

Opinion No. 2012-011

May 2, 2012

Mr. Ray Hobbs, Director  
Arkansas Department of Correction  
Post Office Box 8707  
Pine Bluff, Arkansas 71611-8707

Dear Director Hobbs:

You have requested my opinion regarding a perceived dichotomy between A.C.A. § 12-29-404, which addresses medical parole, and A.C.A. § 16-93-607, which also addresses parole eligibility. You have asked specifically “whether an inmate sentenced to life imprisonment without parole is eligible for medical parole if he or she is ‘permanently incapacitated’ or ‘terminally ill’ as defined in Arkansas Code Annotated § 12-29-404(a) without receiving executive clemency reducing the sentence to a term of years.” You stated: “It is my opinion that inmates who are sentenced to life without parole and are ‘permanently incapacitated’ or ‘terminally ill’ should be eligible for medical parole without limitation except for inmates convicted of certain sex offenses.”

**RESPONSE**

Although your question focuses on inmates sentenced to life imprisonment without parole, I believe it will become evident from the discussion below that the question necessarily extends as well to inmates sentenced to death. To summarize, in my opinion, an inmate who is under a sentence of death or life imprisonment without parole is not eligible for medical parole under A.C.A. § 12-29-404, regardless of commutation of the sentence to a term of years.

**DISCUSSION**

With the exception of certain sex offenders, inmates who are “permanently incapacitated” or “terminally ill” may be transferred to parole supervision as follows pursuant to Section 12-29-404, as amended by Act 570 of 2011:

(b) The Director of the Department of Correction or the Director of the Department of Community Correction shall communicate to the Parole Board when, in the independent opinions of either a Department of Correction physician or Department of Community Correction physician and a consultant physician in Arkansas, an inmate is either terminally ill or permanently incapacitated<sup>[1]</sup> and should be considered for transfer to parole supervision.

(c)(1) Upon receipt of a communication described in subsection (b) of this section, the board shall assemble or request all such information as is germane to determine whether the inmate is eligible under this section for immediate transfer to parole supervision.

(2) If the facts warrant and the board is satisfied that the inmate's physical condition makes the inmate no longer a threat to public safety, the board may approve the inmate for immediate transfer to parole supervision.

(d) An inmate is not eligible for parole supervision under this section if he or she is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 *et seq.*, and:

(1) The inmate is assessed as a Level 3 offender or higher; or

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<sup>1</sup> "Permanently incapacitated" and "terminally ill" are defined as follows

(1) "Permanently incapacitated" means, as determined by a licensed physician, that an inmate:

(A) Has a medical condition that is not necessarily terminal but renders him or her permanently and irreversibly incapacitated; and

(B) Requires immediate and long-term care; and

(2) "Terminally ill" means, as determined by a licensed physician, that an inmate:

(A) Has an incurable condition caused by illness or disease; and

(B) Will likely die within two (2) years due to the illness or disease.

(2) A victim of one (1) or more of the inmate's sex offenses was fourteen (14) years of age or younger.<sup>2</sup>

In presenting your question, you note that another statute—A.C.A. § 16-93-607—provides that an inmate who is sentenced to death or life imprisonment without parole is not eligible for parole, but may be pardoned or have his or her sentence commuted:

A person who commits felonies on or after April 1, 1983, and who shall be convicted and incarcerated for that felony, shall be eligible for release on parole as follows:

***(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have their sentence commuted by the Governor, as provided by law.*** An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency. Upon commutation, the inmate is eligible for release on parole as provided in this section[.]<sup>3</sup>

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<sup>2</sup> A.C.A. § 12-29-404 (Supp. 2011) (Acts 2011, No. 570, § 75). The Parole Board may revoke the parole “if the person’s medical condition improves to the point that he or she would initially not have been eligible for parole supervision under this section.” *Id.* at (e).

I believe it will be helpful to set out the statute’s text prior to its amendment by Act 570 of 2011:

(a) When, in the independent opinions of a prison physician and a consultant physician from the community, an inmate has an incurable illness which, on the average, will result in death within twelve (12) months, or when an inmate is permanently physically or mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting providing a level of care not available in the Department of Correction or the Department of Community Correction, the Director of the Department of Correction or the Director of the Department of Community Correction shall make these facts known to the Post Prison Transfer Board.

(b)(1) The board shall assemble or request all such information as is germane to making a decision.

A.C.A. § 12-29-404 (Repl. 2009) (Acts 1995, No. 290, § 1).

