

FORMAL OPINION

July 13, 1981

CHRISTOPHER DIETZ, *Chairman*
State Parole Board
Whittlesey Road
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1981

Dear Chairman Dietz:

You have requested advice on several questions with regard to that provision of the Penal Code which governs the disposition, treatment and parole of sex offender inmates sentenced to the Adult Diagnostic and Treatment Center (hereinafter referred to as ADTC or Center). Your questions are concerned with whether various categories of inmates should be deemed eligible for parole consideration by the Parole Board only after recommendation by a special classification review board or, on the other hand, whether categories of inmates should be regarded eligible for parole consideration subject to the provisions of Title 30 governing parole.

Prior to providing an analysis of each of the specific inquiries made by you, it is necessary to review both the applicable provisions of the pre-Code legislation and those now made a part of the Penal Code which govern the treatment and parole of sex offenders. Under N.J.S.A. 2A:164-8, sex offenders were eligible for release under parole supervision at any time after their confinement upon a recommendation of the special classification review board that they were "capable of making an acceptable social adjustment in the community."¹ The same administrative procedure and standard for release of sex offenders are in effect with the adoption of the Penal Code in N.J.S.A. 2C:47-5.

In N.J.S.A. 2C:47-4, however, the legislature has made provision for the release of those sex offenders transferred out of the ADTC. The precise statutory language is essential to a disposition of your inquiries and it is therefore set forth at length as follows:

a. The Commissioner of the Department of Corrections, upon commitment of such person, shall provide for his treatment in the Adult Diagnostic and Treatment Center.

b. The Commissioner may, in his discretion, order the transfer of a person sentenced under this chapter out of the Adult Diagnostic and Treatment Center. In the event of such a transfer the conditions of confinement and release of such person transferred shall no longer be governed by this chapter.

1. The statute, repealed by Laws of 1978, c. 95, effective September 1, 1979, provided in pertinent part:

Any person committed to confinement, as provided for in section 2A:164-6 of this title, may be released under parole supervision when it shall appear to the satisfaction of the state parole board, after recommendation by a special classification review board appointed by the state board of control of institutions and agencies, that such person is capable of making an acceptable social adjustment in the community.

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c. If, in the opinion of the commissioner, upon the written recommendation of the Special Classification Review Board continued confinement is not necessary, he shall move before the sentencing court for modification of the sentence originally imposed.

It is clear from a straightforward reading of subsection b that in any instance where the Commissioner of Corrections in the exercise of his discretion orders the transfer of a person sentenced under the Penal Code out of the ADTC, the conditions of confinement and parole release of such an inmate should no longer be governed by those provisions governing the parole of sex offenders, but rather those enactments in Title 30 generally governing the parole of inmates incarcerated in state correctional institutions.

The question, then, arises as to whether the provisions for parole release set forth in N.J.S.A. 2C:47-4(b) apply both to those sex offenders sentenced under the repealed Sex Offenders Act and not resentenced under the Penal Code and to those sex offenders resentenced under the Penal Code. In this regard, it is necessary to again refer to the statutory language in subsection b which provides in pertinent part that "the Commissioner may, in his discretion, order the transfer of a person *sentenced under this chapter* out of the Adult Diagnostic and Treatment Center." It is apparent that the legislature intended that this provision apply only to that class of sex offender "sentenced under the Penal Code." Although provisions of the Code for the release of prisoners are generally applicable to those under sentence for offenses committed prior to its effective date, N.J.S.A. 2C:1-1d(1),² in this instance the legislature has made specific reference to only those sex offenders sentenced under the Penal Code. Consistent with the rule of statutory construction that a specific statutory section governs over the terms of a more general one, it is fair to conclude that the legislature did not intend to extend the provisions of N.J.S.A. 2C:47-4(b) to those sex offenders who have not been resentenced under the Penal Code.

This conclusion is supported by the fact that the enactment of the Penal Code did not in itself reduce or otherwise affect pre-Code sentences. The reduction of pre-Code sentences may only be accomplished upon motion with a showing of disparity in sentences with equivalent offenses and for good cause shown for resentencing. N.J.S.A. 2C:1-1d(2). Therefore, those sex offenders, whether or not transferred out of the ADTC, who have not been resentenced under the Code, continue to serve sentences under the Sex Offender Act prior to its repeal, integral to which eligibility for parole release upon the recommendation of a special classification review board.

2. The statute provides as follows:

The provisions of the code governing the treatment and the release or discharge of prisoners, probationers and parolees shall apply to persons under sentence for offenses committed prior to the effective date of the code, except that the minimum or maximum period of their detention or supervision shall in no case be increased.

