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ATTORNEY GENERAL OPINION NO. 82-187

Mr. Jay W. Vander Velde
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Lyon County Courthouse
Emporia, Kansas 66801

Re: Crimes and Punishments -- Code; Classification of Crimes
and Penalties -- Prospective Application of Increased
Penalties

Synopsis: The increased penalty provisions of K.S.A. 21-4501 (as amended by L. 1982, ch. 137, §1) and K.S.A. 21-4608, (as amended by L. 1982, ch. 150, §1) do not apply to crimes committed before July 1, 1982 (the effective date of the amendments), but are applicable to sentencing for crimes committed after July 1, 1982.

The term "conditional release," as used in K.S.A. 21-4608 (as amended), refers to release from incarceration, subject to rules and conditions imposed by the releasing authority, following imprisonment for the maximum term imposed, minus work and good behavior credits. Cited herein: K.S.A. 21-4501 (as amended by L. 1982, ch. 137, §1), 21-4608 (as amended by L. 1982, ch. 150, §1), 22-3718, U.S. Const., Art. I, §9.

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Dear Mr. Vander Velde:

As Lyon County Attorney, you have requested our opinion regarding recent amendments to sentencing provisions of the Kansas Criminal Code. Your inquiry concerns K.S.A. 21-4501 (as amended by L. 1982, ch. 137, §1),

which deals with increased penalties for certain felonies, and K.S.A. 21-4608 (as amended by L. 1982, ch. 150, §1), relating to consecutive sentencing for crimes committed by individuals while on probation or parole or while incarcerated.

Specifically, you ask whether the increased penalties should be applied:

- 1) To an individual who, while on probation or parole for a prior felony, commits a crime prior to July 1, 1982 (the date the amendments became effective), but is convicted after July 1, 1982; or
- 2) To an individual who, while on probation or parole for a crime committed prior to July 1, 1982, commits a crime after July 1, 1982.

Finally, you inquire whether the term "conditional release," as used in K.S.A. 21-4608 (as amended) refers to probation, or is narrower or broader than probation.

The Kansas Supreme Court has stated: "[T]he general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively." State v. Hutchison, 228 Kan. 279, 287 (1980). It is significant to note, that there is no language in these amendments relating to retrospective application.

Furthermore, Article I, Section 9 of the United States Constitution provides that no ex post facto law shall be passed. In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court reviewed numerous cases involving ex post facto laws and reiterated the following guidelines:

"The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' (Citations omitted.) Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. (Citations omitted.) The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. (Citations omitted.)"

In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. (Citations omitted.) . . . The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 450 U.S. at 28-31.

Effective July 1, 1982, K.S.A. 21-4501 (as amended) increased the penalties for certain classes of felonies. For example, the 1982 amendments include:

An increase in the minimum sentence for Class C felonies from one year to three years;

An increase in the minimum sentence for Class D felonies from one year to two years; and

An increase in the minimum sentence for Class E felonies from one year to "not less than one year nor more than two years."

Also, as of July 1, 1982, K.S.A. 21-4608 (as amended) requires that an individual convicted and sentenced for a felony while on probation or parole or while incarcerated, shall serve the new sentence consecutively to the terms under which the person was released or incarcerated. This amendment effectively prohibits a judge from ordering sentences to run concurrently, an option available to judges prior to passage of the amendment.

Finally, we note that K.S.A. 21-4501 (as amended) and K.S.A. 21-4608 (as amended) are sections of the Kansas Criminal Code. In State v. Palls, 213 Kan. 249 (1973), the Kansas Supreme Court emphasized: "The Kansas

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Criminal Code relates to substantive law and operates prospectively on crimes committed after its effective date." Id. at 252. Substantive law has been defined and distinguished from procedural law as follows:

"As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor; whereas procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.

"Changes in the length of sentences for criminal acts have been given prospective application only." State v. Hutchison, 228 Kan. at 287. (Emphasis in original.)

