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ARIZONA ATTORNEY GENERAL

January 13, 1986

Mr. Richard M. Ortiz, Chairman
Arizona Board of Pardons and Paroles
Suite 326
1645 West Jefferson
Phoenix, Arizona 85007

RE: I86-008 (R85-173)

Dear Mr. Ortiz:

You have asked whether the recent amendment to A.R.S. § 41-1604.06(G) may be applied to prisoners who are sentenced for crimes committed prior to the amendment's effective date. Before its amendment, § 41-1604.06(G) provided that each prisoner's classification for purposes of parole would be reviewed by the Director of the Department of Corrections not less than once every three months and that any prisoner certified eligible for parole and denied parole, but who remained eligible, would be recertified by the director not less than one nor more than four months after the hearing at which parole was denied. The recent amendment grants the Board of Pardons and Paroles the discretion upon denying an inmate parole to "prescribe that the prisoner shall not be recertified for a period of up to one year after the hearing." The amendment allows the Board of Pardons and Paroles to foreclose recertification for parole for up to one year, rather than requiring mandatory recertification in not more than four months.

The Constitutions of the United States and the State of Arizona prohibit ex post facto laws. U.S. Const., art. I, § 10; Ariz. Const., art. II, § 25. Ex post facto laws are laws that change punishment and inflict a greater punishment than the laws governing the crime when committed. State v. Sanders, 124 Ariz. 318, 604 P.2d 20 (App. 1979). The critical issue is whether a subsequently enacted law changes or increases the

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punishment; that is whether it changes or increases any element of the punitive conditions attached to the crime when it was committed. In Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the United States Supreme Court held that a new provision which constricts the opportunity for an early release runs afoul of the prohibition against ex post facto laws.

In Weaver, the Florida legislature passed a statute which altered the availability of "gain time" for good conduct. The petitioner argued that the law was ex post facto when applied to him because he had committed the crime before its enactment. The Court held that two elements must be present for a criminal or penal law to be ex post facto. First it must be retrospective, that is it must apply to events occurring before its enactment, and second, it must disadvantage the offender affected by it. The first element is met if it applies to prisoners convicted of acts committed before the effective date of the provision. The second element is met if the provision restricts an inmate's eligibility for release. Application of the amendment contained in § 41-1604.06(G) would restrict eligibility for release as it would deny an inmate the opportunity to apply for release for up to one year upon the recommendation of the Board where previously he would have been recertified within four months. As in Weaver the opportunity for an earlier release is constricted.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Supreme Court held that there is no imposition of an ex post facto law if the change in the law is "procedural" as opposed to substantive. The Court found that changes in the sentencing provisions for the imposition of the death penalty under Florida statutes, was not a violation of the ex post facto clause, where under the new statute, the trial judge was given the final authority to impose the death penalty notwithstanding a contrary advisory recommendation by a jury; under the old statute, which was in effect at the time of the offense, the jury's recommendation was final. The Court determined that if there was no change in the quantum of punishment attached to the crime and the change in the statute merely alters the method of imposing punishment, then it would not violate the prohibition of the ex post facto clause. The recently enacted amendment to A.R.S. § 41-1604.06(G) does not merely change the method of determining punishment; it grants the Board of Pardons and Paroles the authority to preclude a prisoner from applying for release for up to one year, a

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restriction more onerous than under the statute prior to its amendment. Unlike Dobbert the quantum of punishment is increased.

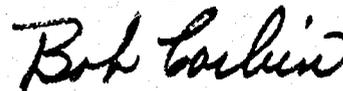
The Arizona Supreme Court in State v. Mendivil, 121 Ariz. 600, 592 P.2d 1256 (1979), considered whether the application of an amendment to a statute which permitted the imposition of a two year sentence of probation for a misdemeanor offense committed prior to the effective date of the amendment was unconstitutional in that it increased the penalty. The court held:

While we agree that probation or parole is not a constitutional right but a matter of legislative grace, State v. Smith, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975), we prefer to join those jurisdictions which subscribe to the premise that statutes detrimentally affecting parole eligibility are unconstitutional insofar as applied to a prisoner charged with commission of a crime prior to the enactment of the statute.

State v. Mendivil, 121 Ariz. at 602, 592 P.2d at 1258. The ability of the Board of Pardons and Paroles to limit recertification after the denial of parole is detrimental to parole eligibility. The inmate having lost the right to mandatory recertification within four months would suffer an increase in penalty if he were convicted prior to the amendment's effective date.

The Board of Pardons and Paroles may apply that portion of A.R.S. § 41-1604.06(G) which permits them to prescribe that a prisoner not be recertified for up to one year after a hearing denying him parole, only to those prisoners who are convicted of crimes committed after the effective date of the amendment.

Sincerely,



BOB CORBIN
Attorney General

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