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The legislative policy underlying the Sex Offender Act prior to its repeal was recently reviewed by the Appellate Division in *Savad v. Corrections*, 178 N.J. Super. 386, 390 (App. Div. 1981). The court stated that:

Progress through treatment and therapy to an acceptable social adjustment was the legislative goal of the repealed Sex Offender Act. Upon satisfactory rehabilitation from their aberrations pre-Code sex offenders . . . were immediately eligible for parole. At the other extreme, their maximums were those fixed by law for the crimes for which they were committed.

Their terms of confinement were thus bounded: release at any time upon satisfactory rehabilitation and social adjustment up to the statutory maximum term of imprisonment. . . .

The major change effected by the enactment of the Penal Code is that sex offenders are sentenced to a specific term of years rather than to an indeterminate term. N.J.S.A. 2C:47-3(b). A sex offender, consequently, is now sentenced to a determinate term in the same manner as are other inmates incarcerated in state correctional institutions.

The legislative policy underlying the sentencing procedures provided for sex offenders under the Penal Code must be considered together with significant changes made in laws concerning eligibility for parole consideration in the 1979 Parole Act. Related statutes must be interpreted together to discern a consistent legislative pattern. *Loboda v. Clark Tp.*, 40 N.J. 424, 435 (1963). In the parole legislation, it is provided that eligibility should be determined for each adult inmate sentenced to a specific term of years. N.J.S.A. 30:4-123.51a. It is apparent that the legislature intended to refer to a specific term of years mandated by a court under the Penal Code and not to an indeterminate term. Consequently, only those sex offenders sentenced or resentenced under the Penal Code would be eligible for parole under non-ADTC guidelines established by the 1979 Parole Act. Those sex offenders transferred out of the ADTC who have not been resentenced under the Code, continue to be eligible for parole release only upon the recommendation of the special classification review board.

There can be no doubt but that this proposition applies not only to inmates transferred by the Commissioner subsequent to their being resentenced under the Code, but also to those sex offenders in the general prison population transferred out of the ADTC prior to resentencing under the Penal Code. The provisions of the Code for the release or discharge of prisoners are clearly applicable to those under sentence for offenses committed prior to its effective date. N.J.S.A. 2C:1-1d(1). The statutory procedure for the release and parole of sex offenders who are transferred out of the ADTC consequently, by operation of the statute, applies to both sex offenders originally transferred under the repealed Sex Offender Act as well as those transferred for the first time under the Code.

In light of this background, your first inquiry concerns the treatment of an inmate sentenced to a term in the Center prior to the effective date of the Penal Code and who is transferred out of the Center to a state prison facility prior to the effective date of the Code and who is not resentenced under the Code. It is our opinion that since in that case an inmate has

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not been resentenced under the Code, the provisions of N.J.S.A. 2C:47-4(b) are not applicable and the inmate should be considered eligible for release under parole supervision consistent with the terms of N.J.S.A. 2A:164-8

The second category posed by you is an inmate sentenced to a term in the Center prior to the effective date of the Code and who is transferred out of the Center to a state prison facility prior to the Code and who is resentenced under the Code. It is clear that under those circumstances, since a sex offender has been resentenced under the Code, the provisions of N.J.S.A. 2C:47-4(b) are applicable and the conditions of confinement and release of such a person should be governed by those provisions of Title 30 governing parole release. This conclusion, furthermore, is supported by the decision of the United States District Court in *McCray v. Dietz*, 517 F. Supp. 787 (D. N.J. 1980), where the court held that an inmate resentenced under the Code who had been transferred out of the Center prior to the enactment of the Code, was entitled to an immediate parole release hearing under non-ADTC parole guidelines.

In the third category, a sex offender is sentenced to a term in the Center prior to the enactment of the Code and is transferred out of the Center to a state prison facility after the enactment of the Code and is not resentenced under the Code. Again, in this case, a sex offender has not been resentenced under the provisions of the Code and, as in the first example, the provisions of N.J.S.A. 2A:164-8 should govern eligibility for release under parole supervision.

Finally, the last category of sex offender is sentenced to a term in the Center prior to the enactment of the Code and is transferred out of the Center to a state prison facility after the enactment of the Code and is resentenced under the Code. There can be no question but that the provisions of N.J.S.A. 2C:47-4(b) directly apply in that situation and the conditions of confinement and release of such a sex offender should be governed by the non-ADTC guidelines governing parole set forth in Title 30.

Very truly yours,
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