



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-5

Chairman Robert Gilliland
Ms. Kelly Doyle
Mr. Adam Luck
Mr. Allen McCall
Mr. Larry Morris
Oklahoma Pardon and Parole Board
2915 North Classen Blvd.
Oklahoma City, OK 73106

March 13, 2020

Dear Chairman Gilliland and Members of the Board,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

If a person is eligible for parole as an “aging prisoner” under 57 O.S.Supp.2019, § 332.21, but is serving consecutive sentences imposed for multiple criminal convictions, may the Pardon and Parole Board grant parole for sentence(s) yet to be served?

I.
BACKGROUND

A. Parole eligibility for persons serving consecutive sentences.

Under the Oklahoma Constitution, the Governor, upon recommendation from the Pardon and Parole Board (the “Board”), has the authority to grant parole to persons convicted of criminal acts. *See* OKLA. CONST. art VI, § 10. The Constitution also permits the Board itself to grant parole to persons convicted of certain nonviolent offenses:

The Pardon and Parole Board by majority vote shall have the power and authority to grant parole for nonviolent offenses after conviction, upon such conditions and with such restrictions and limitations as the majority of the Pardon and Parole Board may deem proper or as may be required by law.

Id. Under the same provision, it is the role of the Legislature to “prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole.” *Id.*

Pursuant to this authority, the Legislature created a framework for determining when an inmate is eligible for parole consideration. *See* 57 O.S.Supp.2019, § 332.7.¹ Generally speaking, the framework consists of a minimum percentage of the sentence that an inmate must serve before parole eligibility, taking into account the inmate’s crime and the date it was committed. *See id.*

If a person is convicted of two or more crimes, the sentencing judge may order the sentences to be served consecutively or concurrently.² *See* 22 O.S.2011, § 976. For purposes of parole, the eligibility of an inmate sentenced to consecutive terms of imprisonment is addressed by Title 57, Section 332.7(I), which provides as follows:

Inmates sentenced to consecutive sentences shall not be eligible for parole consideration on any such consecutive sentence until one-third (1/3) of the consecutive sentence has been served or where parole has been otherwise limited by law, until the minimum term of incarceration has been served as required by law. Unless otherwise ordered by the sentencing court, any credit for jail time served shall be credited to only one offense.

57 O.S.Supp.2019, § 332.7(I).³ This means that an inmate serving consecutive sentences must serve at least one-third—or some other minimum amount where applicable—of the first sentence before he or she is eligible for parole. But if parole is granted as to that sentence, the inmate is not released from confinement. Rather, the inmate then begins serving the next sentence, for which he or she will again be eligible for parole subject to the same restrictions and so on for each consecutive sentence imposed. *See, e.g., Detwiler v. State*, 2019 OK CR 20, ¶ 3, 449 P.3d 873, 876 (Lewis, P.J., dissenting); *Burnett v. Fallin*, 754 Fed.Appx. 696, 699 n.2 (10th Cir. 2018).

B. Parole eligibility for “aging prisoners.”

Separate from the general framework for parole eligibility discussed above, the Legislature has created parole programs for specific types of inmates. Relevant to your request, in 2018 the Legislature enacted a separate parole provision for “aging prisoners,” defined as those who are 60

¹ Known as the Forgotten Man Act, Section 332.7 was originally enacted to ensure that “every inmate must be considered for parole on or before the expiration of one-third of his maximum sentence.” *Shirley v. Chestnut*, 603 F.2d 805, 806 (10th Cir. 1979).

² The Oklahoma Court of Criminal Appeals has described the administration of consecutive sentences in the following terms:

Where there are one or more convictions and judgments thereon, the accused should be incarcerated upon the first conviction for which a commitment is issued for the period of time therein named. At the end of that period of confinement, the imprisonment should commence upon the second conviction and terminate in like manner, and so on for the third and subsequent convictions.

Ex parte Grimes, 1950 OK CR 94, ¶ 5, 221 P.2d 679, 681 (quoting *Ex parte Tillman*, 1945 OK CR 134, ¶ 0, Syl. 1, 164 P.2d 649, 650).

³ Prior to the enactment of Subsection (I) in 2013, *see* 2013 Okla. Sess. Laws ch. 124, § 2, Section 332.7 did not specifically address how the Board was to calculate parole eligibility for inmates serving consecutive sentences. This led to some ambiguity in interpreting mandatory minimum calculations for such offenders. *See* 2001 OK AG 47.

years old or older. *See* 57 O.S.Supp.2019, § 332.21. Section 332.21 provides, in pertinent part, that the Board “is empowered to parole” an aging prisoner who “[h]as served, in actual custody, the shorter of ten (10) years of the term or terms of imprisonment, or one-third (1/3) of the total term or terms of imprisonment.” *Id.* § 332.21(A)(2).⁴

II. DISCUSSION

Your question relates to the Board’s authority to grant parole to “aging prisoners” who are serving consecutive sentences. As explained above, under Section 332.7, which sets forth the general eligibility framework for inmates seeking parole, an inmate is not eligible for parole of one in a series of consecutive sentences until one-third of that sentence, or some other minimum term, has been served. 57 O.S.Supp.2019, § 332.7(I). If parole is granted as to that sentence, the inmate would then begin serving the next, and it is not until the inmate has served the statutory minimum term of the final consecutive sentence that he or she is eligible for release. But in authorizing the Board to separately grant parole to certain “aging prisoners,” Section 332.21 measures consecutive sentences together, such that an aging prisoner who has served the shorter of 10 years or one-third of his or her total “term or terms of imprisonment”⁵ may be paroled. *Id.* § 332.21.

