November 9, 1979

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CHRISTOPHER DIETZ, *Chairman*
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FORMAL OPINION NO. 26—1979

Gentlemen:

You have requested our advice as to whether a sentence to the state prison can be aggregated with a sentence to a county correctional institution for the purpose of determining a single parole eligibility date. Further, assuming the propriety of such aggregation, you have inquired as to the appropriate manner of awarding commutation credits on such a combined sentence. For the following reasons, you are advised that the New Jersey State Parole Board is vested with the authority to determine a single parole eligibility date on a combined sentence required to be served in the state prison. You are also advised that commutation credits provided in N.J.S.A. 30:4-140 should be credited to an inmate on aggregated terms of confinement required by law to be served in the state prison.

In August 1978 the legislature adopted a new comprehensive Penal Code for the State of New Jersey to become effective on September 1, 1979. N.J.S.A. 2C:1-1 *et seq.* With regard to the question at hand, the Code of Criminal Justice provides a means for the determination at the place of confinement of offenders sentenced under its provisions. N.J.S.A. 2C:43-10. A person sentenced to a term of imprisonment of less than one year should be committed to the jail, penitentiary or workhouse of the county in which he is convicted, except that in a county of the first class having a workhouse or penitentiary no sentence of greater than six months shall be made to a county jail. N.J.S.A. 2C:43-10(c). An offender sentenced to a term of imprisonment of one year or greater should be committed to the Department of Corrections and incarcerated in the state prison, except than an offender may be committed to a county penitentiary or workhouse where the sentence does not exceed 18 months. N.J.S.A. 2C:43-10(a), (b). It is therefore clear from this statutory scheme that the place of confinement is determined by the length of the sentence imposed by the court.[1] Furthermore, where a person is sentenced to more than one term of imprisonment and the sentences are consecutive, N.J.S.A.

1. It should be noted that an individual may be sentenced to an indeterminate term of incarceration. The parole authority with respect to such sentences resides in the appropriate Board of Trustees and not the State Parole Board. *See* N.J.S.A. 30:4-146 et seq., 30:4-153 *et seq.*

2C:43-10(d) provides that "the terms shall be aggregated for the purpose of determining the place of imprisonment . . . ."[2]

In order to determine the role of the Parole Board under this amended statutory scheme, it is necessary to briefly review the existing authority of that agency. The Parole Board has been given the duty to determine the time and conditions under which persons serving sentences in the state prison may be released on parole.[3] N.J.S.A. 30:4-123.5. Further, the Parole Board has been vested with the responsibility to determine the parole of inmates sentenced to county correctional institutions where an inmate has been sentenced to a term having a maximum greater than one year and who has served at least one year of such term.[4] N.J.S.A. 30:4-123.35. In sum, therefore, the Parole Board is the paroling authority for offenders sentenced to confinement in the state prison or to county correctional facilities for a period of one year or more.

A reading of the statutory authority of the Parole Board together with the newly imposed requirements regarding the place of confinement of inmates would, therefore, lead to the following conclusions. An offender sentenced to multiple consecutive county sentences that total 12 months

2. While the statute does not provide a definition of consecutive terms of incarceration, it should be noted that sentences which are concurrent in part and consecutive in part may properly be aggregated for purposes of the calculation of parole eligibility dates. *Formal Opinion No. 8—1977. Memorandum Opinion of Attorney General 1959—P-4.* There is no reason why the same result should not obtain for purposes of determining the place of imprisonment under an aggregated sentence. Therefore, multiple county sentences or a multiple state/county sentence, which are concurrent in part and consecutive in part, may be aggregated in order to determine where the offender is to be confined.

3. N.J.S.A. 30:4-123.5 provides in pertinent part:

> It shall be the duty of the board to determine when, and under what conditions, subject to the provisions of this act, persons now or hereafter serving sentences having fixed minimum and maximum terms or serving sentences for life, in the several penal and correctional institutions of this State may be released upon parole.

This statute defines the Board's parole jurisdication with respect to inmates serving minimum-maximum terms in state institutions. Such inmates are state prison inmates since N.J.S.A. 2A:164-17 requires that all sentences to the state prison be for a minimum-maximum term. *Cf.* N.J.S.A. 30:4-148; 30:4-155. The Penal Code does away with minimum-maximum terms. Rather, an offender is sentenced for a specific term of years, N.J.S.A. 2C:43-6; 2C:43-7. However, this change in the style of sentencing was not meant by the legislature to delimit the Board's jurisdiction with respect to inmates sentenced under the Penal Code and committed to the state prison. N.J.S.A. 2C:43-9(a).

4. The pertinent part of N.J.S.A. 30:4-123.35 provides:

> any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted to make application to the board for parole.

