



STATE OF KANSAS

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CURT T. SCHNEIDER
Attorney General

May 27, 1975

Opinion No. 75-232

Mr. Robert R. Raines
Secretary of Corrections
5th Floor, KPL Tower Building
Topeka, Kansas 66612

Dear Secretary Raines:

You inquire whether certain amendatory legislation incorporated within the Penal Reform Act of 1974, modifying the parole eligibility procedures as originally specified within L. 1970, ch. 129, §22-3717 (former K.S.A. 22-3717), should be deemed to operate retrospectively to affect those inmates sentenced prior to its effective date of July 1, 1974. Specifically, you query whether a retrospective application of K.S.A. 22-3717, as amended, which would have the effect of extending an inmate's initial parole eligibility date as it existed under prior law would be a permissible assumption of legislative authority if it was so intended to operate.

As originally enacted by L. 1970, ch. 129, effective July 1, 1970, K.S.A. 22-3717 contained the following provisions concerning parole:

- (1) The board shall have power to release on parole those persons confined in institutions who are eligible for parole when in the opinion of the board, there is reasonable probability that such persons can be released without detriment to the community or to themselves.
- (2) Persons confined in institutions shall be eligible for parole:
 - (a) After 15 years if sentenced to life imprisonment or to a minimum term which, after deduction of work and good behavior credits, aggregates more than 15 years;
 - (b) After 16 months if sentenced pursuant to conviction for a first offense to a minimum term which, after work and good behavior credits, aggregates

more than 16 months, and the person sentenced is under 21 years of age at the time of sentence;

(c) After service of the minimum term of the sentence less work and good behavior credits in all other cases.

(3) x x x

(4) x x x

However, in the 1974 legislative session, the Kansas legislature fundamentally modified the pre-existing parole structure by the enactment of L. 1974, ch. 403, §10, effective July 1, 1974,¹ the present K.S.A. 22-3717, which provided in pertinent part as follows:

- (1) The authority shall have power to release on parole those persons confined in institutions who are eligible for parole when, in the opinion of the authority, there is reasonable probability that such persons can be released without detriment to the community or to themselves.
- (2) After expiration of one hundred twenty (120) days from the date of sentence, the Kansas adult authority is hereby granted the authority to place upon intensive supervised parole any inmate classified in the lowest minimum security classification who has achieved such status under rules and regulations promulgated by the secretary of corrections, except in the case where a death sentence or life imprisonment has been imposed as the minimum sentence or where the minimum sentence imposed aggregates more than fifteen (15) years, after deduction

¹In the 1972 legislative session, the Kansas legislature initially sought to modify K.S.A. 22-3717 by the enactment of House Bill 2030. Section 90 thereof significantly altered the provisions of the prior law, but the legislature deferred the effective date of the bill to July 1, 1974. See reprint of H.B. 2030 following K.S.A. 1972 Supp. 75-20d15. Again in 1973 the legislature performed corrective surgery on the parole eligibility procedures by enacting K.S.A. 1973 Supp. 22-3717, to be effective as of July 1, 1974. However, since the legislature again modified the procedures in the 1974 session by enacting the present version of K.S.A. 22-3717, the previous amendatory legislation never took effect and was superceded by the present statute.

of work and good behavior credits. Persons confined in institutions shall be eligible for parole after fifteen (15) years if sentenced to life imprisonment or to a minimum term which, after deduction of work and good behavior credits, aggregates more than fifteen (15) years.

(3) x x x

(4) x x x As used in this section, the term "minimum security" shall be defined by rules and regulations of the secretary of corrections.

As thus amended, K.S.A. 22-3717 repealed subsections (b) and (c) of the prior law which established dates certain when inmates within those classifications would be initially eligible for parole. Under the provisions of former subsection (b) for example, an inmate became eligible for parole after the completion of 16 months of confinement and was then entitled to a hearing and consideration for release by the parole board (now the Kansas Adult Authority). However, in marked contrast to the former procedures, the recent amendments largely eradicated the concept of guaranteed dates for parole eligibility² and instead adopted a more flexible procedural scheme whereby an inmate's eligibility for parole depends directly upon his security classification as determined by prison officials. Now, whenever an inmate attains the status of "minimum security" as determined by prison officials applying rules and regulations promulgated by the Secretary of Corrections, he becomes initially eligible for parole consideration.

