STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

CURT T. SCHNEIDER
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

October 27, 1978

ATTORNEY GENERAL OPINION NO. 78- 349

Honorable Jerry L. Mershon
Associate District Judge
5th and Pointz Avenue
Manhattan, Kansas 66502

Re: Criminal Law and Procedure--Expungement--Ex Post Facto Law

Synopsis: A person who, on or after July 1, 1978, applies for expungement of a conviction for an offense which was committed prior to that date must do so pursuant to Ch. 120, § 28, L. 1978, rather than pursuant to former K.S.A. 21-4616, -4617, or 12-4515.

* * *

Dear Judge Mershon:

Prior to its repeal by the 1978 Legislature, K.S.A. 21-4616, -4617, and 12-4515 provided for the annulment of convictions under certain conditions. K.S.A. 21-4616 applies to defendants who were not yet 21 years of age at the time of commission of the crime for which he or she was convicted. Any such offender, after having served the sentence imposed, or fulfilled the conditions of and been discharged from probation, parole, could

> "At any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty; and in either case, the court shall thereupon dismiss the complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the crime of which he has

> been convicted, and he shall in all respects be treated as not having been convicted . . . ."

save that the conviction may be considered in sentencing for any subsequent conviction. K.S.A. 21-4617 grants a similar privilege to persons who are 21 years or older at the time of the commission of the crime of which they have been convicted. Similarly, 12-4515 provided for annulment of Muncipal Court convictions.

Vexed by the casual annulment of convictions hereunder by various district courts, the 1978 Legislature repealed the foregoing, and enacted a new procedure for the expungement of convictions. A petition for expungement of a misdemeanor or a class D or E felony may not be filed until at least two years have elapsed from discharge from the sentence or from probation, parole, condition release or suspended sentence. A period of five or more years must elapse before filing a petition for expungement of a class A, B or C felony. Ch. 120, § 28, L. 1978.

In addition, under the new act, the court must find, prior to ordering expungement, that the petitioner has not been convicted of a felony or the subject of any criminal proceeding during the preceding two years, that the circumstances and behavior of the petition "warrant the expungement" and that the "expungement is consistent with the public welfare."

In addition, whereas under former K.S.A. 21-4616, -4617, and 12-4515, the defendant whose conviction has been annulled was free to state in "any application for employment, license or other civil right or privilege," that he has not been convicted of a crime. Under Ch. 120, § 28, L. 1978, a person whose conviction has been expunged must nonetheless disclose the existence of such expunged conviction in any application for employment as a detective with a private detective agency, as defined by K.S.A. 75-7b01; as security personnel with a private patrol operator as defined by K.S.A. 75-7b01, or with a criminal justice agency, as defined by section 1, or 1978 Senate Bill 406.

You request my opinion whether a conviction which was adjudged prior to July 1, 1978, is subject to expungement only under the more restrictive conditions of Ch. 120, § 28, L. 1978, or whether such applications may be dealt with under the conditions of former K.S.A. 21-4616, -4617, and 12-4515, notwithstanding the repeal of those sections.

It may be urged that to apply the more restrictive conditions to an application for annulment or expungement of a conviction adjudged prior to the effective date of the new act constitutes the latter an ex post facto law. Article I, § 10, cl. 1 of the United States Constitution declares that "[n] state shall . . . pass any . . . ex post facto law." An early case, Calder v. Bull, 3 U.S. (3 Dall.)

386, 1 L.Ed 648 (1798) remains the basic decision defining the nature and extent of this clause:

> "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 Ex Parte Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890), Justice Miller extended somwhat the definition thus:

> "[I]t may be said that any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed . . . . or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed sentence was committed, or by some law passed afterwards by which the punishment is not increased." 134 U.S. at 171, 33 L.Ed. at 840.

A number of courts have considered the application of the prohibition against ex post facto laws to legislative amendments which restrictively and retroactively modified pre-existing parole eligibility rules. In Re Griffin, 63 Cal.2d 757, 48 Cal.Rptr. 183, 408 P.2d 959 (1965), the petitioner had been sentenced to a term of 10 years to life imprisonment, and under the parole statutes in force at the time of the offense, he would have been eligible for parole after serving one third of the minimum term, or 3 years and 4 months. However, four months after sentencing, the California legislature altered the existing parole procedures, so as to render the inmate ineligible for parole until completion of five years of the sentence.

