

OPINION NO. 93-073**Syllabus:**

1. The Department of Rehabilitation and Correction was not empowered to promulgate the former provision of [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-05(D)(1)(d) at 712 and 713 that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years, and the provision is therefore invalid.
2. No individual serving a life sentence consecutive to another sentence of imprisonment has been granted, pursuant to the former provision of [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code

5120:1-1-05(D)(1)(d) at 712 and 713, a right of eligibility to be considered for parole after serving fifteen years.

3. Pursuant to R.C. 2967.13(G), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, becomes eligible for parole after serving twenty full years of imprisonment, not after fifteen years.
4. Pursuant to R.C. 2967.13(H), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03 becomes eligible for parole after serving ten full years of imprisonment, plus twenty years, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, rather than after only fifteen years.
5. Pursuant to R.C. 2967.13(I), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life with parole eligibility after serving twenty full years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03 becomes eligible for parole after serving thirty full years of imprisonment, not after fifteen years.
6. Pursuant to R.C. 2967.13(J), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03 becomes eligible for parole after serving forty full years of imprisonment, not after fifteen years.
7. Pursuant to R.C. 2967.13, an individual serving a life sentence for the forcible rape of a juvenile consecutive to another life sentence, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible for parole after serving ten full years of imprisonment, plus the number of years before parole eligibility that pertains to the other life sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable, rather than after only fifteen years.
8. Pursuant to R.C. 2967.13, an individual serving a life sentence for the forcible rape of a juvenile consecutive to an indefinite sentence of imprisonment becomes eligible for parole after serving ten full years of imprisonment, plus the minimum term or terms that pertain to the indefinite sentence, diminished as provided in R.C. 2967.19, R.C.

2967.193, R.C. 5145.11, and R.C. 5145.12, rather than after only fifteen years.

To: Reginald A. Wilkinson, Director, Department of Rehabilitation and Correction, Columbus, Ohio

By: Lee Fisher, Attorney General, December 30, 1993

You have requested an opinion regarding the parole eligibility of an individual serving a life sentence for the forcible rape of a juvenile¹ consecutive to another sentence of imprisonment. By way of background, your letter refers to [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-05(D)(1)(d) at 712 and 713, in effect between January 16, 1984, and February 29, 1988,² which provided, in pertinent part, as follows:

[W]hen any consecutive or aggregated sentence includes a sentence for a crime, other than aggravated murder or murder, punishable by a minimum sentence of life imprisonment, the inmate shall be eligible for parole pursuant to rule 5120:1-1-03³ of the Administrative Code after serving the sum of all terms of actual incarceration imposed pursuant to section 2929.71⁴ of the Revised Code, plus the aggregate of the designated time for parole eligibility for the life sentence plus the designated time for parole eligibility for any other crimes. *The inmate's term of incarceration prior to parole eligibility*, excluding any terms of actual incarceration [imposed] pursuant to section 2929.71 of the Revised Code, *shall not exceed fifteen years.* (Emphasis and footnotes added.)

Under this rule, the term of incarceration prior to parole eligibility of an individual serving a life sentence for the forcible rape of a juvenile consecutive to another sentence of imprisonment, excluding a sentence of imprisonment for aggravated murder or murder and any terms of actual incarceration imposed pursuant to R.C. 2929.71, must not exceed fifteen years.

¹ The term "juvenile," as used throughout this opinion, denotes a person less than thirteen years of age. See generally R.C. 2907.02 (setting forth the offense of, and the penalty of life imprisonment for, the forcible rape of a person less than thirteen years of age).

² [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-05 at 712 and 713 was repealed on November 30, 1987, see 1987-1988 Monthly Record, vol. 1 at 566, and on February 29, 1988, see 1987-1988 Monthly Record, vol. 2 at 1016.

³ Former rule [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-03 at 710-12 set forth the minimum term of imprisonment that an individual was required to serve before becoming eligible for parole. This rule was repealed on November 30, 1987. See [1987-1988 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-03 at 565 and 566. Some of the provisions of former rule 5120:1-1-03, however, appear presently in 17 Ohio Admin. Code 5120-2-05.

⁴ R.C. 2929.71 requires a court to impose a term of actual incarceration of three years in addition to imposing a life sentence or an indefinite term of imprisonment when the offense involves a firearm.

You state further that,

[t]he fifteen year "cap" was placed into the Administrative Rule by the Adult Parole Authority because [R.C. 2967.13] failed to articulate how parole eligibility was to be calculated for an offender serving ... a life sentence consecutive to another sentence. A number of inmates who were admitted prior to February 29, 1988 had their parole eligibility calculated on the basis of fifteen full years pursuant to Administrative Rule 5120:1-1-05 and are still present in our system.

