

Opinion No. 70-57

June 29, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Howard Leach Secretary Department of Corrections P.O. Box 2325 Santa Fe, New Mexico 87501

QUESTIONS

FACTS

Effective July 1, 1969, the New Mexico legislature made significant changes in the parole and release administration of juveniles. Prior to 1969, Section 13-8-29, N.M.S.A., 1953 Compilation, provided that once a juvenile court had obtained jurisdiction of a juvenile, it retained the jurisdiction until the juvenile reached the age of 21 unless certified by the court to another court pursuant to Section 13-8-27, N.M.S.A., 1953 Compilation, or discharged by the court. The powers of the court were limited by Section 13-8-29, **supra**, to the extent that the court could neither release nor parole a juvenile committed to a state institution without written recommendation of the governing authority or the superintendent of the institution where the juvenile was committed.

Section 13-8-29, **supra**, was amended in 1969 and provided as before, that once jurisdiction was obtained by the court, the court's jurisdiction continued until the juvenile became of the age of 21 years, unless certified to another court pursuant to Section 13-8-27, **supra**, or discharged by the court. But the amendment made a significant addition. It provided that the court's jurisdiction terminated when the juvenile court entered an order of commitment to the New Mexico boys' school or the girls' welfare home. The statute also provided that such commitment constituted "a final judgment".

Prior to its amendment, Section 13-8-53, N.M.S.A., 1953 Compilation, provided the court could, among other action, commit a juvenile to the New Mexico boys' school or the girls' welfare home and approved the same. It reiterated the restriction that the juvenile court could parole or release a committed juvenile only upon written recommendation of the governing authority or the superintendent of the particular institution.

In 1969 this section was amended to eliminate the juvenile court from parole or release administration, and it provided that said governing authority or superintendent shall have exclusive power to parole or release a juvenile committed to the New Mexico boys' school or girls' home.

Section 13-8-72, N.M.S.A., 1953 Compilation, originally gave the juvenile courts continuing jurisdiction by providing that "no commitment shall divest the juvenile court of

jurisdiction for the purpose of enforcing its judgment or order", subject to the restriction of Section 13-8-62, **supra**. This section was amended to state merely that "a commitment shall divest the juvenile court of jurisdiction".

Lastly, Section 13-8-73, N.M.S.A., 1953 Compilation, was amended to provide that the judges of the juvenile court shall no longer have the power to release or parole juveniles committed to the New Mexico boys' school or the girls' welfare home (without the exception originally granted in the original Section 13-8-62, **supra**).

QUESTIONS

If the governing authority or superintendent of the New Mexico boys' school or the girls' welfare home desires to release or parole a juvenile presently committed to one of said institutions, are the 1969 amendments to Article 8 of Section 13, N.M.S.A., 1953 Compilation (1969 P.S.) applicable to a juvenile who:

(a) was committed to one of the institutions prior to the effective date of said amendments?

(b) prior to the effective date of said amendments, committed an offense leading directly to the commitment to one of said institutions, but was not committed to one of the institutions until after the effective date?

(c) was made a ward of a juvenile court prior to the effective date of said amendments, but was not committed to one of the institutions until after the effective date of the amendments?

CONCLUSIONS

(a) Yes.

(b) Yes.

(c) Yes.

OPINION

{*96} ANALYSIS

The courts have long been troubled by the "civil" label of convenience which have been attached to juvenile proceedings" as the court said in **In re Gault**, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). The New Mexico Supreme Court has referred to juvenile proceedings as "statutory and special" in **State v. Keller**, 36 N.M. 81, 8 P.2d 786 (1932); and it also referred to juvenile proceedings as a "special statutory civil proceeding" in **In re Santillanes**, 47 N.M. 140, 138 P.2d 503 (1943) and **State v. Acuna**, 78 N.M. 116, 428 P.2d 655 (1967).

However, as shown herein, the answers to the questions are answered the same whether the Juvenile Act is to be construed along civil or criminal legal principles.

The 1969 amendments to the Juvenile Act constituted legislative removal of the power of the juvenile courts to parole or release juveniles committed to the New Mexico boys' school or girls' home. They are applicable to the three categories of juveniles noted in the questions unless the legislation was **ex post facto** in a criminal context; or unless it fell within the prohibition of Section 34 of Article IV of the New Mexico Constitution in a civil context. Section 34 provides:

"No act of the legislature shall effect the right or the remedy of another party . . . in any pending case."

(The section has been applied exclusively to civil cases with the exception of **Woo Dak San v. State**, 36 N.M. 53, 7 P.2d 940 (1932), and in that case the Court expressed considerable hesitancy in considering the applicability of said section to a criminal case.)

Considering the criminal legal aspects, Section 13-8-62, N.M.S.A., 1953 Compilation (1969 P.S.) places the decision of whether to grant a release or parole solely within the discretion of the governing authorities or superintendent of a particular state institution instead of within the discretion of the governing authority or superintendent of a particular state institution combined with the approval of the committing court.

Even if such action of the legislature should, and there is no assurance that it will, increase the severity of punishment because of increased difficulty in {⁹⁷} obtaining parole or release, such a situation would not make the legislation considered here **ex post facto**. See **Sutherland, Statutory Construction**, Section 2307 and cases cited therein.

Furthermore, legislation changing the body exercising the discretion concerning the granting of parole is not **ex post facto**. **Zink v. Lear**, 28 N.J. Super 515, 101 A.2d 72 (1953), **In re Cowen**, 27 L. Ed. 637, 166 P.2d 279 (1946), **Voorhees v. Cox**, 1940 F.2d 132 (10 Cir. 1944). The rule directly follows the concepts in **State v. Powell, supra**, and **Sutherland, supra**, Section 2307.

As to the civil nature of this matter, a release from the New Mexico boys' school or girls' home is the equivalent of a commutation, which is defined as the change of greater punishment to a lesser punishment. **Ex Parte Lefors**, 165 Tex. Cr. 51, 303 S.W. 2d 394 (1957), **State v. Powell**, 139 Mt. 583, 367 P.2d 553 (1961), **Lincoln v. Sigler**, 183 Neb. 347, 160 S.W. 2d 87 (1968).

It is clear that the controlling principle of law concerning commutation of sentence is that a commutation is a matter of grace, privilege, or favor; and it is not a matter of right. **People v. Langella**, 41 Misc. 2d 65, 244 N.Y.S. 2d 802 (1963), **State v. King**, 149 N.W. 2d (S.D. 1967).

In turn, the right to a parole is clearly enunciated in New Mexico law. In **Sneed v. Cox**, 74 N.M. 659, 397 P.2d 308 (1964), the Supreme Court of this State said: ". . . parole is a matter of grace and not a right." See also **Owens v. Swope**, 60 N.M. 71, 287 P.2d 605 (1965), wherein the same subject matter is considered.

Therefore, the 1969 amendments to the Juvenile Act are not contrary to the provisions of Section 34, Article IV of the Constitution of New Mexico, because no "right" of the juvenile has been affected.

On the basis of the statute and concepts set forth above, it is our opinion that the 1969 amendments of the Juvenile Act, noted above, are applicable to the three categories of persons noted in your question. The legislation does not disturb any of their constitutional rights, and therefore the legislature properly exercised its power to determine the persons who are to supervise a juvenile parolee from the New Mexico boys' school or girls' welfare home.

This opinion does not consider, or pass upon, court orders or judgments not related to parole or release.

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