The statute refers to inmates serving sentences in the county penitentiaries. However, parole eligiblity is available to inmates of county jails and county workshouses on the same conditions applicable to inmates of county penitentiaries under N.J.S.A. 30:4-123.35. *Davis v. Heil,* 132 N.J. Super. 283 (App. Div. 1975), *aff'd* 68 N.J. 423 (1975).

or greater in the aggregate would be confined in the state prison unless a county has a penitentiary or workhouse. Thus, the State Parole Board would be the paroling authority for such an inmate, since he would in all likelihood be confined in the state prison and the total aggregate length of sentences imposed is greater than one year. N.J.S.A. 30:4-123.35. It is furthermore clear that where the total of multiple county sentences in the aggregate exceeds 18 months, an individual would be required to be confined in the state prison (N.J.S.A. 2C:43-10(d), N.J.S.A. 2C:44-5(a)(2)), and the Parole Board would be the paroling authority for such an offender. In any case where it is determined by a court to be appropriate to impose consecutive sentences in whole or in part to state and county correctional institutions (N.J.S.A. 2C:44-5), an offender should be confined in the state prison since the total aggregate sentence would be in excess of one year. The Parole Board would in this case as well be the paroling authority, since the offender is confined in the state prison and the total aggregate length of sentences is greater than one year. In all of the above cases, therefore, an offender is within the authority of the Parole Board and it may determine a single parole eligibility date for the aggregated sentence required to be served in the state prison.

There is no similar statutory provision which provides for the aggregation of sentences for the determination of the place of confinement prior to the enactment of the Criminal Code. It is our opinion, however, that the same conclusion should obtain in those cases as well. N.J.S.A. 30:4-123.10 provides in pertinent part:

> Whenever, after the effective date of this act, 2 or more sentences to run consecutively are imposed at the same time by any court of this State upon any person convicted of crime herein, there shall be deemed to be imposed upon such person a sentence the minimum of which shall be the total of the minimum limits of the several sentences so imposed, and the maximum of which shall be the total of the maximum limits of such sentences. For purposes of determining the date upon which such a person shall be eligible for consideration for release on parole, the board shall consider the minimum sentence of such person to be the total aggregate of all the minimum limits of such consecutive sentences and the maximum sentence of such person to be the total aggregate of all of the maximum limits of such consecutive sentences.
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> With regard to consecutive sentences imposed upon prisoners prior to July 3, 1950, and also with regard to consecutive sentences imposed upon prisoners subsequent to July 3, 1950, by different courts at different times, all such consecutive sentences, with the consent of the prisoner, may be aggregated by the board to produce a single sentence, the minimum and maximum of which shall consist of the total of the minima and maxima of such consecutive sentences. Such aggregation shall be for the purpose of establishing the date upon which such prisoner shall be eligible for consideration for release on parole.

It is clear that minimum-maximum consecutive sentences required to be served in the state prison may be aggregated for purposes of determination of a single parole eligibility date on both sentences. Although the express terms of the statute do not refer to the aggregation of state prison sentences with consecutive sentences to county correctional institutions, the decision of the Supreme Court of New Jersey in *Cain v. New Jersey State Parole Board,* 78 N.J. 253 (1978), provides a compelling analogy. The court held in that case that consecutive sentences to a county correctional institution, irrespective of the length of each term, may be aggregated for purposes of the determination of a single parole eligibility date under N.J.S.A. 30:4-123.10. The fixed term imposed in a sentence to a county institution is to be taken as both a minimum and maximum for the purposes of aggregation under the statute.

Consequently, it would seem reasonable to assume that the Parole Board should similarly have jurisdiction to aggregate and determine a single parole eligibility date for consecutive sentences to the state prison and to a county correctional institution which in the aggregate total one year or more. An inmate sentenced to consecutive state and county sentences would be within the authority of the Parole Board on account of the state prison sentence even without regard to the length of the consecutive county sentence. Also, N.J.S.A. 30:4-123.10 expressly provides that all consectutive minimum-maximum sentences may be aggregated for the purpose of determining parole eligibility. It is clear from *Cain* that county sentences may be regarded as minimum-maximum sentences for the purposes of aggregation. Secondly, sentence aggregation for minimum-maximum terms is essentially for the purpose of determining a point at which, during the service of a sentence, an offender may be released from confinement in a custodial facility.[5] To require an inmate to shuttle between the state prison and a county penal facility in order to serve a portion of a sentence to that facility before total release from confinement would frustrate the underlying legislative benefit conferred by the provision for aggregation of sentences. *In re Fitzpatrick,* 9 N.J. Super. 511 (Cty. Ct. 1950), *aff'd* 14 N.J. Super. 213 (App. Div. 1951). Finally, the aggregation of sentences under these circumstances would have the beneficial effect of harmonizing the treatment of inmates sentenced prior to the effective date of the Penal Code with those sentenced after that date.

In sum, the Parole Board has the authority to determine a single parole eligibility date for an inmate who is sentenced to either consecutive terms in the state prison and in a county correctional facility or to multiple terms in a county correctional facility which in the aggregate total more than one year. This conclusion is consistent with the underlying holding of the Supreme Court of New Jersey in *Cain* that criminal offenders should be considered for parole release by the State Parole Board without regard to the length of their individual sentences if the aggregate total of those sentences is for a duration of greater than one year.

