2243.

PRISONER ERRONEOUSLY SENTENCED TO OHIO STATE REFORMATORY AFTER EFFECTIVE DATE OF SECTIONS 2210-1, 2210-2, 2210-3, G. C.—MAY BE TRANSFERRED TO OHIO PENITENTIARY BY DEPARTMENT OF PUBLIC WELFARE, SECTION 2210-2 G. C.—ELIGIBLE FOR PAROLE AFTER TEN FULL YEARS IMPRISONMENT IF SENTENCED FOR MORE THAN FIFTEEN YEARS.

SYLLABUS:

1. *A prisoner convicted of armed burglary of a bank, under the provisions of Section* 12441, *General Code, and upon a recommendation of mercy by the jury, sentenced to serve a term of imprisonment of from twenty years to life by the trial court, which erroneously designated the Ohio State Reformatory as the place of confinement, may, under the express terms of Section* 2210-2, *General Code, be transferred from the Ohio State Reformatory to the Ohio Penitentiary by the Department of Public Welfare, if such prisoner were convicted after the effective date of Section* 2210-1 to 2210-3 *inclusive of the General Code, viz., August* 6, 1931.

2. *Since the amendment of Section* 2210-1, *General Code, by the* 93*rd General Assembly in Amended Substitute Senate Bill No.* 82, *effective May* 3, 1939, *so as to provide inter alia that "a prisoner sentenced for a mini-*

mum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of ten full years' imprisonment," it being expressly provided that such provision shall apply to prisoners sentenced before or after the taking effect of the amendment, a prisoner serving sentence under the facts set forth in the first branch of this syllabus would not be eligible for parole until the expiration of ten full years' imprisonment.

Columbus, Ohio, May 1, 1940.

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

Dear Sir:

This office has your recent request for an opinion, the essential parts of which read as follows:

> "There has come to our attention the case of W. K., received at the Ohio State Reformatory on February 29, 1932, on a charge of Bank Robbery, sentence 'Twenty years to life.' The statutory penalty under Section 12441, G. C., is life or, upon recommendation of mercy *not less than twenty years in the penitentiary.*
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> On April 17, 1936, acting under the provisions of Section 2210-2, G. C., this department transferred W. K. to the Ohio Penitentiary on the basis that the provisions of Section 12441, G. C., require sentence to the Ohio Penitentiary upon conviction for bank robbery.
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> We now find that on January 2, 1940, the Pardon and Parole Commission granted this man a parole. He had served on this sentence a little less than eight years.
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> Section 2210-1, G. C., (Senate Bill 82, Effective May 3, 1939) provides:
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> 'A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner for a minimum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of ten full years' imprisonment. This provision shall apply to prisoners sentenced before or after the taking effect of this act.'
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> Was the Pardon and Parole Commission in error in releasing W. K. on parole before he had served ten full years in prison?"

Your request involves questions as to the *administrative functions* of the Department of Public Welfare; the *power and authority* of the Pardon and

Parole Commission; and the *duties* of the Constitutional Office of the Attorney General, as such duties may be lawfully defined or enlarged by statute. These questions are *ex necessitati* present because of the nature of your request, which in form and in substance asks that the Attorney General hold that the Pardon and Parole Commission was, or was not, "in error" in the action taken by such Commission in the case and upon the facts set forth in your communication.

No compelling argument may or could be presented against the justification for your request. Your department and the heads of the various penal and reformatory institutions under your direction, and all others serving in connection therewith, are charged with the duty of administering in the manner prescribed by law the constitutional mandates of the people in connection with such institutions, as well as all laws duly enacted by the Legislature in conformity therewith. For example, no officer, board or commission could for one second justify in the courts his or its failure to make effective a mandate of the Governor, lawfully issued under Section 11, Article III of the Constitution, which vests in that officer alone, the power "after conviction, to grant reprieves, commutations and pardons."

The office of Attorney General, like that of the Governor and certain other state officers, is an office created under the Constitution (Art. III, Sec. 1). However, with the exception of the provisions of Section 8, Article VIII, providing that the Attorney General shall be a member of "a board of commissioners, to be styled 'The Commissioners of the Sinking Fund,'" there is nothing in the Constitution which in anywise prescribes, defines or limits the powers and duties of the Attorney General.

