

VOLUME NO. 38

OPINION NO. 10

PROBATION AND PAROLE - Parole eligibility of prisoners designated as "Persistent Felony Offenders" or as "Non-Dangerous";

PROBATION AND PAROLE - Parole eligibility of prisoners with no designation.

MONTANA CODE ANNOTATED, Sections 46-18-404, 46-23-201(1);  
REVISED CODES OF MONTANA, 1947 - Sections 95-2206.16, 95-3214(1).

- HELD: 1. Subject to the exceptions set forth in section 46-23-201(1), MCA (section 95-3214(1), R.C.M. 1947), a prisoner who is sentenced to a time sentence for a crime committed on or after July 1, 1977, is ineligible for parole until he has served one-half of his full sentence, less good time, unless he has been designated a "non-dangerous offender" by the sentencing court.
2. A prisoner who has been designated as "non-dangerous" is ineligible for parole until he has served one-quarter of his full sentence, less good time.

3. Designation of a prisoner as a "persistent felony offender" has no significance for parole eligibility with respect to sentences imposed for crimes occurring on or after July 1, 1977. However, for crimes committed between July 1, 1975 and June 30, 1977, inclusive, designated persistent felony offenders must serve one-third of their sentences before they are eligible for parole

2 March 1979

Nick A. Roterling, Esq.  
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Department of Institutions  
1539 Eleventh Avenue  
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Dear Mr. Roterling:

You have requested an opinion concerning the following question:

When is a prisoner serving a time sentence eligible for parole if he has not been designated a "non-dangerous" offender by the sentencing court?

Provision for "non-dangerous offender" designation is made in section 46-18-404, MCA (section 95-2206.16, R.C.M. 1947), which was enacted in 1977. 1977 Mont. Laws, ch. 340, § 5. The section provides in relevant part:

(1) The sentencing court shall designate an offender a non-dangerous offender for purposes of eligibility for parole under part 2 of chapter 23 if:

(a) during the 5 years preceding the commission of the offense for which the offender is being sentenced, the offender was neither convicted of nor incarcerated for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed; or

(b) the court has determined, based on any pre-sentence report and the evidence presented at the trial and the sentencing hearing, that the offender does not represent a substantial danger to other persons or society.

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Designation as a "non-dangerous offender" is tied to parole eligibility standards of part 2, chapter 23 of Title 46, specifically section 46-23-201(1), MCA (section 95-3214(1), R.C.M. 1947). Section 46-23-201(1) provides that a prisoner is ineligible for parole until he has served a prescribed minimum of his sentence. As amended in 1977 (see 1977 Mont. Laws, ch. 184, 340 and 580), it provides:

(1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community:

(a) No convict serving a time sentence may be paroled until he has served at least one-half of his term, less the good time allowance provided for in 53-30-105; except that a convict designated as a non-dangerous offender under 46-18-404 may be paroled after he has served one-quarter of his full term, less the good time allowance provided for in 53-30-105. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, 17 1/2 years.

(b) No convict serving a life sentence may be paroled until he has served 30 years, less the good time allowance provided for in 53-30-105.

Prior to its amendment in 1977, section 46-23-201(1) had provided, generally, that persons serving time sentences were ineligible for parole until they had served one-quarter of their full sentence.

Section 46-18-404 and the 1977 amendments to section 46-23-201(1) have spawned three questions.

The first question is whether the increase in the length of time a prisoner is ineligible for parole can be applied to prisoners sentenced in connection with crimes committed prior to July 1, 1977. The recent case of State v. Azure, \_\_\_ Mont. \_\_\_, 587 P.2d 1297 (1978) held that it cannot.

A law which eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is ex post facto as applied to that defendant.

587 P.2d at 1298. See also State v. Gone, Mont. 587 P.2d 1291 (1978); and State ex rel. Nelson v. Ellsworth, 142 Mont. 14, 380 P.2d 886 (1963).

The second question concerns when a prisoner is eligible for parole if he has not been expressly designated as "non-dangerous" in a judgment of conviction. Section 46-23-201(1), MCA, provides express and unqualified guidance. It provides that a defendant serving a time sentence is ineligible for parole while serving the first one-half of his sentence, less good time, unless he has been designated a non-dangerous offender. Thus, designation as a non-dangerous offender must affirmatively appear from the judgment of conviction for a defendant to be eligible for parole after serving one-quarter of his sentence. Any prisoner who has not been expressly designated as "non-dangerous" in connection with a sentence proposed for a crime committed after July 1, 1977, is ineligible for parole until he has served one-half of his sentence, less good time.

The third question concerns the effect designation as a "persistent felony offender" has upon parole eligibility.

In 1975, the Legislature enacted provisions providing that persons designated as persistent felony offenders were ineligible for parole during the first one-third of their sentences. 1975 Mont. Laws, ch. 312, §§ 2 and 3. Since the Legislature did not specify an effective date for the 1975 provisions, they became effective July 1, 1975. § 102-2-201(1), MCA (§ 43-507, R.C.M. 1947). The 1975 provisions were repealed in 1977 at the same time the Legislature amended section 46-23-201(1) to provide that all prisoners serving time sentences, except those designated as "non-dangerous," are ineligible for parole during the first one-half of their sentences, less good time. Therefore, "persistent felony offenders" designation is significant only as to those prisoners sentenced in connection with crimes committed between July 1, 1975 and June 30, 1977, inclusive. It has no significance in connection with crimes committed on or after July 1, 1977.

THEREFORE, IT IS MY OPINION:

1. Subject to the exceptions set forth in section 46-23-201(1), MCA (section 95-3214(1) R.C.M. 1947) a prisoner who is sentenced to a time sentence for a crime committed on or after July 1, 1977, is ineligible for parole until he has served one-half of his full sentence, less good time, unless he has been designated a "non-dangerous offender" by the sentencing court.

2. A prisoner who has been designated as non-dangerous is ineligible for parole until he has served one-quarter of his full sentence, less good time.
3. Designation of a prisoner as a "persistent felony offender" has no significance for parole eligibility with respect to sentences imposed for crimes occurring on or after July 1, 1977. However, for crimes committed between July 1, 1975 and June 30, 1977, inclusive, designated persistent felony offenders must serve one-third of their sentences before they are eligible for parole.

Very truly yours,

MIKE GREELY  
Attorney General