5. Parole has been defined as a procedure whereby a prisoner is permitted to serve the final portion of his sentence *outside* the gates of the institution on certain terms and conditions in order to prepare him for his eventual return to society. *In re Clover,* 34 N.J. Super. 181, 188 (App. Div. 1955).

You further inquire, assuming state and county consecutive sentences and multiple county sentences should be aggregated for determining the place of incarceration in the state prison, as to the appropriate manner of providing commutation/good time credits on an aggregated sentence. It is necessary to briefly review the legislative provision for commutation and good time credits in both state and county correctional institutions in order to put this question in the proper context. Prior to the enactment of the Penal Code, inmates of the state prison serving minimum-maximum sentences received commutation credits for continuous orderly deportment. This served to reduce both the minimum and maximum terms of such sentence. N.J.S.A. 30:4-140. The entire appropriate statutory entitlement was credited to the inmate as of his commitment to the state prison and was subject to divestment only if the inmate engaged in flagrant misconduct, *Formal Opinion No. 16—1976.* Similarly, inmates serving sentences in county jails and penitentiaries were permitted to receive, on account of good conduct, a remission with respect to the service of their sentences. N.J.S.A. 2A:164-24. Both of these statutes, then, enhance the ability of officials to maintain discipline in correctional facilities. Since these statutes were not repealed by the legislature when it enacted the Code of Criminal Justice, it is evident that the legislature intended these credits to be applied to sentences imposed under the Code.

Although inmates of both state and county correctional institutions are eligible to receive credits for good behavior, the statutory scheme for the award of credits is different. An inmate of a county correctional institution cannot receive more than one day of credit in the remission of his sentence for every six days of his sentence, regardless of the length of the sentence. On the other hand, commutation credits are remitted to inmates of state correctional institutions on a progressive schedule linked directly by N.J.S.A. 30:4-140 to the length of the sentence in years or a fractional part thereof. Therefore, the place of confinement mandated by law is determinative of the manner in which good time credits are received by an inmate.

It is evident on the face of N.J.S.A. 30:4-140 that the legislature has directed prison officials to remit the progressive time credits upon any person committed to any state correctional institution. Where an offender by reason of his term of imprisonment is deemed to be a state prison inmate, he should receive commutation credits as of the date that his sentence requires confinement in the state prison. In the case of multiple state prison/county correctional institution sentences, an inmate should be awarded the progressive commutation credits set forth in N.J.S.A. 30:4-140 on the total aggregated sentence for which an inmate must be confined in the state prison. Where N.J.S.A. 2C:43-10 mandates that a sentence or multiple sentences to a county correctional institution be served in the state prision, commutation credits provided under N.J.S.A. 30:4-140 should be awarded to an inmate as of the date that such county inmate must be confined in the state prison.

In conclusion, it is our opinion that the State Parole Board has the authority to compute a single parole eligibility date on an aggregated sentence required to be served in the state prison. It is further our opinion that the Department of Corrections should award commutation credits

provided by N.J.S.A. 30:4-140 on the full aggregated sentence required to be served in the state prison.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

December 20, 1979

JOANNE E. FINLEY, M.D., M.P.H.
Commissioner of Health
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FORMAL OPINION NO. 27—1979

Dear Dr. Finley:

You have asked whether regulations recently adopted by the Public Health Council of the Department of Health with respect to smoking in certain public places have been superseded by provisions of the State's new criminal code.

The Public Health Council, which consists of eight members appointed by the Governor, is empowered, among other functions, to adopt "such reasonable sanitary regulations *not inconsistent with* the provisions of this act or *the provisions of any other law of this State* as may be necessary properly to preserve and improve the public health in this State." (Emphasis added.) Such regulations are designated as the State Sanitary Code. N.J.S.A. 26:1A-7. The Sanitary Code "may cover any subject affecting public health, or the preservation and improvement of public health and the prevention of disease in the State of New Jersey," including, among other designated functions, "prohibiting nuisances hazardous to human health." *Ibid.*

In December 1978 a public hearing on proposed smoking regulations was conducted by former Judge Goldmann on behalf of the Council. Following the submission of an extensive Report and Recommendations, the Council in April 1979 adopted smoking regulations substantially as proposed in a notice published in the New Jersey Register in November 1978. N.J.A.C. 8:15-1.1 *et seq.* Essentially, the regulations which apply to certain restaurants, retail food stores, health care facilities, and places of public assembly or attendance, require the owner or operator of such establishments to restrict smoking to designated "smoking permitted" areas and to provide adequate mechanical means of ventilation of smoke in these areas. They are scheduled to go into effect on January 1, 1980.

The Sanitary Code regulations contain a specific reference to the provision of the new Code of Criminal Justice that imposes quasi-criminal