Consequently, you ask the following:

1. Since [R.C. 2967.13] did not articulate the manner in which parole eligibility should be calculated for an offender serving a life sentence for [forcible] rape of a [juvenile] consecutive to another sentence, did the Adult Parole Authority have the authority to establish through an Administrative Rule a "cap" of fifteen full years before parole eligibility?
2. If the Adult Parole Authority did have the authority to promulgate such a rule, what is the effect of the repeal of such a rule? To which, if any, should the fifteen year cap continue to be applied?
 - A. Those offenders committed to the Department on or before February 29, 1988?
 - B. Those offenders who committed their crimes on or before February 29, 1988?
3. If the Adult Parole Authority did not have the authority to establish a fifteen year ["cap,"] does an inmate who committed [his crimes,] or [who] was admitted to [the Department,] between the time the rule was promulgated and time it was repealed, have a right to be considered for parole pursuant to the 15 year cap established in the rule?
4. If a person is serving a life sentence for the offense of [forcible] rape of a [juvenile] consecutive to an indefinite sentence or another type of life sentence, is the offender required to serve ten full years plus the time necessary to be eligible for parole on the other offense before becoming eligible for parole?

Authority of the Department of Rehabilitation and Correction to Promulgate Rules Concerning Parole Eligibility

An answer to your first question requires an examination of the statutes concerning the granting of paroles in effect since January 16, 1984, to determine whether the Department of Rehabilitation and Correction ("Department") was authorized to promulgate a rule that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence for the forcible rape of a juvenile consecutive to another sentence of imprisonment must not exceed fifteen years. Pursuant to R.C. 2967.03 as it existed on January 16, 1984, the Department was authorized to "grant a parole to any prisoner, if in its judgment there [was] reasonable ground to believe that, if ... the prisoner [was] paroled, such action would further the interests of justice and be consistent with the welfare and security of society." 1964 Ohio

Laws, Part II, 151 (Am. Sub. H.B. 28, eff. March 18, 1965). In order to discharge its responsibilities relating to the granting of parole to individuals, the Department was further authorized to make rules for the proper execution of its powers. 1971-1972 Ohio Laws, Part II, 1724, 1794 (Am. Sub. H.B. 494, eff. July 1, 1972) (setting forth the provisions of R.C. 5120.42 in effect on January 16, 1984; R.C. 5120.42 requires the Department to make rules for the proper execution of its powers). It is, thus, clear that since January 16, 1984, the Department has had the power to promulgate administrative rules concerning the granting of paroles.⁵ See generally 1927 Op. Att'y Gen. No. 556, vol. II, p. 918.

That the Department is empowered to promulgate rules governing the granting of paroles, however, does not confer upon the Department an unlimited authority to declare the general policy of the state with respect to parole eligibility. See *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 478-79, 166 N.E. 407, 411-12 (1929), *aff'd*, 281 U.S. 74 (1930). Rather, the rules of the Department "may facilitate the operation of what has been enacted by the General Assembly but may not add to or subtract from the legislative enactment." *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 102, 56 N.E.2d 265, 281 (1944), *cert. denied*, 324 U.S. 878 (1944); *accord Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398, 407-08, 52 N.E.2d 738, 742-43 (1944). Insofar as the purpose of administrative rulemaking is to facilitate the implementation of legislative policy, the Department may not promulgate rules that are arbitrary, unreasonable, or in conflict with the statutory law of the state. *Carroll v. Department of Admin. Serv.*, 10 Ohio App. 3d 108, 460 N.E.2d 704 (Franklin County 1983); see also *Williams v. Morris*, 62 Ohio St. 3d 463, 468, 584 N.E.2d 671, 675 (1992) ("when a statute is in conflict with a rule, the rule must yield"). The Department's rulemaking power is thus subject to the limitations the General Assembly enacts with regard to the granting of paroles. See 1936 Op. Att'y Gen. No. 5737, vol. II, p. 894 at 900; 1933 Op. Att'y Gen. No. 106, vol. I, p. 111 at 118.

Parole Eligibility Provisions of R.C. 2967.13

Because the Department may not promulgate a rule that conflicts with a statute, it must be determined whether former rule 5120:1-1-05(D)(1)(d) conflicts with R.C. 2967.13, the statute that addresses parole eligibility for Ohio prisoners. R.C. 2967.13, as in effect on January 16, 1984, provided:

(A) A prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes eligible for parole at the expiration of his minimum term, diminished as provided in section 2967.19 of the Revised Code.