The court found the restrictive law, as applied to the inmate, to be an ex post facto law:

> "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 law." 408 P.2d at 961.

In State ex. rel. Mueller v. Powers, 64 Wisc.2d 643, 221 N.W.2d 692 (1974), the court considered a similar question:

> "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.
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> 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 . . . 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 the 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 . . . . It alters the situation of the petitioners to their disadvantage . . . ."

See also State v. Tyree, 70 Kan. 203, 78 P. 525 (1904), in which the Court held that a retroactive application of amendments reducing or abolishing statutory good time credits in existence at the time of the offense for which the inmate was convicted likewise operates as an ex post facto law.

A number of other cases have reached contrary conclusions, largely on the ground that parole was a privilege, a matter of legislative grace, and that so long as the law fixing the punishment was unchanged, law restricting the conditions under which offenders could be released from that punishment could be changed as the legislature chose. See, e.g., Zink v. Lear, 28 N.J. Sup. 515, 101 A.2d 72 (1953). The United States Supreme Court has long since put to rest the right-privilege distinction. As the Court observed in Sugarman v. Dougall, 413 U.S. 634, 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.'" 413 U.S. at 644.

These cases make clear that legislation which is applied retroactively so as to increase, in any practical and real sense, the punishment to which a defendant is subjected is prohibited by the ex post facto provision. Clearly, when a defendant is sentenced to imprisonment and a subsequent law increases the period of confinement before becoming eligible for release on parole, directly impacts the punitive sanctions imposed on that inmate to his disadvantage.

It is a condition for expungement of a conviction under both former K.S.A. 21-4616, -4617, and 12-4515, and under the new Ch. 120, § 28, L. 1978, that the applicant have fully served the sentence imposed for the offense, or that the defendant have been fully discharged from probation, parole or any suspended sentence imposed therefor. Expungement does not constitute relief from any punishments which may have been imposed for the offense, for the sentence must already have been satisfied. The existence of a record of conviction is a consequence of conviction, but it is not a penal sanction prescribed by law as a punishment. The existence of that record may have certain untoward consequences: it may make finding

a job more difficult; it may render the convicted person ineligible for licenses or bonding necessary to pursue various occupations; and it may or may not be a social stigma. If these consequences appear punitive, it is not because the law or the legislature had mandated them, but because the conviction is thus perceived by society at large.

It is not an aggravation of any punishment prescribed by law that a person convicted of a misdemeanor or class D or E felony prior to July 1, 1978, must now await two years after service of the sentence or discharge from parole or probation therefor, in order to apply for expungement of the record of that conviction, as contrasted with being permitted to apply immediately for expungement as provided by former K.S.A. 21-4616 or 12-4515, for example. Justice Miller in Ex Parte Medley, supra, characterized an ex post facto law as any law "which alters the situation of the accused to his disadvantage." This far-reaching language must not be taken out of the context of the entire paragraph in which it appears, which is quoted above. The ex post facto prohibition forbids any law which increases or aggravated the punishment to which an accused person is subjected, which is enacted after the offense and which is applied retroactively. Expungement is a privilege which has been authorized in order to mitigate the economic and social disadvantages which may undeservedly follow a convicted person by virtue of that conviction, notwithstanding that he or she may have fully served their sentence and satisfied the penalties prescribed by law. Those disadvantages are not penal sanctions. A law which defers eligibility for expungement, or lengthens the period a convicted person must wait in order to apply for it, or restricts the privileges which the expungement entails, does not aggravate the punishment, i.e., the penal sanctions which the law has imposed for the offense of which the applicant was convicted, and is not, in my opinion, an ex post facto law.

Accordingly, it is my opinion that a person who, on or after July 1, 1978, applies for expungement of a conviction for an offense which was committed prior to that date, must do so pursuant to Ch. 120, § 28, L. 1978, rather than according to former K.S.A. 21-4616, -4617, or 12-4515.

Yours truly,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:jj