OPINION NO. 86-034

Syllabus:

Where a court has ordered that sentences of imprisonment be served concurrently, the Department of Rehabilitation and Correction is without authority to determine independently that R.C. 2929.41(B)(3) requires such sentences to be served consecutively and, based upon such determination, to require a prisoner to serve such sentences consecutively.

To: Richard P. Seiter, Director, Department of Rehabilitation and Correction, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1986

I have before me your request for an opinion concerning whether the Department of Rehabilitation and Correction is obligated to follow a court's order that a criminal defendant's sentences be served concurrently or whether the Department may determine that such sentences are to be served consecutively pursuant to R.C. 2929.41(B)(3).

You have presented a specific example from which it appears that your underlying concern is the extent to which you must comply with a court's order that sentences be served concurrently or whether R.C. 2929.41(B)(3), where applicable, automatically modifies the court's sentencing order and requires that sentences be served consecutively. R.C. 2929.41 states in part: "(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:...(3) When it is imposed for a new felony committed by a probationer, parolee, or escapee...." Several courts have interpreted R.C. 2929.41(B)(3) as requiring that where a probationer, parolee or escapee is sentenced for a new felony, such sentence must be served consecutively to his prior sentence. State v. Ricks, 53 Ohio App. 2d 244, 372 N.E.2d 1369 (Medina County 1977) (syllabus, paragraph two) ("[w]here the defendant is a probationer, parolee, or escapee when he commits a felony, R.C. 2929.41(B)(3) mandates that a new sentence must be served consecutively to the sentence previously imposed"); State v. Waddell, No. CA84-11-029 (Ct. App. Preble County June 28, 1985); State v. Detwiler, No. 2-83-19 (Ct. App. Auglaize County June 19, 1984).

Your opinion request refers to State v. White, 18 Ohio St. 3d 340, 341, 481 N.E.2d 596, 597 (1985), in which the court examined the provisions of R.C. 2929.41(E)(2) (currently at R.C. 2929.41(E)(3)) providing: "Consecutive terms of imprisonment imposed shall not exceed:...(2) An aggregate minimum term of fifteen years, when the consecutive terms imposed are for felonies other than aggravated murder or murder." The court concluded that: "where a trial court's sentence exceeds the minimum established for consecutive terms, such judgment is not the basis of a reversible error, as the terms of former R.C. 2929.41(E)(2), now (E)(3), are self-executing, automatically operating to limit the aggregate minimum sentencing term to fifteen years." 18 Ohio St. 3d at 341, 481 N.E.2d at 597. The court then stated: "Therefore, there is no necessity for modification of the consecutive sentences imposed so as to limit the aggregate minimum term to fifteen years because the effects of the statutory scheme in question are self-executing." 18 Ohio St. 3d at 342, 481 N.E.2d at 597.

I am not aware of any cases addressing whether the provisions of R.C. 2929.41(B)(3) are self-executing. The situation about which you ask, however, appears to be similar to that presented in State v. Ricks. In that case defendant, who was incarcerated in the Marion Correctional Institution, was indicted for theft. Defendant bargained with the prosecutor for a sentence to run concurrently with the sentence he was then serving. The trial court accepted defendant's guilty plea and imposed a sentence to run concurrently with the defendant's previous sentence. Defendant then filed a motion to vacate the sentence, in part, on grounds that the trial court had failed to inform him that R.C. 2929.41(B)(3) required that his sentence run consecutively with the sentence he was already serving. On appeal, the court reversed the judgment of the trial court and remanded the cause for an evidentiary hearing to determine whether defendant's sentence was imposed "for a new felony committed by a probationer, parolee, or escapee," thus making R.C. 2929.41(B)(3) applicable. The court specifically stated, however, that it was not addressing the question of whether the Marion Correctional Institution or the Adult Parole Authority was authorized to "correct" the trial court's sentence and view the defendant's sentences as being consecutive rather than concurrent as ordered by the trial court.

