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VIA HAND-DELIVERY
Jose B. Palacios, Director
Department of Corrections
P.O. Box 3236
Hagåtña, Guam 96910

Re: Prisoner Participation in Work Release and Educational Programs

Dear Director Palacios:

I. Introduction

Due to developments in the relevant case law, the Office of the Attorney General is re-examining its opinion in Attorney General Opinion LEG 88-0205, "Application of P.L. 19-6 to DOC inmates." P.L. 19-06 prohibits prisoners convicted of certain crimes from participating in work release and educational programs. Attorney General Opinion LEG 88-0205 opined that applying P.L. 19-06 to prisoners sentenced prior to its enactment would violate the prohibition against ex post facto punishment. As a result, the earlier opinion recommended that prisoners sentenced prior to the enactment of P.L. 19-06 not be subjected to its restrictions, because the application of P.L. 19-06 to those prisoners would not withstand a legal challenge in the courts. This opinion revisits that earlier pronouncement, and also examines the due process and equal protection implications of P.L. 19-06, if any.

II. Facts

In 1982, Guam's murder statute provided in pertinent part:

> Murder is a felony of the first degree but a person convicted of murder shall be sentenced to life imprisonment notwithstanding any other provision of law; provided, however, that any person convicted of murder shall be eligible for parole after serving fifteen (15) years as provided in § 80.72 of this Title and no part of said sentence shall be suspended.

9 G.C.A. § 16.40(b), P.L. 16-126:1 (Dec. 31, 1982).

> In 1987, the statute was amended by P.L 19-06. It now reads in pertinent part:
>
> Murder is a felony of the first degree, but a person convicted of murder shall be sentenced to life imprisonment notwithstanding any other provision of law; provided, however, that any person convicted of murder shall be eligible for parole after serving fifteen (15) years as provided in § 80.72 of this Title and no part of said sentence shall be suspended; *provided, further, that any person convicted of murder shall also not be eligible for work release or educational programs outside the confines of prison.*

9 G.C.A. § 16.40(b), as amended, P.L. 19-06:5 (Aug. 26, 1987) (emphasis added).

Public Law 19-06 also extended the prohibition against work release and educational programs outside the confines of prison to persons convicted of the following offenses:

- aggravated murder, 9 G.C.A. § 16.30;
- first degree criminal sexual conduct, 9 G.C.A. § 25.15;
- second degree criminal sexual conduct, 9 G.C.A. § 25.20;
- aggravated assault, 9 G.C.A. § 19.20;
- first degree robbery, 9 G.C.A. § 40.10; and
- certain drug crimes, 9 G.C.A. § 67.50.

See P.L. 19-06:4, 6-9 (amending 9 G.C.A. §§ 16.30, 25.15, 25.20, 19.20, 40.10 & 67.50).

In 1988, the Office of the Attorney General issued an opinion taking the position that it would be unconstitutional and inorganic to subject prisoners convicted of these offenses and sentenced prior to the enactment of Public Law 19-06 to the strictures of that law. See Att'y Gen. Op. LEG 88-0205. In reliance on that opinion, the Department of Corrections (DOC) has been permitting prisoners convicted of murder and other serious crimes, but sentenced prior to the enactment of P.L. 19-06 on August 26, 1987, to work and attend classes outside the confines of the prison walls.

III. Analysis

1. Ex Post Facto Clause

The United States Constitution forbids Congress from passing any ex post facto law. U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."). The Constitution also provides that "[n]o State shall . . . pass any . . . ex post facto Law". U.S. Const. art. I, § 10, cl. 1. The ex post facto clause applies in Guam through the Organic Act. Organic Act of Guam § 5(j), 48 U.S.C. § 1421b(j) ("No . . . ex post facto law . . . shall be enacted.").

The United States Supreme Court has defined as ex post facto "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); accord United States v. Gianelli, 543 F.3d 1178, 1183 (9th Cir. 2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1396, 173 L. Ed. 2d 593 (2009). "[T]he Ex Post Facto Clause does not prohibit every alteration in a prisoner's confinement that may work to his disadvantage." Gilbert v. Peters, 55 F.3d 237, 238 (7th Cir. 1995). "Only measures which are both retroactive and punitive fall within the purview of the clause." Id. (citing Collins v. Youngblood, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990)) (holding that law requiring sex offenders to submit blood sample prior to final discharge, parole or release is not punitive because purpose is to create database to aid law enforcement).