Nevertheless, it has long been the settled policy of this state, as declared by the Legislature; as almost universally recognized by public officers of all character, whether executive, legislative or judicial; and as acquiesced in by the people, that the Attorney General shall be the sole and exclusive chief law officer of the state and all its departments and officers.

In Section 333, General Code, (Originally passed in 1852, 50 v. 267) it is provided in part as follows:

> "The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by other counsel or attorneys-at-law. * * * "

By Section 341, General Code, which also had its roots in the act of 1852 above referred to, it is provided that:

> "The attorney-general, when so requested, *shall* give legal advice to a state officer, board or commission, the warden or directors of the penitentiary, the superintendent, trustees, or directors of a benevolent or reformatory institution of the state, and the trustees of the Ohio State University, in all matters relating to their official duties." (Emphasis the writer's.)

While this office is not unmindful that the 93rd General Assembly, in enacting the new "Pardon and Parole Code of Ohio" (Am. Sub. S. B. No. 82, codified as Sections 2209 to 2209-23, inclusive, of the General Code) expressly provided in Section 6 of said Code (Sec. 2209-5, G. C.), that:

> "The attorney general shall be the legal advisor of the commission, its officers and employees, and neither the commission nor any of its officers or employees shall employ or be represented in its or his official capacity by any other counsel or attorney at law."

it is manifest that this section is but an emphatic reiteration of the general policy of the state, as declared by the Legislature in Section 333, supra, that the Attorney General should be the exclusive legal adviser of all state officers, boards and commissions in matters in which the state is, or may become, interested. That these views are correct, may be seen by an examination of the case of *State, ex rel. Walton v. Crabbe, Atty. Genl.*, 109 O. S. 623, 626 (1924), in which the Supreme Court expressly declared that the Attorney General, as chief law officer of the state, "is the legal adviser of the state and its departments, and his own opinion as to the merits of the controversy may determine what action, if any, his department should take relative thereto."

The above observations are made to demonstrate the propriety of rendering an opinion to the Director of Public Welfare with reference to the actions of the Pardon and Parole Commission, when within the exercise of his discretion the Attorney General deems it his duty so to do. Moreover, both the Department of Public Welfare and Pardon and Parole Commission are each creatures of statute, and each has such powers, and only such powers, as are *expressly* granted by the Legislature, and such implied powers as may be necessary to carry the express powers into effect. See 32 O. Jur. 933, and cases cited. To a large extent in so far as the retention of prisoners in actual

confinement in the penal and reformatory institutions of the state, or their release therefrom, is concerned, the functions of the Department and the Commission are necessarily correlated. Manifestly, it is the duty of the Department to keep in confinement all prisoners lawfully commited until released according to law; while at the same time it is within the power and authority of the Commission to parole such prisoners in accordance with the provisions of the Pardon and Parole Code. Indeed, the interdependency of the Department and the Commission is expressly recognized in several sections of the General Code, including, for example, 2209 where in subparagraph 8 it is provided that "a prisoner on parole shall remain and be in the legal custody of the *department of public welfare* and under the control of the *commission";* Section 2209-7 in which it is, among other things, provided that the "commission shall be in and a part of the Department of Public Welfare for administrative purposes" as provided in the Pardon and Parole Code and in the other respects therein provided, and especially in Section 2209-8, in which it is provided that when "a prisoner shall have become legally eligible for parole the head of the institution in which such person is confined shall notify the commission in such manner as may be prescribed by the commission." For these reasons I deem it advisable and proper to answer your request, notwithstanding the fact that it concerns certain action heretofore taken by the Pardon and Parole Commission, and may affect certain of its determinations in the future. And it might be here pointed out that quite often an opinion rendered to one state department or officer more or less affects the conduct and activities of one or more of the other departments or officers.

