

4939.

PRISONER—VIOLATING PROVISIONS OF SEC. 12413, G. C.
ELIGIBLE FOR PAROLE ON FIRST LIFE SENTENCE AT
EXPIRATION OF 15 YEARS.

SYLLABUS:

A person who is sentenced to the Ohio Penitentiary to serve two consecutive life sentences on two separate charges of violating the provisions of Section 12413, General Code, becomes eligible for a hearing for parole on the first life sentence at the expiration of fifteen (15) years.

COLUMBUS, OHIO, November 26, 1935.

HON. MARGARET M. ALLMAN, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR MADAM:—This will acknowledge receipt of a letter from the Board of Parole addressed to you, wherein my opinion is sought as to the eligibility for parole of a prisoner sentenced to the Ohio Penitentiary to serve two life sentences on two separate charges of violating the provisions of Section 12413, General Code, which reads in part as follows:

“Whoever has carnal knowledge of his daughter, sister, or a female person under twelve years of age, forcibly and against her will, shall be imprisoned in the penitentiary during life; * * *.”

It is a well established rule of law in this state that where several sentences are imposed for separate and distinct offenses, the sentences run consecutively unless a contrary intention is expressed by the sentencing court. *Anderson vs. Brown*, 117 O. S. 393; *O. A. G.*, 1932, Vols. II and III, pages 919 and 1208; *O. A. G.*, 1933, Vol. I, page 69; and *O. A. G.*, 1934, Vol. II, page 801.

Under the rule of law announced in the case of *Anderson vs. Brown*, supra, the sentencing court in Ohio must definitely state that the sentence is to be concurrent if it is intended that the sentence should be served concurrently, and not consecutively. I am assuming for the purposes of this opinion that the prisoner mentioned in the communication sent to me was not committed to serve the two life sentences imposed upon him concurrently.

Section 2169, General Code, reads as follows:

“The Ohio Board of Administration shall establish rules and regulations by which a prisoner under sentence other than for treason or murder in the first or second degree, having served a

minimum term provided by law for the crime for which he was convicted or a prisoner under sentence for murder in the second degree, having served under such sentence ten full years, may be allowed to go upon parole outside the building and inclosure of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner. The board may designate geographical limits within and without the state, to which a paroled prisoner may be confined or may at any time enlarge or reduce such limits, by unanimous vote."

Section 2210-1, General Code, provides:

"A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner sentenced for a minimum term of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of fifteen years' imprisonment, subject to the provisions of law governing diminution of sentence for good behavior in prison. The above provisions shall apply to prisoners sentenced before or after the taking effect of this act."

Section 2210-1, General Code, was construed by my immediate predecessor in office who held that a person serving a life sentence other than for the crimes of murder in the first degree or treason was eligible for parole under Section 2210-1, General Code, but was not entitled to any diminution of sentence for good behavior as provided by Section 2210, General Code, the provisions of which hasten or accelerate the time when a prisoner serving an indeterminate sentence may become eligible for parole. The provisions for the diminution of sentence for good behavior contained in Section 2210, General Code, apply only to the minimum term of an indeterminate sentence, since the diminution of sentence clause contained in Section 2210, General Code, expressly provides that:

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At the expiration of the minimum sentence diminished as herein provided, each prisoner shall be eligible for parole as provided by law."

Section 2210, General Code, expressly provides that credit for good behavior shall be allowed to prisoners now or hereafter serving a general sentence and that the credit so earned shall be deducted from the minimum term of imprisonment. The expression "general sentence" as used in this

section is synonymous with the expression "indeterminate sentence." See *Reeves vs. Thomas*, 122 O. S., 22 and *O'Neill vs. Thomas*, 123 O. S., 42.

My immediate predecessor in an opinion which may be found in *Opinions of the Attorney General for 1932*, Vol. II, at page 803, held in the second and third paragraphs of the syllabus that:

"2. Persons serving life sentences for the crimes of kidnapping, rape, maiming with acid, burglary, bank robbery and larceny of an inhabited dwelling are eligible for parole at the expiration of fifteen years' imprisonment, as provided by Section 2210-1, General Code.

3. The minimum time provided for in Section 2210-1, General Code, in which a person serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree can become eligible for parole, is not subject to the diminution of sentence for good behavior provided for in Section 2210, General Code."

From the foregoing it is evident that a person serving a sentence for life in the Ohio Penitentiary other than for murder in the first degree or treason, may be considered for parole by the Board of Parole at the expiration of fifteen (15) years.

The next question raised by your inquiry, is when does a person who is serving two life sentences for crimes other than murder in the first degree or treason, which sentences do not run concurrently, become eligible for parole under Section 2210-1, General Code.

Section 2166, General Code, provides in part:

"Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degrees, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated in the manner and by the authority provided by law, but no such terms shall exceed the maximum term provided by law for the felony for which the prisoner was convicted, nor be less than the minimum term provided by law for such felony. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and for the purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. * * *"

Under Section 2166, General Code, a person serving several indeterminate sentences consecutively is deemed to be serving one continuous term for

the purpose of parole, and such person is eligible for parole at the expiration of the aggregate of the minimum terms of his several sentences, less good time off for good behavior as provided by Section 2210, General Code. *Opinions of the Attorney General for 1933, Vol. I, page 69.*

However, the provision in Section 2166, General Code, which provides that several consecutive indeterminate sentences are to be deemed for parole purposes to be one continuous sentence, does not apply to life sentences, since a life sentence is not included within the provisions of Section 2166, General Code. In view of the fact that there is no such provision in reference to life sentences, it necessarily follows that the Board of Parole cannot consider the two life sentences as one continuous term of imprisonment for the purpose of parole. It therefore follows, that the Board must consider the prisoner mentioned in your letter as serving each life sentence separately, the second to follow on the expiration of the first. In that case the prisoner would be entitled to a hearing before the Board of Parole at the expiration of fifteen (15) years of his first life sentence.

