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1. CRIMINAL STATUTE — PENALTY FOR VIOLATION — SENTENCE TO IMPRISONMENT "NOT LESS THAN TEN DAYS NOR MORE THAN ONE YEAR" OR "NOT TO EXCEED ONE YEAR," THOUGH SUBJECT TO REVERSAL FOR INDEFINITENESS, IS NOT VOID — DUTY OF AUTHORITIES, IN INSTITUTION WHERE PERSON SENTENCED IS COMMITTED TO RETAIN CUSTODY OF PRISONER FOR ONE YEAR UNLESS PRISONER SOONER RELEASED BY ORDER OF COURT OF COMPETENT JURISDICTION.

2. WHERE FEMALE OVER AGE OF EIGHTEEN YEARS IS FOUND GUILTY, ON SEVEN SEPARATE COUNTS BY JUVENILE COURT, OF CONTRIBUTING TO DELINQUENCY OF CHILDREN AND IS SENTENCED TO OHIO REFORMATORY FOR WOMEN, PURSUANT TO SECTION 1639-48 G. C., TERMS OF SENTENCES "NOT TO EXCEED ONE YEAR," NOT SPECIFIED TO RUN CONCURRENTLY, DUTY OF REFORMATORY OFFICERS TO HOLD PRISONER FOR FULL PERIOD OF SEVEN YEARS UNLESS COURT HAVING JURISDICTION, BY ORDER, RELEASED THE PRISONER FROM CUSTODY.

3. INCREASED SENTENCES FOR SECOND AND THIRD OFFENDERS IN CERTAIN MISDEMEANOR CASES — SECTION 13457-1 G. C. — PROVISIONS APPLY TO COMMITMENTS MADE TO OHIO REFORMATORY FOR WOMEN PURSUANT TO SECTION 1639-48 G. C.

SYLLABUS:

1. Where a criminal statute authorizes as a penalty for its violation the imposition of a sentence to imprisonment for "not less than ten days nor more than one year", a sentence for "not to exceed one year", though subject to reversal for indefiniteness, is not void, and it is the duty of the authorities of the institution to which the person so sentenced is committed to retain custody of the prisoner for the full period of one year unless he is sooner released by order of a court of competent jurisdiction.

2. Where a female over the age of eighteen years is found guilty by a juvenile court on seven separate counts, of contributing to the delinquency of children, and is sentenced pursuant to Section 1639-48, General Code, to the Ohio Reformatory for Women, such sentences by their terms being for a term "not to exceed one year" and the court has not specified that such sentences are to run concurrently, it is the duty of the officers of such reformatory to hold such prisoner for the full period of seven years, unless she is sooner released from custody by order of a court having jurisdiction to order such release.

3. The provisions of Section 13457-1, General Code, relating to increased sentences for second and third offenders in certain misdemeanor cases, apply to commitments made to the Ohio Reformatory for Women, pursuant to Section 1639-48, General Code.

Columbus, Ohio, June 22, 1944

Hon. Herbert R. Mooney, Director, Department of Public Welfare
Columbus, Ohio

Dear Sir:

I acknowledge receipt of your request for my opinion, reading as follows:

> "Section 1639-48 G. C. gives to the juvenile courts authority to commit to the Ohio Reformatory for Women, women over 18 years of age found guilty of contributing to the dependency, neglect or delinquency of minors, and provides that such commitments shall be 'for the same term for which said female could be committed to a workhouse or jail.' This is the only misdemeanor on which commitment may be made to a state reformatory or penal institution.
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> The Highland County Juvenile court recently committed to the Ohio Reformatory for Women a woman found guilty of contributing to delinquency on several different counts. She was involved with seven boys ranging in age from 13 to 17 years, and the court found her guilty on each offence and convicted and committed her on seven counts, the penalty on each commitment reading 'not to exceed one year'.
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> In view of the provisions of Section 1639-48 and 1639-49 G. C., will you please advise us of the period of time which this prisoner may be held in the Reformatory for Women. The Pardon and Parole Commission has not assumed jurisdiction in cases of prisoners received at the Reformatory for Women under Section 1639-48, inasmuch as the term of imprisonment is fixed by the court at any period not to exceed one year; and further, under Section 1639-49, the court may suspend

sentence *during commitment.*

Do the provisions of Section 13457-1, relating to cumulative sentences in misdemeanor sentences apply to commitments made by the juvenile courts under Section 1639-48 G. C.?"

Section 1639-45, General Code, which is a part of the juvenile court act (117 O. L. 520), reads as follows:

"Whoever abuses a child or aids, abets, induces, causes, encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a child or a ward of the court, or acts in a way tending to cause delinquency in such child, or who aids, abets, induces, causes or encourages a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent, shall be fined not less than five dollars, nor more than one thousand dollars, or imprisoned not less than ten days nor more than one year, or both. Each day of such contribution to such dependency, neglect or delinquency, shall be deemed a separate offense."

