the trial court, after judgment and sentence, to allow jail time by an order which he expects the warden to enforce as a stay of execution is enforced. In short it is a judicial reprieve if it is to be given any force at all.

By its operation it is an infringment on the exclusive executive power of the governmor to issue an edict of pardon, as allowable under the Missouri Constitution, and would have exeeeded the courts jurisdiction if given as a part of the original judgment and sentence.

The subsequent court order is not a temporary suspension of sentence allowable to enable an appeal to be perfected or to allow for time to apply for a pardon or parole or any other allowable relief against immediate enforcement of a sentence, but was a permanent suspension of execution based on considerations extraneous to the legality of the conviction and in excess of the power of the trial court in enforcing the sentence.

It is the opinion of this office that said order was rendered beyond the jurisdiction of the trial court and is unconstitutional and void and of no legal force and effect. Such an order attached to this original judgment and sentence would have been void, and the fact that it came during the same term of court as the original judgment and sentence does not add to its validity. Such an order would be void if made by the trial court nunc pro tunc at a subsequent term.

The time when imprisonment should be computed from is no part of the judgment and sentence in the case under consideration, and should not be considered by the warden when booking the prisoner.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H