The release of such a prisoner on parole at the expiration of fifteen (15) years would not in anywise affect the second life sentence of the prisoner, which sentence in no event can be served until the expiration of his first sentence. I recognize the fact that it may be impossible for a person to serve two life sentences consecutively. However, that fact does not vitiate the sentence of a court which imposes two life sentences upon a prisoner which are to be served consecutively. Under the laws of this state it is possible for the Governor to commute the first life sentence or to pardon the prisoner, and upon the happening of such events the prisoner would be required to serve the second life sentence.

The fact that a life term on parole cannot be granted a final release (O. A. G., 1933, Vol. II, page 1304) does not deprive the Department of Public Welfare of jurisdiction and custody of such prisoner while on a parole. (See Section 2211-6, General Code). Likewise such a prisoner while out on parole is deemed to be serving his sentence constructively. Under such circumstances it must be recognized that a person who is serving two consecutive life sentences in the Ohio Penitentiary, if granted a parole as provided under Section 2210-1, General Code, on one of the sentences, would probably never serve the second life sentence, since the Board of Parole could not grant a final release to such a life term even if the life term complied with all the rules and regulations of the Board of Parole, while out on parole.

As stated in an opinion of this office to be found in *Opinions of the Attorney General for 1933, Vol. II, at page 1304:*

“An absolute discharge or release cannot be granted by the Board of Parole to a life term who is out on parole by virtue of

the provisions of section 2210-1, even though such prisoner has faithfully observed the terms of his parole."

In the course of the opinion at pages 1307 and 1308, it was stated :

"It was held in the opinion (Opinion No. 4455 *O. A. G.* 1932) that life termers under the provisions of section 2210-1 were merely eligible for parole at the expiration of fifteen years' imprisonment. It is also to be observed that the provisions of section 2166 relate specifically to indeterminate sentences and do not include definite sentences. The termination of sentences of prisoners serving definite sentences is specifically provided for in section 2163, General Code. *A prisoner serving a life sentence is not included within either the provisions of section 2163 or 2166.* Judge Day, in the course of his opinion in the case of *O'Neill vs. Thomas*, 123 O. S., 42, decided prior to the amendment of section 2166 in 114 O. L., said that two kinds of sentences in criminal cases could be imposed by the courts in this state, to-wit, definite and indefinite sentences, and that a prisoner serving a definite sentence was entitled to the diminution of his sentence as provided by Section 2163, General Code. The only way the Board of Clemency (now the Board of Parole) could affect such a prisoner was by deducting or restoring to him his credits for good conduct. See sections 2164 and 2165. Thus a prison board cannot parole or terminate the sentence of a prisoner serving a definite sentence in the Ohio Penitentiary. Accordingly, only prisoners serving indeterminate sentences in the Ohio Penitentiary, except those prisoners serving life sentences coming within the provisions of sections 2169 and 2210-1, can be paroled or released by the Board of Parole as provided by sections 2166, 2169 and 2211-6, General Code." (Italics the writer's).

The fact that such a life termer would never serve his second sentence does not, in my opinion, justify the conclusion that such a prisoner should be required to serve thirty (30) years in the penitentiary before he could become eligible for parole as provided under Section 2210-1, General Code.

It also must be borne in mind that life termers under the provisions of Section 2210-1, General Code, are merely eligible for parole at the expiration of fifteen (15) years' imprisonment and whether a life termer at the expiration of fifteen (15) years' imprisonment shall be released from confinement, is a matter solely within the discretion of the Parole Board. The fact that a prisoner may become eligible for parole does not mean that the Board of Parole must release such prisoner on parole, since there is no pro-

vision in the parole laws of this state which can be construed as entitling a prisoner, as a matter of right, to release from confinement on parole.

In the case of *Ex Parte Tischler*, 12 O. S., 404, it was held in the second paragraph of the syllabus that:

“2. A prisoner confined in the Ohio penitentiary is not entitled to a parole as a matter of right upon the expiration of his minimum term of imprisonment.”

The principle of law announced in that case applies equally as well to a lifer who becomes eligible for parole under the provisions of Section 2210-1, General Code. Allen, J., in the course of her opinion in the case of *Ex Parte Tischler*, supra, at page 411, said:

“Under the law as it now exists, the safeguard for the prisoner must be in the conscientious, fair-minded, and humane viewpoint of the board of parole. A discretionary duty, with great power, is confided to the board under the statutes. Under this discretionary power, a petitioner is not entitled as a matter of right to receive a parole at the expiration of his minimum sentence prior to the expiration of his maximum sentence. Quoting the words of the statute (Section 2211-6, General Code), the board of parole has ‘continuous and exclusive power to determine the time when’ any prisoner confined in a penal or reformatory institution may be allowed to go upon parole. The Legislature could hardly have made a more all-inclusive grant of power to such a board, and if such power should not exist, the remedy lies, not with this court, but with the Legislature.”

Specifically answering your inquiry it is my opinion that a person who is sentenced to the Ohio Penitentiary to serve two consecutive life sentences on two separate charges of violating the provisions of Section 12413, General Code, becomes eligible for a hearing for parole on the first life sentence at the expiration of fifteen (15) years.

Respectfully,

JOHN W. BRICKER,
Attorney General.