2734.

1. IMPRISONMENT — WHERE PRISONER SERVING FIRST SENTENCE HAS IMPOSED UPON HIM A SECOND SENTENCE, LATTER SHALL BE SERVED CONCURRENTLY WITH FIRST SENTENCE, IF COURT IN JUDGMENT ENTRY COVERING SECOND SENTENCE SO ORDERS.

2. SENTENCE COMMENCES TO RUN FROM DATE OF INCARCERATION — ROBBERY — SENTENCE TEN TO TWENTY-FIVE YEARS—WHERE PERSON, SECOND TIME, LATER DATE, CONVICTED, SAME SENTENCE PERIOD, COURT ORDERS SECOND SENTENCE TO RUN CONCURRENT WITH FIRST—WHEN SUCH SENTENCE COMMENCES TO RUN — PAROLE — TIME OFF FOR GOOD BEHAVIOR — MAXIMUM TERM.

SYLLABUS:

1. *Where a second sentence to imprisonment is imposed upon a prisoner serving his first sentence, such second sentence shall be served concurrently with the sentence previously imposed if the court imposing the second sentence so orders in its judgment entry.*

2. *A sentence to imprisonment in Ohio commences to run from date of the incarceration of the defendant under and pursuant to such sentence. And where a person, convicted of robbery and sentenced to serve a term of from ten to twenty-five years in the Ohio penitentiary, is at a later date a second time convicted of robbery and sentenced to serve a term of ten to twenty-five years in the Ohio penitentiary, the court ordering in its judgment entry that such second sentence shall run concurrently with the first, the second sentence commences to run on the date of delivery of the prisoner to the penitentiary under such sentence, and such a prisoner is eligible for parole at the expiration of the minimum term provided by law under such second sentence, less time off for good behavior, the maximum term ending at the termination of the second sentence to imprisonment; that is, twenty-five years from the date of the incarceration of such prisoner under and pursuant to the second sentence.*

Columbus, Ohio, September 7, 1940.

Hon. Charles L. Sherwood,
Director, Department of Public Welfare,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "A prisoner was admitted to the Ohio Penitentiary on October 9, 1937, from Cuyahoga County on a charge of Robbery, 10 to 25 years. On June 21, 1938, by order of the Court of Common Pleas of Cuyahoga County, the prisoner was returned to the Sheriff of Cuyahoga County for arraignment and trial on another charge. He plead guilty to another robbery charge and the court sentenced him on the second charge, Robbery, 10 to 25 years, to run concurrently with the first. The prisoner was delivered to the penitentiary on July 6, 1938, with the certificate of sentence, directing that the sentence should run concurrently with the first robbery sentence on which he had already served approximately, eight months.
>
> Query:
>
> 1. Had the court jurisdiction to direct that the second sentence run concurrently with the previous sentence?
>
> 2. If so, when does this man become eligible to consideration for parole: under the laws governing diminution of sentence and with a good conduct record, at the end of six years and four months from the date of his admission on the first sentence, September 7, 1937; or, from the date of his readmission on the sentence to run concurrently with the first, July 6, 1938?
>
> 3. When shall his maximum expire, at the end of twenty-five years from September 7, 1937, or twenty-five years from July 6, 1938?"

In considering your request, we are at once confronted with the question as to whether or not courts in Ohio may order that two or more sentences to imprisonment shall be served concurrently. This question is engendered by the opinion of Judge Kincade, concurred in by the entire court with the exception of Judge Jones, who concurred *only* in the judgment, in the case of Anderson v. Brown, 117 O. S. 393 (1927), in which it was held as follows at pages 397, et seq.:

> "* * * There is no statute in Ohio directing whether sen-

tences shall be cumulative or concurrent, *and in view of the impossibility with respect to concurrent running of imprisonment sentences for separate violations of the criminal law,* it seems fairly evident that the Legislature has appreciated the difficulty that would attend any attempted legislation to the effect that several sentences for several crimes should be served concurrently. No man can be imprisoned for 2 or more days in any one period of 24 hours. He might, of course, be imprisoned for 2 half days, or 4 quarter days in any 24 hours. No one can meet punishment imposed for 4 separate crimes by serving only the imprisonment designated for crime No. 1.