Although it is certainly possible that under the new procedures an inmate might achieve an earlier initial parole eligibility than afforded him by the fixed date eligibility procedures of the prior law, the possibility clearly remains that a good faith application of the new eligibility system could substantially extend the inmate's initial consideration for parole beyond the former guaranteed date³ and thus potentially increase the length of his incarceration within the penitentiary.

²Subsection (2) of the present statute retains fixed date parole eligibility provisions for those persons sentenced to a term of life imprisonment and for those whose minimum sentence aggregates more than 15 years after the deduction of work and good behavior credits.

³The term "guaranteed date" or similar terminology used in this opinion refers only to eligibility for parole consideration, and not to the granting of parole itself.

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It is a recognition of this harsh reality that prompted your inquiry whether the amendatory procedures could legally be applied retroactively to detrimentally affect the parole status of an inmate sentenced prior to the effective date of the new law. After having conducted an analysis of relevant cases addressing this issue, it is the opinion of our office that K.S.A. 22-3717 could not constitutionally be, nor was it intended to be, applied retrospectively to the detriment of an inmate's rights as they existed under prior law in view of the constitutional prohibition against the enactment of ex post facto laws.

Article I, §10, cl. 1 of the United States Constitution explicitly declares that "No state shall . . . pass any . . . ex post facto Law." A case decided early in our constitutional history, Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798), remains the touchstone decision defining the nature and extent of this clause of the Constitution. Therein the Court stated:

"I will state what laws I consider ex post facto laws within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed."
3 U.S. at 390.

In the later case of Medley, Petitioner, 134 U.S. 160, 171, 10 S.Ct. 384, 33 L.Ed. 835 (1890), Justice Miller extended somewhat the previous definition by expounding as follows:

". . . it may be said that any law which was passed after the commission of the offence for which the party is being tried is an ex post facto law, when it . . . alters the situation of the accused to his disadvantage . . ." (Emphasis supplied.)

Undoubtedly the leading case applying these principles to a situation where a legislative amendment restrictively and retroactively modified pre-existing parole eligibility dates is that of In Re Griffin, 63 Cal. 2d 757, 48 Cal. Rptr. 183, 408 P.2d 959 (1965). The petitioner therein had been sentenced

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in 1961 to a term of 10 years to life imprisonment and under the parole statutes existing at the time of the commission of his offense would have been eligible for parole after serving one-third of the minimum term of his sentence, or 3 years and 4 months. However, 4 months after his sentencing, the California legislature altered the existing parole procedures in such a manner that the inmate was not initially eligible for parole until the completion of 5 years of confinement. Finding extended discussion unnecessary, a unanimous Court voided the amendment as a violation of Art. I, §10 of the United States Constitution in observing:

"Whatever the technical nature of a parole may be, from a realistic point of view it is our opinion that such a statute increases the punishment rather than decreases it. It follows, that to apply it to petitioner, would be unconstitutional. It is elementary, of course, that a statute amended after an act is committed so as to increase the punishment cannot be made applicable to an accused, because to do so would run afoul of the prohibition against ex post facto laws." 408 P.2d at 961.

Considering a similar constitutional challenge to a Wisconsin statute which retroactively extended the duration of confinement before eligibility for parole, the Wisconsin Supreme Court likewise condemned the statutory amendment in State ex rel. Mueller v. Powers, 64 Wisc. 2d 643, 221 N.W. 2d 692, 694 (1974), and its detailed and well-reasoned exposition merits repetition herein:

"It is undisputed that a legislative act increasing the sentence to be given an offender for a crime committed before the law was passed would be an ex post facto law and constitutionally prohibited. A more difficult problem arises when a legislative act does not increase the sentence, but in some other manner alters the punishment of the offender to his detriment after he has committed the crime, or, as in the instant case, after he has been convicted and sentenced. The issue presented by the petition now before this Court is whether sec. 57.06, Stats., as amended in 1973, and as applied retroactively by the respondents, increasing the period to be served by petitioners from two to five years before they are eligible for parole consideration, is a constitutionally prohibited ex post facto law.