The Supreme Court generally looks to the purpose of a statute to determine whether it is punitive:

> If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

Trop v. Dulles, 356 U.S. 86, 96, 78 S. Ct. 590, 595-96, 2 L. Ed. 2d 630 (1958) (footnotes omitted); see Gilbert v. Peters, 55 F.3d 237, 238 (7th Cir. 1995) (noting that one significant factor in determining whether a law is punitive for purposes of the ex post facto clause is the purpose of the legislation).

In California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), the United States Supreme Court stated that the challenged law must increase the "measure of punishment for covered crimes." Id. at 509, 115 S. Ct. at 1603. However, where the law does not increase the length of a prisoner's sentence or change his parole options, but merely changes the method of the prison regime, there is no ex post facto violation. Thus, in order to state a valid ex post facto claim, a prisoner-plaintiff must establish that the change in procedures creates "more than a speculative risk of increasing punishment." Johnson v. Gomez, 92 F.3d 964, 967 (9th Cir. 1996), cert. denied, 520 U.S. 1242, 117 S. Ct. 1848, 137 L. Ed. 2d 1050 (1997).

P.L. 19-06 affects a prisoner's eligibility for work release and educational programs, but does not affect the length of a prisoner's sentence. The purpose of the restrictions in P.L. 19-06 is to promote public safety by confining prisoners convicted of dangerous crimes within the prison walls. Cf. Vargas v. Pataki, 899 F. Supp. 96, 99 (N.D.N.Y. 1995) ("The purpose of the amendment is not to increase the punishment for the crime, but to regulate current participation in the temporary work release program.") (citation omitted). Thus, P.L. 19-06 does not have a punitive purpose.

Moreover, the work release and educational programs are discretionary rehabilitation programs. The Attorney General has repeatedly emphasized that participation in such programs

constitutes a privilege, rather than a right. See Att'y Gen. Op. DOC 87-1294 ("Work release is a privilege and not a right."); Att'y Gen. Op. DOC 92-0628 (same); and Att'y Gen. Op. DOC 93-0997 (same); see also Vargas, 899 F. Supp. at 99 ("Participation in a temporary work release program . . . is a privilege, rather than a right."); People v. Miller, 79 A.D.2d 687, 688, 434 N.Y.S.2d 36, 37 (N.Y.A.D. 1980) (holding that "participation in [a work release] program is deemed a 'privilege', giving rise to no vested rights cognizable under the ex post facto doctrine"), cert. denied sub nom. Miller v. New York, 452 U.S. 919, 101 S. Ct. 3056, 69 L. Ed. 2d 423 (1981).

Thus, when DOC administrators deny a prisoner participation in the programs, this does not constitute an additional punishment for the underlying crime. Accordingly, because prisoners were not entitled to work release and educational programs under the old law, the application of P.L. 19-06 does subject them to an increase in punishment. Since prisoners cannot demonstrate that the application of P.L. 19-06 results in an actual increase in their punishment, the application of P.L. 19-06 does not violate ex post facto principles.

Cases decided in various jurisdictions since the passage of P.L. 19-06 uphold this view. For example, in Garcia v. DuBois, 1 Mass. L. Rptr. 322, 1993 WL 818721 (Mass. Super. Ct. 1993), the plaintiff, an inmate found guilty in a disciplinary hearing of conspiring to introduce illegal drugs into the prison, was sentenced to spend three years in the Departmental Disciplinary Unit (DDU), a restrictive correctional facility created in accordance with a new regulation promulgated after he had committed the conspiracy offense. Id. at *1. The plaintiff sued the commissioner of corrections, arguing that the regulation creating the DDU increased the punishment for his offense in contravention of the ex post facto clause. The court observed:

> [T]he plaintiff's confinement to the DDU merely requires the plaintiff to serve a portion of his sentence in a more restrictive setting. It does not affect the plaintiff's maximum or minimum prison sentence, his "good time" credits, his parole eligibility date, or his mandatory release date.
>
> . . . .
>
> [T]he length of the plaintiff's sentence has not been altered by his transfer to DDU. The only change to the plaintiff's circumstances is the location and conditions of his incarceration, a change which was made as a result of a serious disciplinary violation which threatened the safety and good order of a penal institution.