* * * A man can no more serve 100 days by serving 25 days than he can add 100 days to his age by living 25 days. *The situation presents a physical impossibility which is not relieved at all by the statement of the sentencing court that the sentences are to be served concurrently.* It is quite immaterial how long or how general such practices have obtained on the part of the courts. Such a course amounts only to saying that the accused shall pay a penalty—and it may be a minimum fixed by statute—for crime No. 1, but that the provisions of law as to the other crimes shall stand as waived in favor of the accused. If such be the intention of the court, and the court has the power so to do, it is quite pertinent to ask why any of the other three sentences were imposed at all. When the record is silent on the subject, why should a reviewing court assume that the trial court intended to undertake *a manifest impossibility; that is to say, that several imprisonment sentences for several separate crimes should be served concurrently, when, as a matter of fact, they can only be all served cumulatively? * * * * "*

It is interesting to note that while all the above discussion has to do with sentences to imprisonment, the facts in the case were that four different fines and two sentences of thirty days each in the county jail had been imposed upon Brown in four different cases. Each of the four sentences, which as journalized made no provision as to whether they should be served cumulatively or concurrently, "contained a statement that Brown should stand committed to the county jail until such fines and costs were paid, or until he (were) discharge therefrom by allowing a credit of one dollar and fifty cents per day on such fine and costs, or until he (were) otherwise legally discharged." (Old Section 13717, General Code). After serving his two thirty day sentences to imprisonment and serving a number of days sufficient to extinguish his largest fine and the costs assessed in the case in which said fine was imposed, Brown sought to be released on habeas corpus upon the ground that the balance of his fines and costs had also been extinguished "by further application to them of the same credit applied in answering the larger fine and costs."

An examination of the brief filed in the Supreme Court in behalf of

the defendant Anderson, who was the sheriff of Hamilton County, reveals that such brief contains this frank admission:

> "* * * It is so well established as to permit of no dispute that criminal sentences run concurrently if they do not specifically provide that they run cumulatively. But reason and the weight of authority establish that this general rule applies only to sentences of imprisonment and not to pecuniary fines. The underlying reason for the entire rule is the thought that when a man is sentenced to a term of imprisonment, the term commences immediately upon his being confined in the designated penal institution. From this thought has grown the rule that a court in order to make its sentence commence at some future date must make it specifically and accurately appear that such was the intention. The rule has been further refined for requiring that a court designate the order in which two or more cumulative sentences are to be served."

While it was expressly stated in the opinion that it was conceded by counsel for the state "that the general practice of the courts has long been to treat sentences of imprisonment imposed on the same individual as running concurrently, and not to be served cumulatively, unless the contrary intention of the court is clearly indicated in the journal entries covering the sentences", no especial notice was taken of their idea of the law as expressed by counsel for the state. Nor is there any discussion as to whether or not courts generally have held as set forth in this concession.

The opinion in the case of Williams v. State, 18 O. S. 46 (1868), was quoted from at length, in which two principles of law were definitely decided: *First*, that notwithstanding the absence of any statute on the subject, a court in Ohio may impose two or more sentences and require in its judgment that such sentences be served cumulatively or consecutively; and *Second*, that where a sentence is so vague or indefinite that its terms cannot be determined from the record in the particular case in which the sentence was imposed, the cause should be remanded to the trial court for the purpose of having a proper sentence pronounced and journalized. It will be observed that in the Williams case, the court in no wise attempted to prohibit, or place any limitations upon, the power and jurisdiction of the trial court to order that sentences to imprisonment should be served concurrently.

