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

FORMAL OPINION—1953. No. 7.

DEAR COMMISSIONER BATES:

You have requested an interpretation of Section 12, Chapter 84, P. L. 1948, which relates to the date upon which certain prisoners may be considered eligible for release on parole. You desire to be advised whether a prisoner sentenced to a reformatory type institution and who is subsequently transferred, through administrative action by someone in authority in the executive branch of the government, to an institution of penal character, is deemed to have served all or part of a term of imprisonment in a penal institution as defined in Section 12 aforesaid and thus subject to the sanctions contained therein.

It is our opinion that the inquiry must be answered in the negative and we so advise for the reasons outlined herein.

There is a conspicuous policy in this jurisdiction to provide an incentive for reformation by imposing penalties for recidivism. (See *In re Huyler,* 133 N. J. L. 171 (Supreme Court, 1945).) This is accomplished either by imposing a longer term of sentence upon conviction as an habitual offender (See N. J. S. 2A:85–8 et seq.), or by withholding eligibility for consideration for release on parole as provided for in Section 12 aforesaid. The requirement in Section 12, that a prisoner who has previously served all or part of a term of imprisonment in any penal institution and who is again sentenced to a penal institution of this State, which is defined in the law to mean the New Jersey State Prison, must serve one-half of his maximum sentence before being eligible for release on parole, is in the nature of a forfeiture. This must be so for he is denied the opportunity afforded a first offender in Section 10 of the same law to be released at an earlier date, i.e. one-third of his maximum or his minimum less credits for good behavior and work performed, whichever occurs sooner.

Thus, we must be guided by the principles of statutory construction which apply to penal statutes or those creating forfeitures. Traditionally, penal statutes have been strictly construed in favor of the defendant. (Sutherland, Statutory Construction, Third Edition, Horack, Vol. III, Sec. 5603 et seq.) The same applies to forfeiture statutes.

Let us examine the exact language of the law.

> "The granting of parole, as provided for herein, shall be limited as follows:
>
> (a) Any offender sentenced to any penal institution of this State who has previously served all or part of a term of imprisonment in any penal institution
>
> (1) Of this State, or
> (2) Of the United States, or
> (3) Of any State other than this State,
>
> shall be deemed to be a second offender and upon his incarceration for such second offense shall be ineligible for parole consideration by the board until he shall have served at least one-half of the maximum sentence imposed upon him for such second offense * * *."

In the case under discussion, the prisoner was not originally "sentenced" to a penal institution of this or any other State but rather was confined in such penal institution as a result of the administrative action of some official in the executive branch of the government, such as may be done in this jurisdiction under R. S. 30:4–85, the validity and effect of which is discussed in *Ex parte Hodge,* 17 N. J. Super. 198; *Ex parte Zienowicz,* 12 N. J. Super. 563 and *Ex parte White,* 10 N. J. Super. 600.

While the statute under review does not clearly indicate whether the prior term of imprisonment must have resulted from a sentence to a penal institution, nonetheless, we are constrained to the view that a liberal construction of the law most favorable to the defendant requires us to find that such must be the case. Our courts have adopted a liberal construction of the Parole Law to afford the prisoner parole consideration upon the earliest date consistent with the text of the Parole Statute and the legislative intent to be derived therefrom.

To illustrate, although the Parole Law is silent as to whether the Parole Board is empowered to grant a retroactive parole, the court found such authority to be vested in the board to deal with inequitable situations, such as were presented in the case of *DeSanto* vs. *Parole Board,* 17 N. J. Super. 44 (App. Div., 1951). Again, in *White* vs. *Parole Board,* 17 N. J. Super. 580 (App. Div., 1952), it was stated that, although the Parole Statute makes no provision for a hearing by the board to give a prisoner an opportunity to challenge the accuracy of the information utilized to classify him as an habitual offender under Section 12 aforesaid, and even though such was not deemed essential to due process, nevertheless, considerations of simple fairness suggest that the board should pursue procedures reasonably adequate to give the inmate notice of such classification and appropriate consideration upon a claim of error if the facts of prior conviction, imprisonment or identity are denied by him.

For these reasons, we believe that the habitual offender status, alluded to in Section 12 aforesaid, must result from the judicial action of the sentencing court in imposing a sentence to a penal institution rather than from administrative action transferring such a prisoner from an institution of reformatory character to a penal institution of State prison status. It must be remembered that this only imposes an obligation upon the Parole Board to consider the prisoner for release on parole and does not require the grant of parole, for this always is a matter for the exercise of discretion by the Parole Board.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: /s/ EUGENE T. URBANIAK,
Deputy Attorney General.

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