Coming now to the question asked by you, it is noted that the prisoner to whom you refer in your communication was received at the Ohio State Reformatory on February 29, 1932, (the sentence thereto being for a period of from twenty years to life) and that on April 17, 1936, your Department transferred him to the Ohio Penitentiary. In view of the provisions of Section 2134, General Code, to the effect that, within "five days after a person is sentenced to the reformatory unless the execution of such sentence be suspended, he shall be conveyed thereto by the sheriff of the county in which he was convicted, and delivered into the custody of the superintendent thereof, there to be safely kept until released by the Ohio board of administration (the Pardon and Parole Commission) or pardoned by the governor," I assume that W. K. was sentenced on or about February 23rd, 1932. This date

is important because of the holding of the cases of *In re Flora* and *State ex rel. Flora* v. *Allman,* etc., 12 O. O. 495, 27 Abs. 355 (1938), decided by the Court of Appeals of the Second District.

There it was held as stated in the headnotes as follows (the emphasis being the writer's):

> "1. A bank robber, even though he be between the ages of sixteen and twenty-one years at the time he is sentenced, must be sentenced to the penitentiary and the provision of Section 12441, General Code, that if the jury recommends mercy, 'the court may sentence the accused to not less than twenty years in the penitentiary,' has application only to the length of time and not the place of confinement.
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> 2. Even though a sentence imposed by the trial judge may have been in violation of the statute fixing the punishment for bank robbery, any enactment passed subsequent to the sentence imposed which changes the effect of the sentence and imposed a longer sentence or different conditions controlling parole, is a matter *ex post facto* in its operation.
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> 3. The transfer of a prisoner from the reformatory where he is serving an indeterminate sentence to the penitentiary and from there to the prison farm, imposes burdens upon him and curtails privileges to which he is entitled under the indeterminate sentence by the trial court.
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> 4. Where it appears that Section 2210-2, General Code, *was not effective until after the commission, trial and sentence for a crime,* the director of public welfare has no right to transfer a prisoner from a reformatory to the penitentiary."

In the opinion Judge Geiger, speaking for the court, said at page 498 (O. O.) as follows:

> "We are * * * concerned with the right of the director of public welfare or any other official to lay an additional burden upon the prisoner by authority granted by any act which did not become effective until after the prisoner had been sentenced. At first it seemed clear to us that the state, with its inherent, sovereign power to define crimes and fix penalties and to control, through the appropriate departments and boards, the prisoners committed to its various institutions, would have the right to provide, through the functioning of such officials, for the transfer of a prisoner from one institution to the other and for their probation and parole under legislative enactment, such as Sections 2210 and 2210-2 General Code and that even though such laws may have been enacted and become effective after the commission of the crime and sentence imposed upon the convicted party, laws for transfer from one institution to another would not be *ex post facto* in their operation. We, however,

have reached the conclusion that although the sentence imposed by the trial judge may have inadvertently been in violation of the statute fixing the punishment for bank robbery, due to the fact that such action of the trial court stands unreversed and unmodified, any enactment passed subsequent to the sentence imposed which changes the effect of the sentence, even though the same may have been unauthorized and imposes a greater burden or longer sentence or different conditions controlling parole, is a matter *ex post facto* in its operation.

It is admitted on all hands that the transfer of this prisoner from the reformatory where he was serving an indeterminate sentence to the penitentiary and from there to the prison farm, has imposed burdens upon him and curtailed privileges to which he was entitled under the indeterminate sentence by the trial court. * * *

We must therefore hold that he is now illegally confined in the prison farm at London and should be reconveyed to Mansfield, there to continue in confinement under the provisions of the original sentence and that he is entitled to such consideration as to parole as may legally attach to those who are sentenced to the reformatory for an indeterminate period. * * * "

If the facts in the case of the prisoner about whom you inquire were "on all fours" with the facts in the Flora case, this office would unhesitatingly say that the Flora case is dispositive of your question. It is unnecessary to point out that the Ohio Penitentiary, located in Franklin County, and the London Prison Farm, in Madison County, are each within the territorial jurisdiction of the Court of Appeals of such district. This being true, any decision of the Court of Appeals of the Second District of Ohio is binding upon every one within the district, including even Courts of Common Pleas in such district and public officers of all character, including state officers. As stated in 11 O. Jur. 778:

"It is a general rule that a decision of a court which has authority to review the decisions of another court is binding upon the latter court. The decision of an appellate court is evidence of law and in the inferior courts is in the nature of conclusive evidence. It is the duty of the lower court to determine what the decisions of the higher courts are, and then defer to their authority. * * * A common pleas court is bound by a decision of the circuit court in its district, unless the latter decision is in irreconcilable conflict with the decisions of the supreme court. * * * "

And, of course, it should be unnecessary again to state the position of this office to the effect that the Attorney General implicitly follows the law as laid down by the courts created by or under the Constitution. See Opinions, Attorney General, 1927, Vol. 1, p. 689; No. 1330, 1939.