<sup>3</sup> A.C.A. § 16-93-607(c) (Supp. 2011) (emphasis added). *See also* A.C.A. § 16-93-604(b)(1) (Repl. 2006) (an identical provision applicable to persons who committed felonies between April 1, 1977 and April 1, 1983)). For the parole eligibility laws in effect prior to April 1, 1977, see A.C.A. § 16-93-601 (Repl. 2006) and *Rogers v. State*, 265 Ark. 945, 954-56, 582 S.W.2d 7 (1979) (discussing “the new sentencing procedure called ‘life imprisonment without parole[.]’” and noting the statute—currently A.C.A. § 5-4-607(d) and (e),

Indeed, several other statutes, two of which were added by Act 570 of 2011, similarly prohibit the parole or “transfer”<sup>4</sup> of persons sentenced to death or life without parole. One predating Act 570 addresses executive clemency and provides in relevant part:

***(d) A person sentenced to death or to life imprisonment without parole is not eligible for parole and shall not be paroled.***

(e) If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years, the person shall not be paroled, nor shall the length of his or her incarceration be reduced in any way to less than the full term of years specified in the order of commutation or in any subsequent order of commutation.

(f) A reprieve may be granted as presently provided by law.<sup>5</sup>

Another, added by Act 570 of 2011, states:

A person who commits a Class Y, Class A, or Class B felony, except those drug offenses addressed in § 16-93-619 or those Class Y felonies addressed in § 16-93-614 or § 16-93-618, and who shall be convicted and incarcerated for that felony, shall be eligible for release on parole as follows:

***(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be***

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*infra*—that prohibits parole for persons sentenced to life without parole, including those whose sentences are commuted.

With regard to A.C.A. § 16-93-607, the section head of this statute was changed slightly by Act 570 of 2011 to say “Parole eligibility—Felonies committed on or after April 1, 1983 but before January 1, 1994,” but the statute was not otherwise amended by Act 570. *See* Acts 2011, No. 570, § 94.

<sup>4</sup> “Transfer” is a term used under the community correction statutes (A.C.A. § 16-93-1201 *et seq.*) to mean “an administrative condition permitting transfer of eligible offenders sentenced to traditional state correctional facilities to community correction facilities, programming, and community supervision, provided that only target offenders are eligible for the facilities.” A.C.A. § 16-93-1202(11) (Supp. 2011).

<sup>5</sup> A.C.A. § 5-4-607 (Repl. 2006) (emphasis added). Reference should also be made to A.C.A. §16-93-207 (Supp. 2011) with respect to executive clemency.

***pardoned or have his or her sentence commuted by the Governor, as provided by law; and***

(2)(A) An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency.

(B) Upon commutation, the inmate is eligible for release on parole as provided in this subchapter.<sup>6</sup>

The other statute added by Act 570 similarly states:

A person who commits a felony on or after January 1, 1994, and who shall be convicted and incarcerated for that felony shall be eligible for transfer to community correction as follows:

***(1)(A) An inmate under sentence of death or life imprisonment without parole shall not be eligible for transfer, but may be pardoned or have his or her sentence commuted by the Governor as provided by law.***

(B) An inmate sentenced to life imprisonment shall not be eligible for transfer unless his or her sentence is commuted to a term of years by executive clemency.

(C) Upon commutation, an inmate shall be eligible for transfer as provided in this section[.]<sup>7</sup>

Turning to your question regarding medical parole under Section 12-29-404, you have not stated the specific basis for your view that inmates who are under a sentence of life imprisonment without parole should be eligible for medical parole under this statute. In your request for my opinion, however, you observed that “[o]ther than the exception of certain convicted sex offenders, the statute does not mention any other limitation based on the type of conviction imposed upon an inmate.” The implication is that given this limited exception, Section 12-29-404 may properly be viewed as applying to all other inmates, including those under a sentence of death or life imprisonment without parole who, according to the other

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<sup>6</sup> A.C.A. § 16-93-613(a) (Supp. 2011) (emphasis added; Acts 2011, No. 570, § 98).

<sup>7</sup> A.C.A. § 16-93-614(c)(1) (Supp. 2011) (emphasis added; Acts 2011, No. 570, § 99).

statutes noted above, are not eligible for parole. This raises the prospect of a conflict between Section 12-29-404 and these other statutes.

While I appreciate that at first blush Section 12-29-404 may appear to be in conflict with these other statutes, it is my conclusion upon closer examination that the statutes need not be read as conflicting. As you can see by comparing the current text of Section 12-29-404, set out above, with the previous version,<sup>8</sup> Act 570 amended the statute in several respects, primarily by inserting and defining the specific terms “permanently incapacitated” and “terminally ill” and by adding the prohibition against medical parole for certain sex offenders.<sup>9</sup> Of additional significance, however, Act 570 also enacted the several statutes set out above that echo prior law in prohibiting the release on parole of an inmate sentenced to death or life without parole. It is a basic axiom of statutory construction that we must, if possible, reconcile these provisions, giving effect to each:

In determining the intent of the legislature, this court must look at the whole act and, as far as practicable, give effect to every part, reconciling provisions to make them consistent, harmonious, and sensible. *Brandon v. Arkansas Pub. Serv. Comm’n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999). This court not only looks at the language of the statute but also its subject matter, the object to be accomplished by the statute, the purpose to be served, and other appropriate matters. *Id.*<sup>10</sup>

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<sup>8</sup> Note 1, *supra*.

