

even though such doubt exists after an examination of the opinion of my predecessor in office the cases cited therein and the cases in the briefs submitted to this office, I do not feel warranted in overruling the opinion of my predecessor in office.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

1396.

PRISONER—PAROLE BOARD UNAUTHORIZED TO RELEASE ON
 POROLE BEFORE EXPIRATION OF MINIMUM TERM FIXED BY
 COURT.

SYLLABUS:

1. *A board of parole has no authority to release on parole a prisoner sentenced by a court of competent jurisdiction before the expiration of the minimum term of imprisonment fixed by the court, less good time off as provided by section 2210, where the statute (section 12423-1), which defines the offense, fixes only a maximum term of imprisonment and does not provide for a minimum term of imprisonment.*

2. *A prisoner committed to the Ohio Penitentiary to serve an indeterminate sentence of four to ten years for the violation of section 12423-1, which does not fix a minimum term of imprisonment, is eligible for parole only after serving the minimum term of imprisonment fixed by the trial court, less good time off as provided by section 2210, General Code.*

COLUMBUS, OHIO, August 14, 1933.

HON. ELMO M. ESTILL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

“One charged in our Court with a violation of Section 12423-1 of the General Code, being an assault upon a minor child was sentenced by the Court to the Penitentiary for not less than four years nor more than ten years. You will note that under this Section of the General Code the minimum term is not set. Will you kindly advise whether under our Ohio Law the Defendant so sentenced,

1. Is eligible for hearing before the Parole Board immediately after his commitment, or

2. Whether the Parole Board would have jurisdiction for a hearing on the matter of parole prior to the minimum sentence imposed by the Court, there being no minimum sentence expressed in the statute.”

Your inquiry raises the question of whether the Board of Parole can disregard the minimum term of imprisonment imposed by a court on a person convicted of violating section 12423-1, General Code and consider such prisoner as eligible for parole as soon as he is admitted to the Ohio Penitentiary.

Section 12423-1 provides that one convicted of felonious assault on a female child under the age of fourteen years shall be punished by imprisonment in the Ohio Penitentiary for not more than ten years or a fine of not more than one thousand dollars, or both, but does not prescribe a minimum term of imprisonment. Section 2166, General Code, as amended in 114 O. L. declares that all sentences to the Ohio Penitentiary shall be indeterminate. Section 2166, General Code, reads in so far as is pertinent:

“Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, 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 of which the prisoner was convicted, nor be less than the minimum term provided by the law for such felony. * * *”

There is no express provision either in section 2166 or in any other statute which empowers a court in a criminal case to fix a minimum term of imprisonment where the statute defining the offense fails to prescribe a minimum penalty for the offense. Under the provisions of section 2166, as amended in 1931, the courts in sentencing persons to the Ohio penitentiary are required to impose indeterminate sentences and cannot fix the minimum term of imprisonment as was the practice under the Norwood Act prior to its repeal in 1931. The Indeterminate Sentence Law (section 2166) and sections 2169, 2211-4, 2211-5 and 2211-6 confer upon the Board of Parole the power to grant paroles to prisoners in the Ohio Penitentiary who have served the minimum term of imprisonment fixed by Ohio Penitentiary who have served the minimum term of imprisonment fixed by the statute defining the offense for which they were convicted. Section 2169 reads in part, 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.”

Under section 2169 a prisoner is not eligible for parole until he has served the minimum term of imprisonment fixed by law for the felony. However, the provisions of that statute must be construed together with the provisions of section 2210 and 2210-1 which hasten or accelerate the time when a prisoner serving an indeterminate sentence may become eligible for parole. Although section 2169 provides that a prisoner in the Ohio penitentiary is not eligible for parole until he has served the minimum term of imprisonment fixed by law for the felony the same cannot be said to authorize the Board of Parole to disregard the minimum term of imprisonment fixed by a court in sentencing a person for violating a statute which provides a maximum term of imprisonment only.

The Board of Parole being purely a creature of statute, it has such powers

and only such as are conferred upon it by law. *Ex Parte Urbanowicz*, 24 Fed. 2d. 574.

There is no provision in the act creating the Board of Parole (sections 2211 to 2211-9) which vests in the Board of Parole the right to disregard a minimum term of imprisonment fixed by a court in sentencing a person to the Ohio penitentiary, except those minimum terms of imprisonment which come within the purview of section 2166-1, which reads:

"The power granted by section 2166, General Code, as amended in this act, to terminate terms of imprisonment shall apply to any prisoner who shall have served the minimum term provided by law for the felony of which he was convicted, notwithstanding the fixing by the court of a larger minimum period under the authority of the act passed March 15, 1921, entitled 'To amend section 2166 of the General Code relative to indeterminate sentences to the Ohio penitentiary,' or under authority of section 13451-19 of the General Code and shall apply to any person hereafter sentenced, notwithstanding that the felony may have been committed previous to the enactment of said laws."