For certain aging prisoners serving consecutive sentences, there may be instances where these two statutes may appear to be in conflict. Consider, for example, a scenario involving a 60-year-old inmate who has served 10 years in actual custody spanning two consecutive sentences, but has yet to begin serving his third and final consecutive sentence. Under Section 332.7(I), the inmate is not eligible for parole consideration on the third sentence because he has not served one-third, or some other minimum portion, of that sentence. But Section 332.21 specifically authorizes the Board to parole the same inmate, assuming he has satisfied the other criteria, because he has served 10 years of his “term or terms of imprisonment.” Thus, you ask whether the Board has the authority under Section 332.21 to grant parole to an eligible “aging prisoner” who is serving consecutive sentences, even if the inmate has yet to begin serving one or more of those sentences.

When considering the interaction between two statutory provisions, they “are to be construed so as to render them consistent with one another.” *Sharp v. Tulsa Cty. Election Bd.*, 1994 OK 104, ¶ 11, 890 P.2d 836, 840. Accordingly, we must “reconcile the different provisions of statutes, as far as practicable, to make them not only consistent and harmonious, but also to give intelligent effect to each.” *Id.* *See also Glasco v. State*, 2008 OK 65, ¶ 17, 188 P.3d 177, 184 (“Where a plain reading leads to inconsistency between the provisions in statutes on the same subject, the

⁴ Aging prisoners convicted of certain crimes are not eligible for parole under Section 332.21. *See* 57 O.S.Supp.2019, § 332.21(A)(4), (5). Even for those who are eligible, the Board must determine that the aging prisoner “poses minimal public safety risks warranting continued imprisonment.” *Id.* § 332.21(A)(3).

⁵ It bears mentioning that Section 332.21 employs the word “total” to modify “term or terms of imprisonment” in the second clause, but not the first: “The [Board] is empowered to parole a prisoner who . . . [h]as served, in actual custody, the shorter of ten (10) years of *the term or terms of imprisonment*, or one-third (1/3) of *the total term or terms of imprisonment*.” 57 O.S.Supp.2019, § 332.21(A)(2). It is not clear what the Legislature intended when it made this choice, but we do not view this difference as affecting the meaning of the statute. Even without the word “total” preceding it, the phrase “term or terms of imprisonment” indicates that consecutive sentences should be considered together as a single block of time.

conflicting provisions dealing with the same subject will be harmonized to give effect to both.”); *Walker v. State*, 1998 OK CR 14, ¶ 6, 953 P.2d 354, 356 (“When the legislature enacts two provisions regulating the same subject matter and those provisions appear to conflict, this Court should give effect to both, if doing so does not defeat legislative intent.”).

Looking first at Section 332.7, it operates primarily as a general statute that sets forth various conditions for parole eligibility, post-parole supervision requirements, and procedural provisions for the Board to follow in considering inmates for parole. Other than the recent addition of a process by which the Board may grant “administrative parole,” *see* 57 O.S.Supp.2019, § 332.7(Q)-(W), Section 332.7 says little about the Board’s discretionary authority.

By contrast, Section 332.21 explicitly gives the Board a new discretionary power to grant parole to a certain subset of inmates. *See* 57 O.S.Supp.2019, § 332.21(A) (“The Pardon and Parole Board is **empowered to parole** . . .” (emphasis added)). The provision includes its own eligibility requirements and sets forth the Board’s procedures for evaluating requests made under that provision. In so structuring Section 332.21, the Legislature created a new grant of authority that is separate from the requirements of Section 332.7.

This conclusion is further reinforced by reference to the history of House Bill 2286, which created Section 332.21, as it made its way through the legislative process. *See State ex rel. Cartwright v. Georgia-Pac. Corp.*, 1982 OK 148, ¶ 34, 663 P.2d 718, 724 (“[A]ny doubt about the meaning of a statute may be resolved by reference to its history.”); *State ex rel. Rucker v. Tapp*, 1963 OK 37, ¶ 14, 380 P.2d 260, 265 (“In determining what meaning should be given” to particular statutory language, “we may properly seek resort to the history of [the statute.]”). As it was being considered by the Legislature, several iterations of H.B. 2286 included a shorter provision that would have created a parole option for “aging prisoners.” *See, e.g.*, H.B. 2286, 56th Legislature, 1st Session, § 7 (House Floor Version). However, in those versions of the bill, the provision was found in a section numbered 332.7b, placing the language directly after the general parole statute. *Id.* More importantly, like Section 332.7, the proposed provision spoke in terms of prisoner eligibility; it did not grant a new discretionary authority to the Board. Indeed, the provision stated that such prisoners, should they meet the eligibility requirements set forth therein, “shall be eligible for parole **pursuant to Section 332.7 of Title 57** of the Oklahoma Statutes[.]” *Id.*

The fact that the Legislature abandoned this approach and instead created a separate parole program for “aging prisoners” as a new power of the Board suggests that it did not intend the eligibility requirements of Section 332.7 to affect the Board’s authority to grant parole under Section 332.21. Instead, they are best interpreted as independent of one another. By construing them this way, both provisions “remain viable and effective legislative pronouncements. The delimitation of the scope of each statute resolves any conflict between the two.” *Upton v. State*, 2000 OK 46, ¶ 12, 9 P.3d 84, 88.

It is therefore, the official Opinion of the Attorney General that:

Parole eligibility for “aging prisoners” pursuant to 57 O.S.Supp.2019, § 332.21 is measured by aggregating the inmate’s term or terms of imprisonment, so the Board may grant parole to an inmate serving consecutive sentences who is otherwise eligible under 57 O.S.Supp.2019, § 332.21 even if the inmate has yet to begin serving one or more of the consecutive sentences.



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