Section 1639-48, General Code, being a part of the same act, provides:

"When any female over the age of eighteen years is found guilty of a misdemeanor under the provisions of this chapter, the judge may order such female confined to the women's reformatory at Marysville for the same term for which said female could be committed to a workhouse or jail."

Your letter does not indicate that the court in pronouncing the sentences in question, ordered that they should run concurrently. Accordingly, we are assuming for the purpose of this opinion that they are to be served consecutively. In the case of Anderson v. Brown, 117 O. S. 393, it was held:

"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 amount 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.)

Similar rulings were made in Opinions of the Attorney General for 1933, p. 69, where the case of Anderson v. Brown, supra, was cited and relied upon, and in Opinions of the Attorney General for 1932, p. 1208.

It will be observed that Section 1639-45, General Code, in defining the offense and prescribing the penalty, authorizes the imposition of a fine of not less than five dollars nor more than one thousand dollars, or imprisonment not less than ten days nor more than one year, or both. It would therefore have been within the power of the court to impose a sentence of imprisonment of one year on each of the seven counts upon which the offender was found guilty, and, according to the authority above mentioned, such sentences, in the absence of a stipulation of the court that they were to run concurrently, would be enforced consecutively. But the court did not pronounce the sentence of imprisonment of one year. In view of the terms of the statute, the sentence pronounced by the court might be interpreted as any period from ten days to one year and neither the prisoner nor the officer or the institution to whose custody the prisoner was sentenced, would have any means of knowing with certainty when the sentence on each or all of the seven counts was to terminate. Such a sentence may fail of compliance with the law and may be erroneous, but, under the authorities to which I call attention, is not void.

In the case of Williams v. The State, 18 O. S. 47, it was held:

> "1. Where a party is convicted at the same term, of several crimes, each punishable by imprisonment in the penitentiary, it is not error in sentencing the defendant, to make one term of imprisonment commence when another terminates.
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> 2. But where the sentence, as shown by the record, is to imprisonment in the penitentiary 'for a further term of ten years, to commence at expiration of the sentence aforesaid,' and there is nothing in the record showing to what the term 'aforesaid' relates, such judgment and sentence will be reversed for uncertainty.
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> 3. Upon the reversal of such insufficient judgment, the proper course is to remand the cause to the court below for sentence and judgment upon the verdict, pursuant to law."

In the case of Picket v. State, 22 O. S. 405, it was held:

> "The terms of a sentence of imprisonment ought to be so definite and certain, as to advise the prisoner and the officer charged with the execution of the sentence of the time of its commencement and termination, without being required to inspect the records of any other court, or the record of any other case."

The sentence in that case was that the defendant "be confined and imprisoned in the jail of Hamilton County for the term of thirty days from and after the expiration of the sentence heretofore made in Case No. 4948, state of Ohio v. Henry Picket, and pay a fine of fifty dollars and the cost of this prosecution." The court referred to and approved the case of Williams v. State supra, and likewise remanded the case to the court of common pleas for sentence and judgment in accordance with law.

In the case of Hamilton v. State, 78 O. S. 76, it was held:

> "It is the duty of the court in pronouncing judgment against the accused in a criminal case to pronounce the judgment provided by law, and where a fine is part of the penalty so provided and the court is authorized by law to commit the accused to the workhouse 'until such fine and the costs of prosecution are paid, or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs for each day of confinement in such workhouse, or be otherwise legally discharged' — a sentence providing and requiring that the accused 'shall stand committed to such workhouse until the fine and costs are paid', without adding thereto the further words of the statute 'or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs,' etc., while not wholly void is incomplete and erroneous, and where such sentence has not been executed, it will be reversed."

It will be noted that the court here states that such sentence, though incomplete and erroneous, is not wholly void.

In the opinion at page 85, the court, after refering to the statute allowing a credit of sixty cents per day on the fine and costs for each day of confinement, said:

> "The conditions of release being thus clearly expressed in the statute, they become and are a necessary part of every proper sentence imposed thereunder, and while their omission *will not necessarily render the sentence wholly void if any part of the punishment imposed is authorized by law,* it nevertheless

> makes such sentence incomplete and erroneous. But it may be said that such error is not prejudicial and that a court if called upon to construe such a sentence can read into it the words of the statute omitted therefrom and thus preserve to a defendant all of his rights. The answer to this is, that a *sentence of imprisonment in a criminal case, to be a valid sentence, must in and of itself be definite and complete* in all of its material terms,*and so certain and accurate as to the time of it commencement and proper termination,* as that it shall not be necessary for either the prisoner, or the officers charged with its execution to apply to a court to ascertain its meaning. Picket v. State, 22 Ohio St. 405. In other words, to borrow the language of Norris, J., In re Moore, 14 C. C. R. 244, 'a man who is compelled to have a law suit to get into jail, ought not, by reason of the uncertainty of his sentence, be compelled to have another law suit to get out.' "
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> (Emphasis mine.)