<sup>9</sup> Provisions for the release of inmates based on illness or incapacity date back to 1893. Originally, an inmate with an incurable or life-threatening disease could only be pardoned by the Governor. Acts 1893, No. 76, § 35. This was the law until 1991, when Act 771 of that year provided that an inmate with a “terminal illness” (undefined) could be “immediately discharged,” and “his or her term shall be complete.” As you can see from n. 1, *supra*, Act 290 of 1995 amended the statute to establish a procedure similar to that under Act 570 of 2011 for determining when an inmate has an “incurable illness which, on average, will result in death within 12 months” or is “permanently physically or mentally incapacitated.” The 1995 act also interjected parole supervision, providing that “[i]f the facts warrant, the Post Prison Transfer Board may make the inmate eligible for immediate transfer to parole supervision.”

<sup>10</sup> *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 69 Ark. App. 323, 333, 13 S.W.3d 197 (2000).

Moreover, in determining the intent of lawmakers, the courts are required to look to the whole act rather than to isolated words or sections.<sup>11</sup> The intent that is reflected by the act as a whole takes precedence over an intent reflected by isolated words or sections.<sup>12</sup>

Applying these principles of construction, I interpret Section 12-29-404 as extending only to inmates who are otherwise eligible to be paroled or transferred at some point under the laws governing parole and transfer. As reflected in the Arkansas Parole Board's Policy Manual, an inmate is not eligible for parole or transfer until his or her "parole eligibility (PE) date" or "transfer eligibility (TE) date":

The Arkansas Code Annotated 16-93-614, 615, and 617 allows for the transfer of inmates who have committed certain crimes on or after January 1, 1994, under the provisions of a transfer date, to be transferred to parole status by the ADC subject to rules and regulations promulgated by the Board of Corrections and conditions set by the Board. The electronic Offender Management Information System (eOMIS) assigns *a transfer eligibility (TE) date to inmates who are in this "transfer eligible" category (other inmates who are eligible for parole are assigned a "parole eligibility (PE)" date).*<sup>13</sup>

However, Section 12-29-404 sets forth criteria for an inmate to be "eligible ... for immediate transfer to parole supervision."<sup>14</sup> Simply put, if a determination is

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<sup>11</sup> *Fiser v. Clayton*, 221 Ark. 528, 536, 254 S.W.2d 315 (1953) (citing *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945), *cert. denied* 326 U.S. 773 (1945)). See also *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1986).

<sup>12</sup> *Id.*

<sup>13</sup> *Arkansas Parole Board Policy Manual* (effective July 27, 2011) at 4 (emphasis added). As noted in the Manual, "[d]epending on the date of the offense, some inmates are 'transfer eligible,' some are 'parole eligible,' and some inmates are not eligible for parole, but may be considered for release under clemency laws." *Id.* at 3. Regarding time computation, the Manual states:

Within 90 days of incarceration, the ADC will provide inmates who have a TE or PE date with a time card that will provide at a minimum the following information: (1) sentence length, (2) offense, (3) minimum required time to be served before transfer/parole eligibility, (4) jail time credit, (5) class status, and (6) release dates.

*Id.* at 5.

<sup>14</sup> A.C.A. § 12-29-404 (c)(1). Note that the phrase "eligible for immediate transfer to parole supervision" was previously part of the statute, i.e., it was not added by Act 570. See n. 1, *supra*.

made pursuant to the provisions of Section 12-29-404 that an inmate is either “terminally ill” or “permanently incapacitated,” then he or she may be approved by the Parole Board for “**immediate transfer to parole supervision.**” (Emphasis added). In my opinion, Section 12-29-404 can be interpreted as creating an exception to the minimum time an inmate must otherwise serve to be eligible for parole or transfer. I believe this reasonably follows from the emphasized language. Such an exception plainly would not apply to inmates under sentence of death or life without parole, who are unambiguously identified as ineligible for parole under the other statutes enacted pursuant to Act 570. I believe Section 12-29-404 can be reconciled with the latter statutes on this basis, a result we are obliged to achieve if possible, under established rules of statutory construction.

This interpretation also preserves the several statutes predating Act 570 that, as noted above, similarly prohibited the parole of inmates sentenced to death or life without parole.<sup>15</sup> Implicit in your question is the suggestion that the legislature impliedly amended these parole prohibition statutes when it excluded certain sex offenders from eligibility for medical parole. However, amendments by implication are not favored in construing statutes.<sup>16</sup> Ordinarily, an amendment by implication can occur “only where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together.”<sup>17</sup> As explained above, it is my opinion that the statutes are not repugnant in that way because Section 12-29-404 can reasonably be construed to apply to inmates who may otherwise be paroled or transferred at some point.<sup>18</sup>

In sum, it is my opinion that Section 12-29-404 does not, in the absence of any other evidence of legislative intent on the question, apply to inmates who have been sentenced to death or life imprisonment without parole.