It is further interesting to note that the discussion in the opinion relating to the power of the trial court to order that two or more sentences to imprisonment should be served concurrently is not carried into the syllabus of the Brown case the second branch of which reads:

> "Where the record is silent as to whether two or more sentences of imprisonment or fines on the same individual are to be executed cumulatively, the presumption obtains that the sentencing court intended that the prisoner should serve the full aggregate of all imprisonments or pay the full aggregate of all fines, or that the same should be covered by the credit allowance thereon, as provided in Section 13717, General Code. (Williams v. State, 18 Ohio St., 46, approved and followed.)

Two well settled principles of law must be kept in mind when the opinion of Judge Kincade in the Brown case, and its effect upon the questions asked by you are under consideration. *First*, it is now the rule of the Supreme Court, as it has been since January, 1858, that the syllabus of a reported decision states the law; that is to say, the points of law decided in any case are to be found in the syllabus, which is controlling. See Rule VI, Rules of Practice of the Supreme Court of Ohio and note contained in 94 O. S., IX. *Second,* as stated in 11 O. Jur. 798, the "rules stated in the syllabus must be interpreted with reference to the facts in the case and the questions presented to and considered by the court, and cannot be construed as being any broader than the facts of the case warrant."

Applying these principles to the question now before me, I have no difficulty in concluding that it was not held in the Brown case, or in any other Ohio case of which I have knowledge, that two or more sentences to imprisonment may not be served concurrently in Ohio, if the judgment of the court so orders. So far as the law bearing on this question is concerned, as annunciated in the second branch of the syllabus in the Brown case, the law of Ohio is different from the general rule in that in Ohio the rule is that if the sentencing court does not expressly provide in its judgment that two or more sentences to imprisonment shall be served concurrently, such sentences are to be served consecutively, while the almost universal rule is the exact opposite. As stated in the annotation contained in 70 A. L. R. 1511, 1512:

> "* * * in the absence of a statute to the contrary, if 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."

In view of the foregoing, it is my opinion that a trial court in Ohio having jurisdiction in criminal causes may order that two or more sentences to imprisonment should be served concurrently. And this conclusion is amply supported by previous opinions rendered by this office. See Opinions, Attorney General, 1932, Vol. II, pp. 919 and 1208; 1935, Vol. III, p. 1539; 1936, p. 894; and 1937, p. 1902.

Your first question may be succinctly posed as follows: May a court at a later date, or in a day in a subsequent term, direct that a second or subsequent sentence to imprisonment should be served concurrently?

A diligent search fails to reveal any case directly in point, although in the opinion of the Attorney General reported in Opinions, Attorney General, 1937, Vol. II, p. 1902, the question asked by you was tacitly passed upon, no notice being taken of the fact that the judgment imposing a sentence and ordering that the same should be served concurrently with a former sentence was entered some five or six months after the imposition of the original sentence, and apparently at a different term of the court. I know of no reason why a court of general jurisdiction may not in a criminal case direct that any sentence to imprisonment imposed by it should be served concurrently with a sentence to imprisonment theretofore imposed and then in effect, subject to the limitation that such sentences must be served in the same place. And unless and until the courts of Ohio decide otherwise, it is my opinion that a judgment of a court of competent jurisdiction, directing that sentences to imprisonment be served concurrently is valid. In any event, unless the judgment containing such a sentence be reversed or modified by a higher court in a proper proceeding, such judgment is the law of the case and should be adhered to.

II. In answer to your second question, I think it obvious that there could only be a concurrent serving of the two sentences from the time that the imprisonment under the second sentence actually commenced. In Ohio a sentence to imprisonment commences on the date of incarceration pursuant to the judgment of the court.

Because of this fact, it would seem clear that the prisoner about whom you inquire will become eligible for consideration for parole when he shall have served the minimum time provided by law under the second sentence, less time off for good behavior.

III. I come now to your third question. The second sentence, having

been imposed by a court of record having jurisdiction of the subject matter and the person of the accused, is conclusive unless the the same were modified or reversed by a court of competent jurisdiction. It is manifest therefore that the maximum term of imprisonment imposed by the court ends at the termination of the second sentence to imprisonment; that is, twenty-five years from the date of the incarceration under and pursuant to the second sentence.

Respectfully,

THOMAS J. HERBERT,
Attorney General.