Obviously, the recent amendments to K.S.A. 21-4501 and 21-4608 enhance the criminal punishment for certain felonies and for crimes committed by individuals while on probation or parole or while incarcerated. Therefore, in our opinion, retroactive application of these amendments to crimes committed before July 1, 1982 (the effective date of these amendments), would be improper as violative of the prohibition against ex post facto laws.

Your second inquiry concerns the applicability of the increased penalty amendments of K.S.A. 21-4608 to individuals who commit a crime after July 1, 1982, while on probation or parole for a crime committed prior to July 1, 1982. In essence, the enhanced penalties are status related, being applicable only to individuals who are incarcerated or on probation or parole when convicted of a subsequent crime. In this regard, it is helpful to note that in discussing a recidivist statute, the Kansas Supreme Court stated:

"A showing of prior convictions goes only to the question of defendant's status. The prior conviction or convictions gives the defendant a classification, and the statute prescribes sequentially increased punishment for repeated offenders. A repeating offender is not punished for the prior offense or offenses, but the Legislature has declared that repeated violations justify the enhanced penalty." State v. Jones, 214 Kan. 568, 570 (1974).

The Court then concluded: "The recidivist statute in question is neither unconstitutional as an ex post facto law nor denies defendant equal protection or due process of law." Id.

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Similarly, in a series of cases, the Kansas Supreme Court has upheld habitual criminal statutes, finding "it has generally been held it is not an ex post facto law, that it is simply an additional or greater punishment imposed for the recent conviction because of a former conviction or convictions." Cochran v. Simpson, 143 Kan. 273, 276 (1936). (Emphasis added.) See also Fairbanks v. State, 196 Kan. 650, 652 (1966); Thompson v. State, 195 Kan. 318, 320 (1965); Johnson v. Crouse, 191 Kan. 694, 700 (1963); Luppy v. Hudspeth, 159 Kan. 434, 436 (1945).

In accordance with the cited authorities, it is our opinion that the amendments to K.S.A. 21-4608, which enhance penalties based on the status of the offender, do not constitute an ex post facto law. Therefore, K.S.A. 21-4608 (as amended) is properly applied to individuals who commit a felony after July 1, 1982, while on probation or parole for a crime committed prior to July 1, 1982.

Your final question concerns the meaning of "conditional release" as used in K.S.A. 21-4608 (as amended). K.S.A. 22-3718 defines conditional release, stating:

"An inmate who has served his maximum term or terms, less such work and good behavior credits as have been earned, shall, upon release, be subject to such written rules and conditions as the authority may impose, until the expiration of the maximum term or terms for which he was sentenced or until he is otherwise discharged."

In discussing the meaning of "conditional release" under Kansas law, the United States District Court for the district of Kansas found:

"It should be indicated here that the distinction between 'parole' and 'conditional release' is worth noting. In the former instance, release from confinement is discretionary with the Board of Probation and Parole, while 'conditional release' is mandatory, the time being computed by deductions from the maximum term for 'good time' and 'incentive credits,' and is the equivalent of a sentence served completely." Smith v Crouse, 298 F.Supp. 1029, 1033 (D. Kan. 1968).

Therefore, it is our opinion that the term conditional release does not pertain to probation at all, but refers instead to release subject to specified conditions, following imprisonment for the maximum term less work and good behavior credits.

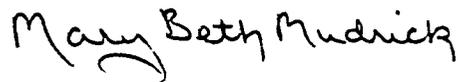
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In conclusion, it is our opinion that the increased penalty provisions of K.S.A. 21-4501 (as amended by L. 1982, ch. 137, §1) and K.S.A. 21-4608 (as amended by L. 1982, ch. 150, §1) do not apply to crimes committed before July 1, 1982, but are applicable to sentencing for crimes committed after July 1, 1982. Finally, the term "conditional release," as used in K.S.A. 21-4608 (as amended), refers to release from incarceration, subject to rules and conditions imposed by the releasing authority, following imprisonment for the maximum term imposed, minus work and good behavior credits.

Very truly yours,



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