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<sup>15</sup> *E.g.*, A.C.A. §§ 5-4-607; 16-93-607(c); 16-93-604(b)(1).

<sup>16</sup> *E.g.*, *Cummings v. Washington County Election Com’n*, 291 Ark. 354, 724 S.W.2d 486 (1987).

<sup>17</sup> *Pruitt v. Sebastian County Coal & Mining Company*, 215 Ark. 673, 684, 222 S.W.2d 50 (1949) (quoting *Corpus Juris*).

<sup>18</sup> It also bears noting that I am unaware of any previous administrative interpretation of Section 12-29-404 that would allow for the parole of an inmate under a sentence of death or life without parole. A longstanding interpretation to that effect could affect the analysis. *See generally* Op. Att’y Gen. Nos. 2007-280; 91-386. But I have no information suggesting application of that principle in this case.

As a final matter, I must address an assumption regarding executive clemency that appears to be built into your question.<sup>19</sup> To restate, you have asked “whether an inmate sentenced to life imprisonment without parole is eligible for medical parole ... *without receiving executive clemency reducing the sentence to a term of years.*” (Emphasis added.) The emphasized language seems to assume, or at least suggests, that an inmate who was sentenced to life without parole becomes eligible for parole upon receiving executive clemency. If that were the case, then it would seem to follow that such an inmate could become eligible for medical parole under Section 12-29-404.

According to A.C.A. § 5-4-607, however, parole is not available to such an inmate after commutation:

A person sentenced to death or to life imprisonment without parole is not eligible for parole and shall not be paroled.

If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years, ***the person shall not be paroled, nor shall the length of his or her incarceration be reduced in any way to less than the full term of years specified in the order of commutation*** or in any subsequent order of commutation.<sup>20</sup>

The first rule in considering the meaning and effect of this statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language.<sup>21</sup> The above-emphasized language expressly and unambiguously provides that a person sentenced to death or life without parole is not eligible for parole in the event his or her sentence is commuted. The statute must therefore be interpreted just as it reads. There is no need to resort to rules of statutory construction.<sup>22</sup>

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<sup>19</sup> As explained in the *Arkansas Parole Board Policy Manual*, *supra* n. 12, “Executive Clemency is the process through which the Governor considers requests for granting reprieves, commutations of sentence and pardons after conviction and considers requests to remit (forgive) fines and forfeitures.” *Id.* at 16. See A.C.A. §§ 5-4-607 (Repl. 2006); 16-93-207 (Supp. 2011).

<sup>20</sup> A.C.A. § 5-4-607(d) and (e) (Repl. 2006) (emphasis added).

<sup>21</sup> *E.g. Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

<sup>22</sup> *Id.*

It should perhaps be noted that a different result obtains in the case of an inmate sentenced to *life imprisonment*, as distinct from life imprisonment without parole. An inmate sentenced to life can be paroled if the sentence is commuted. Indeed, commutation is a prerequisite for parole eligibility in that case. This is evident from subsection (a)(2) of A.C.A. § 16-93-613 (Supp. 2011), which was set out above, but which I will repeat here in the interest of clarity. The subsection states in relevant part:

(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have his or her sentence commuted by the Governor, as provided by law; and

(2)(A) *An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency.*

(B) *Upon commutation, the inmate is eligible for release on parole as provided in this subchapter.*

(Emphasis added).

The provision for parole eligibility upon commutation plainly applies to an inmate sentenced to *life imprisonment*. Subsection 16-93-607(c)(1) (Supp. 2011), also set out above and applicable to felonies committed after April 1, 1983 but before January 1, 1994, similarly states:

An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have their sentence commuted by the Governor, as provided by law. *An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency. Upon commutation, the inmate is eligible for release on parole as provided in this section[.]*

(Emphasis added). See also subsection 16-93-614(c)(1)(B) (Supp. 2011), also set out above, which similarly provides that “[a]n inmate sentenced to *life imprisonment shall not be eligible for transfer unless his or her sentence is commuted....*” (Emphasis added).

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Particularly in light of A.C.A. § 5-4-607, *supra* (clearly specifying no parole following commutation for person sentenced to death or life without), I believe these provisions for parole eligibility upon commutation are properly interpreted to apply only to an inmate sentenced to life imprisonment.

In conclusion, it is my opinion that an inmate who is under a sentence of death or life imprisonment without parole is not eligible for medical parole under A.C.A. § 12-29-404, regardless of commutation of the sentence to a term of years.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/EAW:cyh