It must be noted, however, that the facts in the case of W. K., the prisoner mentioned in your inquiry, are entirely different from the facts in the Flora case. Flora was convicted, sentenced and received at the Ohio State Reformatory, prior to the enactment of Section 2210-2, General Code. W. K. was sentenced and received *after* the enactment of such section. The reasoning and the discussion of the court in the Flora case were grounded upon the fact that Section 2210-2, General Code, was not a part of the law of Ohio when Flora was convicted and sentenced, but was enacted by the Legislature after such conviction and sentence. It is apparent that this case has no application here.

At the time of the conviction and sentence of W. K. Section 2210-1, General Code, provided as follows:

> "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 2210-2, General Code, enacted as a part of the same act in which Sections 2210 to 2210-3, General Code, were enacted, reads:

> "If through oversight or otherwise, a prisoner is sentenced to the Ohio penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto, the warden or superintendent of said institution shall receive said prisoner and shall forthwith recommend to the department of public welfare, the transfer of said prisoner to the proper institution. Prisoners so transferred shall be entitled to the same legal rights and privileges as to the term of sentence, diminution of sentence and parole, as if originally sentenced and committed to the institution to which they have been transferred."

In the same act, it was provided in part in Section 2210, General Code, that:

> "A person confined in a state penal institution and not eligible to parole before the expiration of a minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence, who has faithfully observed the rules of said institution, shall be entitled to the following diminution of his minimum sentence:
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> * * *

(f) A prisoner sentenced for a minimum term of six or more years, shall be allowed a deduction of eleven days from each of the months of his minimum sentence.

* * *

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

Since W. K. was sentenced *after* the enactment of Section 2210-2, supra, the reasoning and conclusions of the Court of Appeals in the Flora case would seem to have no application in the instant case, and W. K. was not eligible for parole until he had met the requirements of either Section 2210 or 2210-2 of the General Code.

In this connection, your attention is invited to the fact that Section 2210-1, supra, was amended by the 93rd General Assembly, in the same act in which the Pardon and Parole Code was enacted. The changes are indicated by the asterisks and the words emphasized in the following quotation:

"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 years, whether consecutive or otherwise, of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of * * * *ten full* years' imprisonment. * * * *This provision* shall apply to prisoners sentenced before or after the taking effect of this act."

Whether the Pardon and Parole Commission assumed to act under the provisions of Section 2210-1, General Code, prior to its amendment by the 93rd General Assembly, (Am. Sub. S. B. No. 82; Eff. 5-3-39), or under such section as it now reads is immaterial. In either case the Commission was without power or authority to act under the law. If old Section 2210-1, supra, were followed, W. K. would not, under the provisions of Section 2210, General Code, have been eligible for parole until he should have served approximately twelve and three-quarters (12¾) years. Under Section 2210-1, as amended by the 93rd General Assembly, he became eligible for parole "at the expiration of ten full years' imprisonment." The Legislature expressly provided that the provisions of Section 2210-1 should "apply to prisoners sentenced before or after the taking effect of this act." It requires no authority to support the position that Section 2210-1, as amended, being more liberal than old Section 2210-1, (which being a penal section must be strictly construed against the state and liberally construed in favor of the criminal)

would apply to all prisoners confined in Ohio penal institutions, even if the Legislature had not expressly provided that Section 2210-1, as amended, should "apply to prisoners sentenced before or after the taking effect" of the act.

While other questions may be engendered by the amendment in question, in view of the foregoing and in specific answer to your question, the Pardon and Parole Commission was without power or authority to parole W. K. at the time he had only served a little less than eight years as stated in your request.

Respectfully,

THOMAS J. HERBERT,
Attorney General.