Id. at *2-3. Consequently, the court in Garcia found no violation of the ex post facto clause.

In Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996), the prisoner-plaintiff sued government officials after they terminated his participation in a work release program following the promulgation of new regulations which made prisoners convicted of sex crimes who remained in denial of their offense ineligible for work release. Id. at 1157. The district court denied his claim, holding that the regulation was "driven by safety concerns, and not by a desire to impose further punishment on prisoners." Id. at 1162. The First Circuit Court of Appeals noted "that the proper focus of ex post facto inquiry is whether the relevant change 'alters the

definition of criminal conduct or increases the penalty by which a crime is punishable.' " Id. (quoting California Dep't of Corrections v. Morales, 514 U.S. 499, 506 n.3, 115 S. Ct. 1597, 1602 n.3, 131 L. Ed. 2d 588 (1995)). However, "[t]he Ex Post Facto Clause does not encourage close scrutiny by the federal courts of ongoing procedural or operational changes in prisons to coordinate treatment, promote security, and protect the public safety." Id. at 1163.

The First Circuit concluded "that this change in the conditions determining the nature of his confinement while serving his sentence was an allowed alteration in the prevailing 'legal regime' rather than an 'increased penalty' for ex post facto purposes." Id. (citing, *inter alia*, Morales, 514 U.S. at 510 n.6, 115 S. Ct. at 1603 n.6). Since application of the new regulation to the prisoner-plaintiff did not affect the length of his sentence or his parole options, the new regulation did not violate the ex post facto clause. Dominique, 73 F.3d at 1163.

In Francis v. Fox, 838 F.2d 1147 (11th Cir. 1988), the corrections department review board relied on a newly enacted regulation to deny the plaintiff, a prisoner convicted of robbery and sentenced to twenty-five years in prison, participation in the state's work release program. The new regulation required the review board to consider the likelihood of negative reaction from the community. Id. at 1148. In fact, "negative community reaction was one of the reasons for the denial of [the plaintiff's] work-release application." Id. at 1150. The plaintiff filed suit, alleging that the application of the new regulation to him violated the constitutional prohibition against ex post facto laws. Id. at 1148-49. The district court denied him relief and he appealed. Id. at 1149.

The Eleventh Circuit Court of Appeals pointed out that an ex post facto law is one which "possesses three characteristics: it is a criminal or penal measure, retrospective, and disadvantageous to the offender because it may impose greater punishment." Id. (quoting Dufresne v. Baer, 744 F.2d 1543, 1546 (11th Cir. 1984), cert. denied, 474 U.S. 817, 106 S. Ct. 61, 88 L. Ed. 2d 49 (1985)). The new regulation at issue in Francis failed to meet these criteria because it did "not affect the maximum or minimum prison sentence a court may impose, the point at which the prisoner becomes eligible for parole, or his mandatory release date." Francis, 838 F.2d at 1150 (quoting Dufresne, 744 F.2d 1550). Thus, the appellate court found no violation of the ex post facto clause.

Finally, in Milhouse v. Levi, 548 F.2d 357 (D.C. Cir. 1976), the D.C. Circuit Court of Appeals pointed out:

> A furlough program, unlike parole, *is not an integral part of the sentencing* procedure. It is an internal rehabilitational program the denial of which cannot be said to be an element of the punishment attached to an inmate's initial conviction. Administrative regulations which adversely affect an inmate's eligibility for furloughs are not, therefore, subject to the constitutional prohibitions against ex post facto laws. To hold otherwise would severely limit the flexibility needed to implement innovative rehabitational programs.

Id. at 364 (emphasis added). The same is true in Guam when DOC officials control a prisoner's participation in work release or educational programs. See Lee v. Governor of State of N.Y., 87 F.3d 55, 60 (2d Cir. 1996) (holding "that the change at issue here—rendering certain prisoners ineligible for temporary release whereas previously they would have been eligible only with the (discretionary) permission of the Commissioner—is simply a change in the legal regime and is not an increase in punishment").

Based on the foregoing, P.L. 19-06's prohibitions against certain prisoners participating in work release and educational programs do not amount to ex post facto laws. Therefore, these restrictions must be applied equally to all inmates of DOC facilities.