Although this issue is one of first impression for this Court, the majority of courts of other jurisdictions that have considered this question have held that the retroactive application of an amendatory statute increasing the period to be served by an offender before he is eligible for parole consideration is constitutionally prohibited as an ex post facto law. We agree. The retroactive application of sec. 57.06, Stats., as amended in 1973, increasing the time that must be served by petitioners before they are eligible for parole consideration from two to five years in a very real and practical sense imposes an additional penalty and violates the constitutional inhibition against ex post facto legislation. Although the decision to refuse or grant parole lies within the discretion of the department, Wisconsin law grants petitioners as a matter of right the opportunity to be considered for parole after serving a given period of time. A retroactive increase of this period violates petitioners' constitutional rights. . . the retroactive application of sec. 57.06(1)(a), Stats., as amended in 1973, has a substantial effect upon petitioners' punishment. It alters the situation of petitioners to their disadvantage, Medley, Petitioner, supra, and, as such, is prohibited by both the Wisconsin Constitution and the United States Constitution."

Other decisions reaching an identical result are Ex Parte Alegria, 464 S.W. 2d 868 (Tex. Cr. App. 1971); Love v. Fitzharris, 311 F. Supp. 702 (N.D. Cal. 1970), aff'd, 460 F.2d 382 (9th Cir. 1972); Greenfield v. Scafati, 277 F. Supp. 644, 646 (D. Mass. 1967) (3-Judge Court); State ex rel. Woodward v. Board of Parole, 155 La. 699, 99 So. 534 (1924). Additionally, a number of cases have similarly found violations of the ex post facto prohibition in situations where subsequent statutory changes reduced or abolished statutory good time credits in existence at the time an inmate committed the offense causing his incarceration. Foremost among these is the decision of the Kansas Supreme Court in State v. Tyree, 70 Kan. 203, 78 P. 525 (1904).

Therein, a defendant was convicted and sentenced under the provisions of an indeterminate sentencing act enacted after the commission of the offense for which he was tried. The amendatory statute completely abolished the right to earn statutory good time credits from the maximum sentence in existence when the offense was committed but did establish an expanded parole eligibility system not existing theretofore under Kansas law. Although the Court recognized that the new procedures might result in the inmate's release on parole prior to the time

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when he could have been released under the former system had he earned all credits possible, the Court nevertheless held the amendatory legislation unconstitutional as a prohibited ex post facto law, noting that the credits abolished could be earned as a matter of right whereas the receipt of parole was merely a matter of favor and discretion.

Since decisions construing the scope of the ex post facto clause of the United States Constitution⁴ have been relative rarities in the history of this state, the Court's analysis in Tyree should be noted, at 204-205:

"The term ex post facto applies only to penal or criminal statutes. Every retrospective penal or criminal statute is not necessarily ex post facto. If the law under which the appellant was sentenced mitigates the punishment prescribed in the statute in existence when the offense was committed it would not be ex post facto, although retrospective. (Citation omitted). A retrospective criminal or penal law that does not deprive the party of some constitutional right to which he was entitled under the law at the time the offense was committed, or does not alter his situation to his disadvantage, is not ex post facto. (Emphasis supplied)

Although the Tyree case involved the question of retrospective abolishment of good time credits rather than a retrospective increase in the length of confinement prior to initial eligibility for parole, the analysis employed by the Court clearly indicates that it is not inclined to a restrictive interpretation of the ex post facto clause and would, if presented with similar facts, join the rulings of the clear majority of courts that have considered the clause in the context of parole restriction. State v. Ellsworth, 142 Mont. 14, 380 P.2d 886 (1963); Greenfield v. Scafati, supra.

Thorough scrutiny of the question herein presented necessitates some brief comment on several decisions of other courts that have reached contrary conclusions to those discussed heretofore upon confronting the issue at bar. Probably the leading case in opposition to those previously mentioned is Zink v. Lear,

⁴Kansas has no similar provisions within its constitution.

