

PENAL INSTITUTIONS: Sentences to different institutions
are cumulative and not concurrent.

January 9, 1946

1-25



Mr. Thomas E. Whitecotton,
Director Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Whitecotton:

In reply to your request to this office for an
opinion on concurrent or consecutive sentences as stated
in your letter, which is as follows:

"Attached are certified copies of
Sentence and Judgment relating to
the incarceration of James Rawles,
Algoa No. 5008, and Missouri State
Penitentiary No. 58350.

"This subject was sentenced on the
26th day of June 1943 to serve two
years in the Intermediate Reforma-
tory. While under sentence and
awaiting transportation to the Re-
formatory, he and one King attempted
to dig their way from the county jail.
They were apprehended and on the 18th
day of October 1943, were sentenced
to two years in the State Penitentiary.

"You will note that the Algoa commit-
ment reads 'that the said Defendant
having pleaded guilty as aforesaid,
be confined in the Intermediate Re-
formatory of the State of Missouri
for the period of two years, from
this date,'. The Penitenti-
ary commitment reads 'that the said
Defendant, James Rawles, having pleaded
guilty as aforesaid, be confined in the
penitentiary of the State of Missouri
for the period of Two years, from this
date,'.

"The question has arisen as to whether or not the Record Clerks at Algoa and the Penitentiary were correct in setting this inmate to serve the sentences consecutively. I might add that this subject was received at the Intermediate Reformatory October 26, 1943, completed his sentence, and was registered at the Penitentiary December 28, 1944, then was reassigned to Algoa as an inmate clerk in the Chief Clerk's office.

"Your official opinion is requested as to how these two sentences should run, whether concurrent or consecutive, and whether in your opinion it was the intention of the court that the latter sentence, that is, two years in the State Penitentiary without any indication as to how it would run, would supersede the two-year sentence to Algoa."

This question turns upon the interpretation of the two commitments, one being a commitment to the Intermediate Reformatory at Algoa for two years, and the other being a commitment to the penitentiary for a term of two years, by the same judge, in the same court, but at different terms.

The commitment to the Intermediate Reformatory at Algoa was made at the June Term, 1943, of the Circuit Court of Jasper County, Missouri, and reads as follows:

"BE IT REMEMBERED, That heretofore, towit: on the 26 day of June A.D. 1943, at the regular June Term of the Circuit Court, begun and held at the Court House in the City of Carthage in the County and State aforesaid, before the Honorable Wilbur J. Owen Judge of Division Two of the Twenty fifth Judicial Circuit of the State of Missouri, and Judge of this Court. The following among other proceedings were had, towit:

"STATE OF MISSOURI	Plaintiff)	
VS.)	No. 7838
James Rawles	Defendant)	

"Now, at this day comes the Prosecuting Attorney for the State, and also comes the Defendant herein, in person and in open Court, whereupon said Defendant is duly arraigned and informed by the Court that he stands charged upon the Information filed against him by the Prosecuting Attorney of Jasper County with the crime of Burglary and being now enquired of how he will acquit himself of said charge, for plea thereto the Defendant says he is guilty as charged in the Information. And thereupon the Court does assess his punishment at Two years imprisonment in the Intermediate Reformatory at Algoa, of this State. And now being now asked by the Court if he has any legal cause to show why Judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court, that the said Defendant having pleaded guilty as aforesaid, be confined in the Intermediate Reformatory of the State of Missouri for the period of Two years, from this date, and that the Sheriff of this County shall remove and safely convey the said Defendant to the said Intermediate Reformatory there to be kept, confined and treated in the manner directed by law, and the Superintendent of said Intermediate Reformatory is required to receive and safely keep him, the said Defendant in the Intermediate Reformatory aforesaid until the Judgment and Sentence of this Court be complied with, or until said Defendant shall be otherwise discharged by due course of law. And that the State of Missouri have and recover of and from said Defendant the costs in this suit expended, and that execution issue therefore."

The commitment to the Penitentiary was made at the September Term, 1943, of the Circuit Court of Jasper County, Missouri, and reads as follows:

"BE IT REMEMBERED, That heretofore, to-wit: on the 18" day of Oct. A. D. 1943, at the

regular September Term of the Circuit Court, begun and held at the Court House in the City of Joplin, in the County and State aforesaid, before the Honorable Wilbur J. Owen, Judge of Division 2 of the Twenty-fifth Judicial Circuit of the State of Missouri, and Judge of this Court.

"The following among other proceedings were had, to-wit:

"STATE OF MISSOURI, Plaintiff,)	No. 10960
VS.)	Criminal
James Rawles, Defendant.)	Action,
	Sentence
	and
	Judgment.