2. Due Process Clause

The due process clause of the United States Constitution provides that "no person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. The Fourteenth Amendment extends due process protections to the States. U.S. Const. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."). Thus, the due process clause protects property and liberty interests arising from the due process clause itself or state law. Due process applies in Guam through the Organic Act. See Organic Act of Guam, § 5(e), 48 U.S.C. § 1421b(e) ("No person shall be deprived of life, liberty, or property without due process of law.").

In the Francis case cited above, the prisoner-plaintiff alleged, in addition to his ex post facto arguments, that the new regulation involving the likelihood of negative community reaction violated his due process rights. See Francis, 838 F.2d at 1148. The district court denied him relief and he appealed. Id. at 1149. The Eleventh Circuit Court of Appeals noted that due process rights may arise either from the Constitution or from state law. Id. (citing Hewitt v. Helms, 459 U.S. 460, 466, 103 S. Ct. 864, 868, 74 L. Ed. 2d 675 (1983)). The United States Supreme Court has held that prisoners have "no constitutional right to conditional release before expiration of [a] valid sentence". Francis, 838 F.2d at 1149 n.7 (citing Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103, 60 L. Ed. 2d 668 (1979)). As a consequence, the plaintiff in Francis could not assert a constitutionally based due process claim.

Next, the Eleventh Circuit observed that state law creates a due process-protected liberty interest in work release only if the law constrains official discretion. Francis, 838 F.2d at 1149. "When the statute is framed in discretionary terms there is not a liberty interest created." Id. (quoting Thomas v. Sellers, 691 F.2d 487, 489 (11th Cir. 1982) (per curiam)). The state law at issue in Francis provided the corrections board with the authority to promulgate regulations which would "permit" the corrections commissioner to extend the limits of prisoner's confinement. Francis, 838 F.2d at 1149. The regulations themselves specified selection criteria to determine which prisoners were eligible for work release, but did not categorically state who "must" receive work release. Thus, the discretion in selecting suitable prisoners lay with the

department of corrections. As a result, the plaintiff had no due process rights based on a state statute or regulation. Id. at 1150.

In the Dominique case cited above, the prisoner-plaintiff convicted of multiple sex crimes sued for reinstatement of his work release status after prison officials revoked it following the promulgation of new regulations making the plaintiff ineligible for work release. See Dominique, 73 F.3d at 1157. The district court denied him relief and he appealed, arguing that he had suffered due process violations. Id. at 1157-58. The First Circuit Court of Appeals noted that prisoners may have due process-protected liberty interests arising either from the Constitution or from state law, but pointed out that those interests are subject to the test articulated by the United States Supreme Court in Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995):

> [T]hese interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes *atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.*

Sandin, 515 U.S. at 484, 115 S. Ct. at 2300 (emphasis added, citations and parentheticals omitted).

The court in Dominique observed that the new regulation "did not in any way affect the duration of [plaintiff's] state sentence . . . [and] his transfer to a more secure facility subjected him to conditions no different from those ordinarily experienced by large numbers of other inmates serving their sentences in customary fashion." Dominique, 73 F.3d at 1160. Thus, any hardship the plaintiff had experienced "was not 'atypical' in relation to the ordinary incidents of prison life." Id. Although the court agreed that "there [wa]s a considerable difference between the freedoms [plaintiff] enjoyed when he was in work release status and the conditions of incarceration at a medium security facility", id., there was nothing atypical beyond the ordinary incidents of prison life in the plaintiff's changed circumstances under the new regulation. Based on the Sandin test, the court in Dominique concluded that the plaintiff had no liberty interest in his work release status and therefore its revocation did not violate his due process rights. Id. ("[T]he state's removal of [plaintiff's] measure of freedom, replacing it with confinement of a sort commonly associated with ordinary prison life, did not violate anything that can be termed a liberty interest.") (citing Klos v. Haskell, 48 F.3d 81 (2d Cir. 1995) (identified as "a pre-Sandin case denying relief on strikingly similar facts, cited with apparent approval in Sandin, 515 U.S. at [483], 115 S. Ct. at 2299-2300")).

