FEBRUARY 20, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 4.

DEAR SIR:

You desire to be advised concerning the proper interpretation to be placed upon Section 4, Chapter 207, P. L. 1950, an act providing for the disposition of persons convicted of certain enumerated sex crimes.

You wish to be informed whether a person placed on probation under Section 4(a), with a condition that he receive psychiatric treatment, may thereafter be subject to revocation of such probation for failure to comply with such condition and subsequently be committed to an institution to be designated by the Commissioner of Institutions and Agencies as set forth in Section 4(b).

An examination of the pertinent sections of the law leads us to the conclusion that the answer to the query is in the affirmative.

The Legislature in the enactment of Chapter 207, P. L. 1950, recognized that certain repetitive sex offenders commit these crimes because of mental disorders. Provision is made for the examination of the defendant, after conviction of certain enumerated sex crimes, at the Diagnostic Center. If it appears from the report submitted by the Diagnostic Center that the offender's conduct was characterized by a pattern of repetitive compulsive behavior and, either violence or age disparity, it shall be the duty of the court to recognize that such offender requires specialized treatment for his mental and physical aberrations.

In Section 4, here under construction, it is provided that the court shall dispose of the case by *one or more* of the following methods: (a) Place the individual on probation with a condition that he receive psychiatric treatment; (b) Commit such individual to an institution to be designated by the Commissioner of Institutions and Agencies.

The legislative intent seems clear that either one or both of these measures may be adopted and the commitment of the defendant to an institution following probation and revocation thereof presupposes that the condition has been violated.

There is no suggestion that the court is limited in its treatment of the defendant to but one of the two suggested procedures but it will appear that either or both may be utilized for the welfare of society and the person so convicted. To adopt the contrary view would be to discourage the use of probation and would result in an unusually large number of institutional commitments without the many benefits available in modern day probation methods.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

FEBRUARY 26, 1953.

RE: A-4302773 IB

MR. A. C. DEVANEY, *Assistant Commissioner,*
Inspections and Examinations Division,
Immigration and Naturalization Service,
United States Department of Justice,
Washington 25, D. C.

FORMAL OPINION—1953. No. 5.

DEAR SIR:

By your inquiry of January 19, 1953, you raised four questions relating to the effect of an order expunging record of conviction secured under the provisions of R. S. 2:192–15 (now N. J. S. 2A:164–28). We believe that the issues raised can be resolved by the single question, "Is such an order expunging record of conviction secured in accordance with the cited statutes equivalent to a pardon granted by the Governor and would an individual who had secured such an expunging order be exempt from additional punishment available to habitual offenders?"

It is our opinion and we advise you that such an order expunging record of conviction does not have the attributes of a full pardon granted either by the former Court of Pardons under the Constitution of 1844 or by the Governor under the Constitution of 1947.

It becomes necessary to make reference to the provisions of our former Constitution because it appears that the order in question was secured in the appropriate court of Middlesex County on January 2, 1948. The present Constitution of this State became effective January 1, 1948. Since the proceedings were instituted under the former Constitution, it might be urged that the individual involved had available to him the safeguards of the former Constitution. Even if this be the case, we will demonstrate that the result obtained from a review of the law is the same under either Constitution.

By the Constitution of 1844, Art. V, Par. 10, it was provided as follows:

> "The governor, or person administering the government, the chancellor, and the six judges of the Court of Errors and Appeals, or a major part of them, of whom the governor, or person administering the government, shall be one, may remit fines and forfeitures, and grant pardons, after conviction, in all cases except impeachment."

This provision of our former Constitution received judicial interpretation in an advisory opinion of Chancellor Walker in a matter entitled In re N. J. Court of Pardons, 97 N. J. Eq. 555 (Chancery Court, 1925). Therein it was stated that the former Court of Pardons could not grant a pardon by a majority vote of the members of the court unless the Governor or person administering the government, concurred. It was further said:

> "Our Court of Pardons represents, not the parliament but the king and his privy counsel, *Cook* vs. *Freeholders* * * *, 26 N. J. L. 340. Ergo, it is a kingly, and not a parliamentary power—that is, one vested in the executive and not in the legislature."