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28 N.J. Sup. 515, 101 A.2d 72, 77 (1953) wherein the Court opined:

"Parole presents a question of statutory construction; no constitutional right is involved. (Citation omitted). Parole is a matter of legislative grace and not a thing of right. (Citation omitted). Parole may be granted or withheld, as the legislative discretion may impel. When sentence is imposed on a defendant, there is no constitutional guaranty that the provisions regarding parole will remain constant; the only constitutional inhibition is that no law may be passed increasing the punishment for the crime committed."

The Court thereupon proceeded to observe that a retroactive change in the parole structure did not in any manner serve to enhance the punishment for the crime and concluded that it was without authority to interfere in an area entrusted entirely to the legislative branch. Cases of a similar thrust include State v. Swenson, 243 Minn. 46, 66 N.W. 2d 337 (1954); Cf. Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957).

In our judgment, the holdings of these cases are based upon the antiquated and now discarded notion that governmental revocation of privileges, as opposed to rights, raises no question of constitutional dimension since the privilege is a creature of legislative grace, not a matter of entitlement, and may therefore be withdrawn at will. This euphemistic distinction has received a fitting interment in a solid line of decisions emanating from the United States Supreme Court. As that Court observed in Sugarman v. Dougall, 413 U.S. 634, 644, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973), "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" See also Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971); Goldberg v. Kelley, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963). Thus, a retroactive withdrawal or retraction of the parole privilege merely for the sake of administrative convenience and without a compelling basis therefor would raise grave constitutional questions.⁵

⁵This is not to say that any and every privilege, once conferred by the legislature, thereafter becomes a matter of permanent entitlement to the grantee.

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Secondly, these decisions unduly restrict the intended scope and purpose of the ex post facto clause by narrowly directing their inquiry to whether the amendatory statute increases the sentence imposed by the court. (emphasis supplied). Since the parole statutes generally exist separate and apart from the statutes imposing the penalty for a particular offense, these courts reason that the parole procedures are not part of "the law annexed to the crime, when committed," Calder v. Bull, supra, and therefore conclude that a retrospective dilution of parole eligibility does not run afoul of the ex post facto clause. These decisions exalt form over substance and ignore the pragmatic reality that a lengthening of the period before which parole eligibility may be achieved has the treacherous potential of increasing the duration of one's confinement and most assuredly "alters the situation of the accused to his disadvantage" as defined in Medley, supra. By reducing the integrity of invaluable federal constitutional guarantees to a sophistic characterization of whether parole is considered part of the sentence or a separate privilege under state law, these tribunals ignore the pragmatic effect of the parole system and risk evisceration of the constitutional guarantee.

The recent case of Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 94 S.Ct. 2532, 41 L.Ed.2d. 383 (1974) gives some indication of how the Supreme Court as presently constituted would view the issue. There, the Court merely held that a subsequent federal statutory amendment which abolished the no-parole provision of the prior statute pertaining to federal narcotics offenders did not, as a matter of Congressional intent, operate retroactively to confer parole eligibility upon an offender committing a narcotics violation prior to the effective date of the act. Although the no-parole proviso of the former statute was embodied within the penalty provision of the narcotics statute, the Court indicated generally that a flat denial of parole eligibility realistically served as punishment for the offense. Significantly, the Court, in dicta, considered the effect of a reverse situation where parole eligibility once conferred was subsequently withdrawn, observing, 94 S.Ct. at 2538.

"Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause of Art. I, §9 of the Constitution, of whether it imposed '[a] greater

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or more severe punishment than was prescribed
by law at the time of the . . . offense . . ."

Clearly, a statute subsequently enacted which substantially restricted or impaired a former right of parole eligibility would just as seriously undermine the constitutional prohibition against ex post facto legislation. In essence, an inmate has a vested entitlement to the benefit of those procedures affecting the duration of his confinement in existence at the time of the commission of the offense. Such a result is consistent with the purposes of the clause to provide fundamental fairness to an offender by notifying him in advance of the penalties he risks by violating a substantive criminal statute and to prevent arbitrary action by the government. In this respect, the clause operates in a similar fashion to the due process clause's prohibition against vague criminal statutes. See Love v. Fitzharris, supra, 311 F. Supp. at 703.