In Asquith v. Volunteers of America, 1 F. Supp. 2d 405 (D.N.J. 1998), a prisoner-plaintiff sued state officials under 28 U.S.C. § 1983 for terminating him from a work release program. Asquith, 1 F. Supp. 2d at 408. Under the terms of the program, the plaintiff was prohibited from drinking alcohol while living in a halfway house and working as a mechanic off the premises. Id. at 406-07. He was terminated from the program for using alcohol and returned to confinement in prison. Id. at 407. After a subsequent disciplinary hearing absolved him of

alcohol use, he petitioned to return to the halfway house, but prison officials denied his request. Id. at 408. In his lawsuit, the plaintiff alleged due process violations stemming from the decision not to return him to the work release program, claiming that "he had a liberty interest, arising from the Due Process Clause itself, in continued participation in the work release program." Id. at 410.

The district court noted that "prisoners under confinement do not have inherent liberty interests in particular modes, places or features of confinement or custody." Id. at 410. The court pointed out that the plaintiff did not enjoy the same liberties as a parolee (who would be entitled to due process), because his

> liberty did not include many of the core values of unqualified liberty. . . . [His] life . . . was one of incarceration, strict limitation and certain sharply conscribed privileges. At all times he was considered an 'inmate.' His home was a penal institution. He might have resided beyond actual penitentiary walls, but he had not been 'released' from prison or liberated from institutional life. This fact alone is sufficient to doom his inherent liberty interest claim. . . . [His] freedoms were carved out of his status as an incarcerated person and were heavily qualified.

Id. at 412 (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)) (quotation marks and other citations omitted). Accordingly, the court in Asquith held that the plaintiff "did not have a liberty interest arising from the Due Process Clause in continued participation in his work release program." Asquith, 1 F. Supp. 2d at 413.

The district court in Asquith observed that "[c]ourts have not reached uniform results on the issue of whether the interest in remaining in a work release program implicates a State-created protected liberty interest." Id. at 416. However, the court in Asquith concluded that the

> reasoning and outcome [in Dominique] harmonize with Sandin better than the reasoning and outcome in the contrary cases. Dominique suggests that an inmate's subjective expectations concerning the conditions of his confinement, while relevant, should not be dispositive. Disappointed expectations are, after all, an ordinary incident of prison life.

Asquith, 1 F. Supp. 2d at 417-18 (characterizing prisoner-plaintiff's condition as "a species of incarceration").

In an earlier but still valid opinion, the Attorney General stated:

> Work release is a privilege and not a right. This privilege is granted at the discretion of the government and it can be unilaterally removed or modified. On Guam the work release privilege is a creature of statute (9 G.C.A. §§ 80.48; 80.49; 90.30) and can be abolished or modified by statute or executive order.

Att'y Gen. Op. DOC 87-1294.

Inmates sentenced prior to the enactment of P.L. 19-06 originally fell under the work release program regulations created by Executive Order No. 68-25, as amended by Executive Order No. 76-11. See Exec. Order Nos. 68-25 (1968) & 76-11 (1976). After the enactment of P.L. 19-06, Executive Order No. 87-23 repealed Executive Order Nos. 68-25 and 76-11 in their entirety. However, Executive Order No. 87-23 provided that "[i]nmates who were eligible under previous regulations and are now successfully participating in work release shall be allowed to participate in the Inmate Work Release Program." Exec. Order No. 87-23 § 1(b) (1987).

In declaring that previously qualified inmates enjoyed continued eligibility for work release under the new law, Executive Order No. 87-23 directly conflicted with the dictates of P.L. 19-06, which disqualified certain inmates from participating in work release who were eligible under the previous regulations. When an executive order conflicts with a duly enacted statute, the statute trumps the executive order. See In re Request of Governor Felix P. Camacho, 2004 Guam 10 ¶ 60 (holding that executive order which implements or supplements constitution or statutes has the force of law only if it is "not in conflict with any applicable law") (quoting 48 U.S.C. § 1422). Therefore, the portion of Executive Order No. 87-23 which permits the inmates disqualified by P.L. 19-06 to continue participating in work release is invalid. P.L. 19-06 permissibly modified inmate eligibility for work release and educational programs outside the prison walls, thereby rendering certain prisoners ineligible.

