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OPINION NO. 86-61

Honorable Ron Fuller
State Representative
10020 Rodney Parham, W. #D
Little Rock, Arkansas 72207

Honorable Bob Teague
State Representative
P.O. Box 2113
Little Rock, Arkansas 72203

Gentlemen:

This is in response to your request for clarification on the following questions.

1. Is an individual who has been sentenced to prison for carnal abuse under the Alternative Service Act of 1975 (Act 378) eligible for early release and alternative service?

Yes. Those eligible for sentencing under the Alternative Service Act (which, until 1983, was the Youthful Offender Alternative Service Act of 1975) are set out in Ark. Stat. Ann. §43-2340(f):

(f) "Eligible Offender" means any person convicted of a felony offense, other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery and who has never been previously convicted of a felony offense, and whose interests, and the interests of the State, in the opinion of the sentencing trial court, could be [better] served by diversion under the provisions of this Act than by sentencing under other

applicable penalty provisions established by law. Those persons under the age of twenty-six (26) years at the time of the commission of a felony offense, other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery for which they are convicted shall still be "Eligible Offenders" under this Act if they had one (1) previous felony conviction other than a conviction for a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping or aggravated robbery. A person over the age of twenty-six (26) who has one (1) or more previous felony convictions shall not be an "Eligible Offender" under this Act. For purposes of this Act, the fact that a felony conviction has been "expunged" under this Act shall not render a person an "Eligible Offender". A person over eighteen (18) years of age who is convicted of the offense of delivering controlled substances to a minor as prohibited in subsection (b) of Section 1 of Act 1005 of 1975 [§ 82-2641] as amended, is not an "Eligible Offender" under this Act.

Once the Trial Court determines that the offender is eligible, and that diversion is proper, the Court has the alternatives of

- 1) suspending imposition of sentence
- 2) placing the offender on probation
- 3) diverting the offender to an alternative service program for a designated period of time not to exceed three years
- 4) sentencing the offender to the Department of Correction with the proviso that he is subject to transfer to an alternative service program, and that he is immediately subject to parole
- 5) sentencing the offender to the Department of Correction with the proviso that he is subject to transfer to an alternative

service program, and that he is eligible for parole in the same manner as if he had not been sentenced under the Alternative Service Act.

2. Is carnal abuse defined as a non-violent crime? Is an individual convicted of carnal abuse deemed non-threatening to society?

The Arkansas Statutes do not address either of these questions.

According to the Acts of 1983, Section 3, Number 344 states that individuals sentenced under this act must have committed non-violent crimes and not be a threat to society.

It is true that the Emergency Clause, which is Section 3 of Act 344 of 1983, states, in pertinent part "...that this legislation is needed to provide that first time offenders, twenty-six (26) years of age and older, who commit non-violent crimes and who are not a threat to society are Eligible Offenders under Act 378 of 1975."

This section does not define either of the terms. It may be that the intent of the Legislature was to define the terms in Section 2 of Act 344, when persons "...convicted of a felony offense, other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery..." were excepted from "Eligible Offender."

If that is the case, then, according to the Act, carnal abuse is a non-violent crime and the perpetrator is not a threat to society. Again, however, it is not clear that the Legislature was defining those terms in Section 2.

3. Is it the intent of Act 378 to allow individuals convicted of carnal abuse to perform alternative services as defined in sections 43-2340 (i.e. Education settings such as vocational and technical schools, secondary colleges and universities, adult basic education, private and commercial training, government and private job development and skills training)?

The Act itself does not speak to its intent, although it would seem from its title that it may have such an intent:

AN ACT to Create a Commission on Community Based Rehabilitation; to Authorize the Diversion or Transfer of Eligible Offenders to Alternative Service Programs...

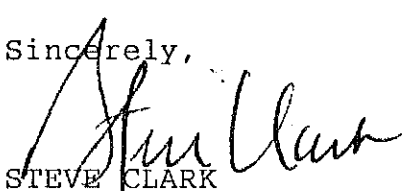
It would appear that subsection (i) and (ii) of Section D, Section 43-2342 are in contradiction by use of the word "and". Is this the case?

It would not appear that the two subsections are in contradiction.

Subsection (i) speaks to transfer to an alternative service program. Subsection (ii) speaks to pardon and/or parole.

The foregoing opinion, which I hereby approve, was prepared by Deputy Attorney General A. Carter Hardage.

Sincerely,


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SC:ACH:sfh