The preceding discussion has attempted to elucidate the serious constitutional problems that would be incurred by a retrospective application of K.S.A. 22-3717 which would extend an inmate's initial parole eligibility date beyond what it would have been under the procedures in effect when the offense was committed. However, the conclusions reached heretofore do not necessarily foreordain the constitutional infirmity of the Kansas statute in question here. Rather, the question of the constitutionality of the recent amendments will depend upon whether the legislature, in enacting the law, intended it to operate retrospectively or prospectively.

Resort to the statutory language itself provides no assistance in resolving this determinative issue. Although subsection (2) of the statute confers upon the Kansas Adult Authority "the authority to place upon intensive supervised parole any inmate classified in the lowest minimum security classification", the language merely restates the question without guidance as to which inmates should be subject to the new parole scheme (emphasis supplied). A complete reading of §22-3717 reveals that the statute is facially silent on the question of retroactivity.

Despite the statutory silence, however, a consideration of certain general principles of statutory construction provide the requisite assistance to answer the issue at hand. One of the most well-established of these principles, dating far into jurisprudential antiquity, is the interpretive canon that a legislative act is presumed to be constitutional and if fairly susceptible to an interpretation that would

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uphold its validity, should be sustained under the favored construction. Morra v. State Board of Examiners of Psychologists, 212 Kan. 103, 510 P.2d 614 (1973); Unified School Dist. No. 255, Barber County v. Unified School Dist. No. 254, Barber County, 204 Kan. 282, 463 P.2d 499 (1969); In re Burnette, 73 Kan. 609, 85 P. 575 (1906). As applied to the circumstances of the question presented herein, this saving presumption upholds the constitutional validity of K.S.A. 22-3717 since its application does not contravene or ignore the plain wording of the statute itself. Indeed, its application herein is clearly appropriate for the statute itself is silent and therefore equally susceptible to an interpretation upholding its validity, i.e. non-retrospective application to offenses committed prior to its July 1, 1974, effective date where to do so would detrimentally affect an inmate's rights under the prior law.

Yet another interpretive canon which relevantly applies herein was precisely enunciated in Johnson v. Warren, 192 Kan. 310, 314, 387 P.2d 213 (1963) as follows:

"The general rule, however, is that a statute operates only in the future from its effective date; that it has no retrospective effect unless its language clearly indicates that the legislature so intended, and that retrospective application is not to be given where vested rights will be impaired."

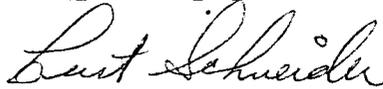
Therefore, in view of the serious constitutional problems that would be raised by a retrospective application of the recent amendatory legislation to the detriment of an inmate's rights as they existed at the time of commission of the offense and in consideration of the interpretive principles recited above, it is our opinion that K.S.A. 22-3717 is not constitutionally defective as a prohibited ex post facto law.

Additionally, it is important here to emphasize that all offenders who committed their respective crimes prior to July 1, 1974, are entitled to the benefits of the parole eligibility procedures existing theretofore if their application would improve the status of the inmate. Thus, the determinative date for the purposes of the ex post facto prohibition is the time the offense was committed, and not the date of sentencing as assumed by your inquiry. See Kring v. State of Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883).

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As a final note, several observations should be made as to what this opinion does not involve. As an initial matter, it in no manner should be construed as impairing the traditional discretion of the Kansas Adult Authority to grant or refuse to grant parole in a particular case. The parole function is clearly entrusted by statute to the benign wisdom of the Adult Authority whose sole province it remains to authorize an inmate's release on parole after its consideration of the requisite statutory and regulatory criteria. Secondly, the opinion does not question the legislature's prerogative to modify the laws affecting parole in the future should it deem it necessary or desirable to do so subject only to the strictures imposed by the state and federal constitutions. See Opin. Atty. Gen. No. 74-389 (December 16, 1974), at 6. This opinion addresses only the limited questions posed by your letter concerning whether K.S.A. 22-3717 was intended to operate retroactively to the possible injury of an inmate's rights under prior law, and whether if so, such action would be constitutional. For the reasons enunciated above, it is our opinion that the statute is constitutional since it was not designed to impair rights existing under prior law.

Very truly yours,



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