The same principles are applied on the authority of the two cases last above cited in the case of Francis v. State, 25 O. C. C. (N. S.) 281.

The case of In re Moore, 14 O. C. C. 237, was one in which the same defect was found in the sentence as was present in the case of Hamilton v. State, supra. The court said in the syllabus:

> "A sentence in a criminal case must be so complete as to need no construction of a court to ascertain its import, so that the offender may not look between the lines for its meaning, and it cannot be supplemented by a non-judicial or ministerial officer."

This case did not come into the Circuit Court as a proceeding in error, but was an application for a writ of habeas corpus, and the court, evidently regarding the defect in the sentence as fatal to its validity, granted the writ and discharged the prisoner, which lends color to the theory that the sentence was void and subject to collateral attack. In view, however, of the expression of the Supreme Court in the several cases above referred to, I cannot hold that the sentences involved in your inquiry are void, and therefore to be disregarded by the officers of the reformatory. It is said in 15 Am. Juris., 102:

> "Unless a judgment is an absolute nullity, imprisonment under it cannot be unlawful; and it is not a nullity, though erroneous, if the court has general jurisdiction, and, until reversed, it cannot be disregarded."

Nor is it either the duty or right of the officers of the reformatory to prosecute error and seek to have the case remanded to the trial court for proper sentence. In the absence of action by the prisoner to assert her right to have the judgment and sentence reviewed, the only course remaining to the authorities of the reformatory would appear to be to let her continue to serve her sentence up to the limit indicated by the sentencing court.

Section 1639-49, General Code, being also a part of the juvenile court act, gives the trial court continuing control over the matter of suspension of a sentence. It reads:

> "In every case of conviction and where imprisonment is imposed as part of the punishment, such judge may suspend sentence, before or during commitment, upon such condition as he imposes."

Accordingly, in specific answer to your first question, it is my opinion that where a female over the age of eighteen years is found guilty by a juvenile court on seven separate counts, of contributing to the delinquency of children, and is sentenced pursuant to Section 1639-48, General Code, to the Ohio Reformatory for Women, such sentences by their terms being for a term "not to exceed one year", and the court has not specified that such sentences are to run concurrently, it is the duty of the officers of such reformatory to hold such prisoner for the full period on each count, unless she is sooner released from custody by order of a court having jurisdiction to order such release.

Referring to your question as to the application of Section 13457-1, General Code, to commitments made by the juvenile court under Section 1639-48, I note that while the heading of that section speaks of "cumulative sentence", the language of the statute has nothing to do with cumulative sentences as those words are used by the courts in the cases to which I have already referred. Section 13457-1 deals only with increased sentences for second and third offenders. It reads as follows:

> "When a person is convicted of a misdemeanor involving moral turpitude under the law of this state, or an ordinance of a municipal corporation, and the judge or magistrate before whom such conviction is had, is authorized by law to commit him to a workhouse, and a previous conviction for any such

misdemeanor, in this state or elsewhere, is proved against him, the sentence for the last offense shall not be less than double the penalty imposed for such previous offense. When two previous convictions for such offenses are proven against the offender, the sentence shall not be less than double the penalty imposed for the last of such previous offenses. This section shall not impose a penalty greater than the maximum now provided by law for such offenses in the aggregate."

There is no question but that the offenses for which a juvenile court may commit female offenders to the "Women's Reformatory at Marysville" are misdemeanors. That is the express provision of Section 1639-48 hereinbefore quoted. For such offenses the juvenile court is authorized to sentence offenders to a workhouse.

Section 4128, General Code, provides:

"When a person over sixteen years of age is convicted of an offense under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is authorized by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, may sentence the offender to the workhouse, if there is such house in the county.

When a commitment is made from a city, village, or township in the county, other than in the municipality, having such workhouse, the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to not less than seventy cents per day for the time of the commitment, to be placed in the hands of the superintendent of the workhouse for the care and maintenance of the prisoner."

Section 12386, General Code, makes provision for committing such person to the workhouse of another county where there is none in the county where the conviction is had.

Although not applicable to the facts recited in your inquiry, it is my opinion that the provisions of Section 13457-1, General Code, relating to increased sentences for second and third offenders in certain misdemeanor cases, apply to commitments made to the Ohio Reformatory for Women, pursuant to Section 1639-48, General Code. In connection therewith, it is pointed out, however, that the provisions of the former section are controlling upon the trial court only, and therefore are of no

concern to the Director of the Department of Public Welfare.

Respectfully,

THOMAS J. HERBERT

Attorney General