Moreover, neither P.L. 19-06 nor any of the executive orders placed any constraint on official discretion. The executive orders governing work release listed the eligibility criteria for work release, see Exec. Order Nos. 68-25 § 5; 76-11 § 4; and 87-23 §§ 4 & 5, but did not mandate that prisoners who met those criteria would have an unequivocal right to participate in the work release program. Both then and now, participation in the work release program depended on the prisoner's submission of an application, which had to pass the recommendation of a DOC board or committee, as well as the approval of the Director of the Department of Corrections. See, e.g., Exec. Order Nos. 68-25 §§ 2, 4, & 5; 76-11 §§ 2, 3 & 4; and 87-23 §§ 2, 3, & 5. In other words, the discretion in selecting suitable prisoners lies, as it always has, with DOC.

As in the Francis, Dominique, and Asquith cases cited above, prisoners confined in Guam DOC facilities do not have an inherent liberty interest in the particular modes, places or features of their confinement or custody. Section 80.48 of the Guam Criminal Code provides that the Director of Corrections or the court at the time of sentencing "may" permit an offender to continue in his regular employment or education, or, if he has none, secure "suitable" employment or education. 9 G.C.A. § 80.48(a). Thus, by law, DOC has the discretion to grant or deny any inmate the privilege of participating in work release and educational programs. Consequently, neither prior regulations nor current law create a liberty interest in the work release program.

P.L. 19-06 does not subject the prisoners to whom it applies to conditions different from those ordinarily experienced by other inmates serving their sentences in the customary fashion in DOC facilities. Moreover, the law does not eliminate their eligibility for work release and

educational programs altogether, but only for those programs taking place outside the prison walls. Inmates subject to P.L. 19-06 remain eligible for programs within the confines of the prison. Any "hardships" that such affected prisoners might experience are typical with respect to the ordinary incidents of prison life. Therefore, the restrictions of P.L. 19-06 do not violate prisoners' due process rights. As a result, P.L. 19-06 must be applied to all prisoners who fall within its strictures, including those sentenced prior to the enactment of P.L. 19-06.

3. Equal Protection Clause

Finally, the changes wrought by P.L. 19-06 do not implicate equal protection issues. See U.S. Const. amend. XIV, § 1("[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."); Organic Act of Guam § 5(n), 48 U.S.C. § 1421b(n) ("No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.").

In Vargas v. Pataki, 899 F. Supp. 96 (N.D.N.Y. 1995), a prisoner-plaintiff sued state officials under 42 U.S.C. § 1983, alleging that a law prohibiting prisoners convicted of homicide from participating in a work release program violated his right to equal protection. Vargas, 899 F. Supp. at 98. Noting that prisoners do not comprise a suspect class and that participation in a work release program does not constitute a fundamental right, the district court applied the rational relationship test, asking whether the classification at issue bore a rational relationship to a legitimate state interest. Id. at 98-99 (citing City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985)). Since the law in Vargas was rationally related to the goal of minimizing the risk to public safety from work release programs, application of the law to the plaintiff did not constitute a denial of his right to equal protection. Vargas, 899 F. Supp. at 99.

Like the prisoner-plaintiff in Vargas, DOC prisoners do not fall into a suspect class and have no fundamental right to participate in the work release program. Like the law at issue in Vargas, P.L. 19-06 prohibits previously eligible prisoners from participating in the work release program. Like the law at issue in Vargas, the goal of P.L. 19-06 is to minimize the risk to public safety from the work release program. It therefore follows that P.L. 19-06, like the law in Vargas, meets the rational relationship test. As a result, application of P.L. 19-06 to DOC prisoners does not deny them equal protection of the laws. In consequence, P.L. 19-06 must be applied uniformly to all prisoners, not just those sentenced after its enactment.

IV. Conclusion

The prohibition on work release and educational programs on prisoners convicted of certain offenses as set forth in P.L. 19-06 does not offend due process, equal protection, or ex post facto principles. Thus, the law applies to all prisoners confined in Guam DOC facilities, regardless of their sentencing date. As a consequence, all prisoners, even those sentenced prior to the enactment of P.L. 19-06 on August 26, 1987, are ineligible for work release and educational programs outside the confines of the prison.

This letter is issued as an opinion of the Attorney General and supersedes Attorney General Opinion LEG 88-0205, "Application of P.L. 19-6 to DOC inmates," in its entirety. The Department of Corrections shall comply with the dictates of this opinion forthwith. For a faster response to any inquiry about this letter, please use the reference number shown above.

Sincerely,

Alicia G. Limtiaco

Alicia G. Limtiaco
Attorney General