

**PENAL INSTITUTIONS:** The Record Clerk of the penitentiary  
(Supplemental) 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.

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January 12, 1940.

Hon. Lankin James  
Prosecuting Attorney  
Saline County  
Marshall, Missouri



Dear Sir:

This will acknowledge receipt of your request for a further opinion under the facts stated in an opinion rendered by this office on September 13th, 1939, to you in regard to concurrent and consecutive sentences. We are herein enclosing a copy of that opinion, which is made a part of this supplemental opinion.

Section 12969 R. S. Missouri, 1929, reads as follows:

"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: \* \* "

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The above section makes it mandatory for a court to sentence a convict who has committed another crime so that the sentences must run consecutively and not concurrently.

We are referring you to the case of Lee v. Gilvan, 229 S. W. 1045, where the facts are exactly the same state of facts as exists in your former request. The facts were as follows:

"The petitioner states that he is unlawfully detained in the penitentiary; that he was convicted of a felony in the circuit court of Jackson county, August 2, 1915, and sentenced to a term of five years in the penitentiary; that on April 24, 1917, he was paroled by the Governor; that on October 8, 1917, he was convicted of a felony in the circuit court of Jasper county, and sentenced to a term of five years in the penitentiary, and was received there on November 13, 1917; that on November 20, 1917, the Governor revoked his parole; that on December 28, 1920, the prison authorities discharged him under the merit system from the Jasper county sentence, but are now illegally restraining him under the Jackson county sentence aforesaid; that upon the revocation of his parole said sentences became concurrent and he is now entitled to his discharge. \* \* \* "

The court in this case said:

"By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. 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 that case, after Allen had been convicted and while he was being held in the county jail awaiting removal to the penitentiary, he committed another felony, for which he was tried, convicted, and sentenced. At the expiration of the period of the first sentence, he sought to be released on the ground that the sentences were concurrent. In an opinion by Judge Gantt, this court held that the case came within the provisions of section 2383, R. S. 1899, now section 2292, and that the sentences were cumulative."

Section 2292 referred to in the above quotation is now Section 12969 R. S. Missouri, 1929. In that case the court referring to this particular section specifically held that the sentence of a convict shall not commence to run until the expiration of the sentence under which he is held. The court in this case also held that a prisoner under parole is under sentence and if convicted of another offense sentences are cumulative, that is consecutive and it is mandatory upon the court to have the sentences run consecutively.

Hon. Larkin James

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In order for us to change the opinion herein enclosed, dated September 13th, 1939, we would be compelled to find a case overruling the case of Lee v. Gilvan, supra.

CONCLUSION

In view of the above authority, Lee v. Gilvan, it is still 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 Section 12969, supra, under the record as set out in the two separate commitments under 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 concurrently is of no effect and in violation of Section 12969, supra, but that the comment in the two commitments does not invalidate the commitments in total. The two commitments on their face show that on the first charge the defendant was a convict and comes within Section 12969, on the commitment under the second charge.

APPROVED:

Respectfully submitted,

TYRE W. BURTON  
(Acting) Attorney General

W. J. BURKE  
Assistant Attorney General

WJB:RW