It is apparent that the provisions of section 2166-1 do not apply to the sentence in question, since there is no minimum term of imprisonment fixed by section 12423-1. By the terms of section 2166-1 the legislature intended only to reduce or modify minimum terms of imprisonment fixed by trial courts in indeterminate sentences to the Ohio Penitentiary as authorized by section 2166 (Norwood Act), prior to its repeal and amendment in 1931, to the minimum terms of imprisonment fixed by law for the felony. Opinions Nos. 76 and 106 of the Opinions of the Attorney General for 1933. It must be borne in mind that the Board of Parole is not authorized by law to examine or inquire into the legality of a sentence, and it is a fundamental rule of law that such an administrative body cannot, without at least statutory authority, nullify the judgment of a court by substituting a minimum term of imprisonment different than that imposed by the trial court and thus make it possible for a prisoner to go out on parole at a time earlier than that permitted by the minimum term of imprisonment fixed by the sentencing court. That a Board of Parole does not have the power to reduce a minimum term of a sentence fixed by a court is stated by Day, J., in the course of his opinion in the case of *Reeves vs. Thomas*, 122 O. S. 22 at page 27, wherein he said:

"We cannot take the view that the board has the power to reduce the minimum fixed by the trial judge."

The minimum sentence imposed by a trial court also cannot be ignored by the Board of Parole even though the statute defining the offense fixes no minimum term of imprisonment, because the sentence of a court is the judgment of a court in a criminal proceeding and denotes the action taken by the court in imposing the penalty required by law on a verdict or confession of guilt, and a parole board had no power to violate the sentence imposed by the court by granting a parole to the prisoner before he is entitled to it under the sentence of the court. The language of Collin, J., in the case of *Lewis vs. Carter, et al.*, 115 N. E. (N. Y.) 19, at page 21, is particularly in point:

"Moreover, the board of parole had not power to violate the sentence imposed by the court. It was a judgment, a judicial determination, obligatory upon the state and each of its officers until it was reversed or annulled by the judgment of an appellate court, or a judicial determination made in a proceeding attacking it directly. The board of parole had not the right to substitute for it a judgement or sentence of their own creation."

If the Board of Parole did disregard the judgment of the court, it would in effect be violative of the universal rule of law that a final judgment or order of a court cannot be declared void on collateral attack. In view of the fact that the Board of Parole has no authority to inquire into the legality of a sentence, and since the sentence imposed by the trial court for a violation of section 12423-1 does not come within the provisions of section 2166-1, it follows that the prisoner has to serve the minimum term of imprisonment fixed by the trial court, less good time off as provided by section 2210, before the Board of Parole can permit the prisoner to go out on parole.

Specifically answering your inquiry, I am of the opinion that:

1. A board of parole has no authority to release on parole a prisoner sentenced by a court of competent jurisdiction before the expiration of the minimum term of imprisonment fixed by the court, less good time off as provided by section 2210, where the statute (section 12423-1), which defines the offense, fixes only a maximum term of imprisonment and does not provide for a minimum term of imprisonment.

2. A prisoner committed to the Ohio Penitentiary to serve an indeterminate sentence of four to ten years for the violation of section 12423-1, which does not fix a minimum term of imprisonment, is eligible for parole only after serving the minimum term of imprisonment fixed by the trial court, less good time off as provided by section 2210, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1397.

DEPENDENTS—ILLEGITIMATE CHILD—COUNTY WHERE MOTHER HAD LEGAL RESIDENCE HAS JURISDICTION TO COMMIT CHILD BORN IN ANOTHER COUNTY—JURISDICTION OF JUVENILE COURT OVER DEPENDENTS DISCUSSED.

SYLLABUS:

1. *A court of the county in which the mother was originally committed to the Girls' Industrial School, such county being the legal residence of the mother, has jurisdiction to commit her illegitimate child born in another county, under section 1653, General Code.*

2. *A juvenile court has jurisdiction to declare any child a dependent which is found within the county under facts and circumstances constituting dependency. The legal residence of the child or its parents, or those standing in loco parentis, does not determine the jurisdiction of the court. (O. A. G. 1929, Vol. II, page 1151 approved and followed.)*