Opinion No. 81-15

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OPINION OF: Jeff Bingaman, Attorney General

BY: Ralph W. Muxlow II, Assistant Attorney General

TO: Roger Crist, Secretary, Corrections and Criminal Rehabilitation Department, 113 Washington Avenue, Santa Fe, New Mexico 87501; Joe O. Bowlin, Chairman, New Mexico Parole Board, 1451 St. Michaels Drive, Santa Fe, New Mexico 87501

CRIMINAL PROCEDURE; CHILDREN'S CODE

Synopsis: The punishment provisions of amendments to the Children's Code (Laws 1981, Chap. 36) and to probation and parole statutes (Laws 1981, Chap. 285) are not applicable to crimes and delinquent acts which occurred prior to June 19, 1981.

QUESTIONS

Are the punishment provisions of amendments to the Children's Code [Laws 1981, Chapter 36] and to probation and parole statutes [Laws 1981, Chapter 285] which became effective on June 19, 1981, applicable to crimes and delinquent acts which occurred prior to June 19, 1981?

CONCLUSIONS

No.

ANALYSIS

Both the United States and the New Mexico Constitutions contain provisions prohibiting the passage of **ex post facto** laws. **U.S. Const.,** Art. 1, § 10, cl. 1; N.M. Const. Art. II, § 19.

OPINION

Ex post facto means the state is without power to make criminal an act which was done prior to the effective date of a law and which was innocent when done, to inflict a greater punishment than was prescribed when the crime was committed or, generally, in relation to the offense or its consequences, to alter the situation of an accused to his material disadvantage. See 16A C.J.S., Section 435, Constitutional Law, and cases cited therein.

1. **Children's Code**

The prohibition against **ex post facto** laws applies only to criminal laws or those with punishment consequences. Although the Children's Code is not a criminal code, it has punishment consequences and the courts have consistently applied **ex post facto** prohibitions to juvenile laws which contained new or increased punishments for children. **In Re Valenzuela,** 79 Cal.Rptr. 760 (1969); **Matter of Owens,** 97 Misc.2d 290, 411 N.Y.S.2d 139 (1978); **People v. Bertholf,** 100 Misc.2d 559, 419 N.Y.S.2d 825 (1979); **In re Dennis C.,** 104 Cal.App.3d 16, 163 Cal.Rptr. 496 (1980).

In general, this means that any new or increased punishment consequences of the 1981 Children's Code amendments can constitutionally be applied only to acts committed on or after June 19, 1981. This affects the new or increased punishments contained in amended Sections 32-1-32 and 32-1-34 NMSA 1978. For example, amended Section 32-1-32(D) *{*241}* permits an adjudicated delinquent child to be placed in the Youth Diagnostic Center (YDC) for a period of time of not more than ninety days. The **ex post facto** prohibition means that a child who commits a delinquent act before June 19, 1981, can only be placed in the YDC for a period of time of not more than sixty days pursuant to former Section 32-1-32(D). Amended Section 32-1-32(D) applies only to delinquent acts committed on or after June 19, 1981. The same reasoning applies to other new or increased punishments. Although the Children's Code does not label these new dispositions "punishments" as such, in reality, when a child is deprived of his freedom of movement in a significant fashion, this triggers the **ex post facto** prohibition.

2. **Parole and Probation**

Although the case law regulating parole and probation is not uniform, the better reasoned cases seem to indicate that any law which increases the parole or probation consequences may run afoul of the prohibition against **ex post facto** laws. Laws 1981, Chapter 285 allows for increased probation and parole costs and increased probation terms. In **State v. Mendivil,** 121 Ariz. 600, 592 P.2d 1256 (1979), the Court discusses the authorities and concludes that the application of a two-year probation period to misdemeanor offenses occurring before effective date of statute (law in effect at time of offense provided for only one-year sentence) was unconstitutional as violative of the prohibition against **ex post facto** laws. Even though probation in Arizona was not a sentence but a feature of the suspension of imposition of sentence, the Supreme Court of Arizona, sitting en banc, felt that since the defendant's freedom of movement under probation supervision would be restricted for two years instead of one, the additional year increased the penalty so as to run afoul of the **ex post facto** prohibition. See, also, **Warden v. Marrero,** 417 U.S. 653, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974). Compare, **State v. Baca,** 90 N.M. 280, 562 P.2d 841 (Ct.App. 1977).

Similarly, in **People v. Harris,** 69 Ill.App.3d 118, 387 N.E.2d 33 (1979), the Court squarely held that costs and fines assessed against a probationer which were not authorized by law at the time the offense was committed, constituted an increase in punishment and operated as an **ex post facto** law and was therefore unconstitutional.

Applying these principles to Laws 1981, Chapter 285, there are three increased punishments to be considered: increased probation costs, increased probation terms, and new or increased parole costs. With respect to increased probation costs, former Section 31-20-6 NMSA 1978, authorized discretionary probation costs not to exceed two hundred dollars ($200) annually. Amended Section 31-20-6 authorizes mandatory probation costs not to exceed one thousand twenty dollars ($1,020) annually. The increased probation costs, i.e., any amount in excess of two hundred dollars ($200) annually, can only constitutionally be applied to offenses which occur on or after June 19, 1981, at least to the extent amended Section 31-20-6 is relied upon as authority for the increased probation costs.

The same principle may be applied to a law increasing probation terms. Former Section 31-20-6 limited probation terms to the maximum sentence prescribed by law for the commission of the crime. Thus, for a third degree felony the maximum probation term was four years *{*242}* and, for a fourth degree felony, the maximum probation term was two years. Amended Section 31-20-6 now allows a maximum probation term of five years for a third or fourth degree felony. The increased probation term of five years, i.e., any term in excess of four years for a third degree felony or any term in excess of two years for a fourth degree felony, can only constitutionally be applied to a third or fourth degree felony which occurs on or after June 19, 1981.[1]

With respect to parole costs, former Section 31-21-10 NMSA 1978 did not contain specific authority for parole costs. Although the parole board has general authority to impose reasonable conditions of parole, (similar to the court's authority to impose reasonable conditions of probation), the practice of the Parole Board in the past has not been, as a matter of policy or practice, to impose parole costs as a condition of parole. Therefore, parole costs authorized by amended Section 31-21-10 can only constitutionally be applied to prisoners who are placed on parole for crimes committed on or after June 19, 1981, at least to the extent amended Section 31-20-6 is relied on as authority for parole costs. Although these costs appear to be required, the district court must include authority for parole costs pursuant to amended Section 31-18-5 NMSA 1978.

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n1 Section 31-20-5 NMSA 1978, states that the total period of probation shall not exceed five years. This may conflict with the probation terms authorized under former Section 31-20-6 for third and fourth degree felonies. This question is unresolved, however, and the prudent course of action is to follow the advice contained herein. Amended Section 31-20-6 clearly conflicts with Section 31-20-7(B) NMSA 1978. This conflict will have to be resolved by the courts or the legislature. The Conflict is that,

although amended Section 31-20-6 allows probation terms to **exceed** the maximum length of the term of imprisonment which could have been imposed for a third or fourth degree felony, Section 31-20-7(B) limits the probation term to the maximum length of the term of imprisonment which could have been imposed.