"Now at this day comes the Prosecuting Attorney for the State, and also comes the Defendant herein in person and in open Court, whereupon said Defendant informs the Court that he will withdraw his plea of not guilty heretofore entered herein, and enter his plea of guilty to the crime of Attempting to Break Jail as charged in the information. And thereupon the Court does assess his punishment therefor at -- Two years imprisonment in the Penitentiary of this State. And being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him, according to law, and still failing to show such cause, it is therefore sentenced ordered and adjudged by the Court that the said Defendant James Rawles, having pleaded guilty as aforesaid, be confined in the penitentiary of the State of Missouri for the period of Two years, from this date, and that the Sheriff of this County shall remove and safely convey the said Defendant to the said Penitentiary, there to be kept, confined and treated in the manner directed by law, and the Warden of said Penitentiary is required to receive and safely keep him, the said Defendant in the Penitentiary aforesaid until the Judgment and Sentence of this Court be complied with, or until said Defendant shall be otherwise discharged by due course of law. And that the State of Missouri have and recover of and from said Defendant the costs in this suit expended, and that execution issue therefor."

Section 9108, R. S. Mo. 1939, reads as follows:

"An intermediate reformatory for young men, who for the first time have been convicted of a felony as hereinafter designated, is hereby established."

Section 9109, R. S. Mo. 1939, reads as follows:

"The intermediate reformatory for young men shall be under the management of the department of penal institutions, but it shall be established separate and apart from the Missouri penitentiary and also the Missouri training school for boys now located at Boonville."

Judge Leedy, in the case of Anthony v. Kaiser, 169 S. W. (2d) 47, 1. c. 49, states that the Intermediate Reformatory for Young Men at Algoa, and the penitentiary, are separate institutions, in the following language:

"The act of 1927 by which the Intermediate Reformatory for Young Men was created expressly provided for its establishment 'separate and apart from the Missouri penitentiary * * *.' It is an institution 'for young men, who for the first time have been convicted of a felony.' Sections 9108, 9109, R. S. '39; Mo. R.S.A. Secs. 9108, 9109. But the inmates are convicts, and they are referred to as such in numerous sections of said act."

Section 465, p. 123, Vol. 15 Am. Jur., referring to concurrent and cumulative sentences, in part reads as follows:

"In those states where cumulative sentences are permissible and the subject is not con-

trolled by statute, if the accused is convicted of more than one offense or under more than one count, sentences of imprisonment imposed under the different counts or for different offenses, if by the same court, will be construed as running concurrently, and the accused will be discharged at the expiration of the longest term, unless the sentences expressly state otherwise or unless for other reasons (as that the imprisonment is in different places) it clearly appears that the court intended that the sentences should run consecutively, and not concurrently. If the court inadvertently fails to have the sentence recorded in such form as to show the imposition of a cumulative sentence or from leniency intentionally omits to add such a provision, and the defendant is committed in pursuance of such sentence and another or other sentences, he is either voluntarily released by the jailer or discharged on habeas corpus at the expiration of the longest term named in any one of the sentences. No presumption will be indulged in favor of sustaining a sentence as cumulative."

(Emphasis ours.)

Note in this citation that part underscored and enclosed in parenthesis.

Again, in the Anthony case, supra, l. c. 49, Note 5, Judge Leedy, in commenting upon the circumstances, makes mention that sentences to different institutions are cumulative and not concurrent.

In the case of Higlin v. Kaiser, 179 S. W. (2d) 471, at l. c. 471, 472, 473, Judge Tipton points out that dates fixed by the trial court are surplusage, as follows:

"* * * it may be laid down as a general rule, though not one without some exceptions, that any attempt on the part of the court to fix the beginning or end of a period of imprisonment is nothing more

than a mandate of execution, and, being merely directory, may be treated as surplusage. The fixing of such a date is ministerial and not judicial and, therefore, may be properly devolved upon an executive officer.' 15 Am. Jur. 109, Sec. 448.

" * * * * *

"From a review of the statutes and the authorities cited, we are of the opinion that any part of a judgment of record which shows that a sentence is to start at a date prior to the date of sentence (or the fixing of any date) is surplusage. * * * * *

"To hold otherwise, it would permit the will of the legislature to be thwarted by a trial court. For instance, a court could provide a date far enough in advance of the date of judgment to let the convicted person entirely escape punishment. Moreover, if the convicted person was at liberty on bond pending his appeal to an appellate court, he would not necessarily serve his full time, while a convicted person who did not appeal would serve his full sentence. The law and not the judgment fixes the date his punishment shall commence."

CONCLUSION

In view of the foregoing, it is the opinion of this Department that the two sentences above referred to are cumulative and that it was not the intention of the trial court that the penitentiary sentence should supersede the Alcoa sentence.

Respectfully submitted,

APPROVED:

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Attorney General