The extent of the Department's authority to modify a sentence of imprisonment was addressed by my predecessor in 1975 Op. Att'y Gen. No. 75-082. At issue in Op. No. 75-082 was whether a court or the Department of Rehabilitation and Correction determines whether to abrogate the conviction or modify the sentences of prisoners and parolees under 1975-1976 Ohio Laws, Part II, 2311, 2394-95 (Am. Sub. H.B. 300, eff. Nov. 21, 1975) (uncodified section three) which states in part:

> Any person charged, convicted, or serving a sentence of imprisonment for an offense under existing law that would not be an offense on the effective date specified in Section 4 of this act shall have the charge dismissed and the conviction abrogated, shall be finally released from imprisonment, and shall have his records expunged of all information concerning that offense. Any person charged with an offense committed prior to the effective date specified in Section 4 of this act that shall be an offense under this act shall be prosecuted under the law as it existed at the time the offense was committed and any person convicted or serving a sentence of imprisonment for an offense under existing law that would be an offense on the effective date specified in Section 4 of this act but would entail a lesser penalty than the penalty provided for the offense under existing law shall be sentenced according to the penalties provided in this act or have his existing sentence modified in conformity with the penalties provided in this act. Such modification shall grant him a final release from imprisonment if he has already completed the period of imprisonment provided under this act or shall render him eligible for parole release from imprisonment if he has completed a period of imprisonment that would render him eligible for parole under the provisions of this act.
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> Courts, the Department of Rehabilitation and Correction, persons responsible for the superintendence of municipal and county jails and

> workhouses, the Adult Parole Authority, county departments of probation, and any other state or local governmental officer or agency having responsibility for prisoners or parolees...shall, upon written request from any person so affected by this section, or his attorney, take all action necessary to accomplish the release, modification of sentence, or modification of record required by this section. Such officers and agencies may make further modifications of such records as in their opinion are made necessary by this section.

Although the legislation considered in Op. No. 75-082 does not specify which entity makes a decision as to whether a conviction will be abrogated or a sentence redetermined, the opinion concludes that vacation or modification of a sentence is a judicial function which, pursuant to Ohio Const. art. IV, §1, may not be exercised by an administrative official or agency such as the Department of Rehabilitation and Correction. See generally State v. Morris, 55 Ohio St. 2d 101, 378 N.E.2d 708 (1978) (interpreting the provisions of section three of Am. Sub. H.B. 300 as imposing upon the trial court the duty to review a prisoner's conviction and sentence and to either abrogate the conviction or redetermine the sentence as may be required by Am. Sub. H.B. 300).

In the absence of a specific judicial determination that provisions of R.C. 2929.41(B)(3) are self-executing, I must advise you that the Department is required to obey any order issued by a court within its jurisdiction and power. See State ex rel. Beil v. Dota, 168 Ohio St. 315, 154 N.E.2d 634 (1958). As stated in 1981 Op. Att'y Gen. No. 81-053 at 2-210: "where a court has issued an order within its jurisdiction and power, disobedience of such order is contempt. See In re Thomas, 52 Ohio Op. 375, 117 N.E.2d 740 (P. Ct. Hamilton County 1954)." If the situation were to arise, where the Department questions a court's authority to issue a particular sentencing order, or where a particular order is unclear as to the specific duties it imposes upon the Department, it would be necessary for your counsel to contact the prosecutor who handled the case and request that he seek a modification or clarification from the sentencing court. See generally State v. Ricks (where the court of appeals remanded the case to the trial court for an evidentiary hearing to determine whether the facts of the case fit within the provisions of R.C. 2929.41(B)(3)).

Based on the foregoing, it is my opinion, and you are advised, that where a court has ordered that sentences of imprisonment be served concurrently, the Department of Rehabilitation and Correction is without authority to determine independently that R.C. 2929.41(B)(3) requires such sentences to be served consecutively and, based upon such determination, to require a prisoner to serve such sentences consecutively.