(B) A prisoner serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, becomes eligible for parole after serving a term of fifteen full years.

⁵ R.C. 2967.03 has been amended since January 16, 1984. See 1987-1988 Ohio Laws, Part I, 35, 42 (Am. Sub. S.B. 6, eff. June 10, 1987); 1983-1984 Ohio Laws, Part I, 472, 489 (Sub. S.B. 172, eff. Sept. 26, 1984). Neither of those amendments, however, affected the authority of the Department of Rehabilitation and Correction to grant paroles, and R.C. 5120.42 presently authorizes the Department to make rules for the proper execution of its powers. As a result, the Department is empowered currently to promulgate administrative rules concerning the granting of paroles.

(C) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code becomes eligible for parole after serving a term of twenty years, diminished as provided in section 2967.19 of the Revised Code.

(D) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty full years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code becomes eligible for parole after serving a term of twenty full years. A person serving such a sentence is not entitled to any diminution of the twenty full years that he is required to serve before parole eligibility.

(E) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code becomes eligible for parole after serving a term of thirty full years. A person serving such a sentence is not entitled to any diminution of the thirty full years that he is required to serve before parole eligibility.

(F) A prisoner serving a sentence of imprisonment for life for an offense other than the offense of first degree murder or aggravated murder, which sentence was imposed prior to October 19, 1981, serving a term of imprisonment for life for rape or felonious sexual penetration, or serving a minimum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, imposed under any former law of this state, becomes eligible for parole after serving a term of ten full years' imprisonment.

(G) A prisoner serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, consecutively to any other term of imprisonment becomes eligible for parole after serving fifteen full years as to each such sentence of life imprisonment, plus the minimum term or terms, diminished as provided in section 2967.19 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in section 2967.19 of the Revised Code, of the other sentences consecutively imposed, except that in no case shall the total number of years that such a person is required to serve before becoming eligible for parole exceed twenty years of imprisonment.

(H) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, consecutively to any other term of imprisonment becomes eligible for parole after serving twenty years as to each such sentence of life imprisonment, plus the minimum term or terms, or in the case of another type of life sentence, the number of years before parole eligibility, of the other sentences consecutively imposed, all as diminished as provided in section 2967.19 of the Revised Code.

(I) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty full years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, consecutively to any other term of imprisonment becomes eligible for parole after serving twenty full years as to each such sentence of life imprisonment, plus the minimum term or terms, diminished as provided in section 2967.19 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility,

diminished as provided in section 2967.19 of the Revised Code, of the other sentences consecutively imposed.

(J) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, consecutively to any other term of imprisonment becomes eligible for parole after serving thirty full years as to each such sentence of life imprisonment, plus the minimum term or terms, diminished as provided in section 2967.19 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in section 2967.19 of the Revised Code, of the other sentences consecutively imposed.

(K) A prisoner serving a definite term of imprisonment for a felony of the third or fourth degree shall be released from imprisonment when he has served the full term of his definite sentence, diminished as provided in section 2967.19 of the Revised Code, and may be released from imprisonment pursuant to section 2967.18 or 2967.31 of the Revised Code.

1983-1984 Ohio Laws, Part I, 583, 607-08 (Am. S.B. 210, eff. July 1, 1983). *See generally* R.C. 2967.19 (an individual confined in a state penal or reformatory institution is entitled, by virtue of his good behavior, to have his minimum sentence reduced and his date for parole consideration accordingly advanced).

As you note in your first question, the foregoing version of R.C. 2967.13 does not state explicitly when an individual serving a life sentence for the forcible rape of a juvenile consecutive to another sentence of imprisonment, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, *see* R.C. 2967.13(G)-(J), becomes eligible for parole.⁶ Consequently, it is uncertain whether the General Assembly intended R.C. 2967.13 to grant a right of eligibility to be considered for parole to an individual in that particular situation.

It is a fundamental rule of statutory interpretation that an ambiguous statute is to be construed in a manner that carries out the intention of the General Assembly. *Cochrel v. Robinson*, 113 Ohio St. 526, 149 N.E. 871 (1925) (syllabus, paragraph four). In determining the intention of the General Assembly, it is appropriate to consider, *inter alia*, the objective of the statute and the consequences of a particular construction. R.C. 1.49; *see also Harris v. Van Hoose*, 49 Ohio St. 3d 24, 26, 550 N.E.2d 461, 462 (1990). Resolution of your first question, therefore, requires an application of these principles to R.C. 2967.13 to determine initially

⁶ The General Assembly has amended R.C. 2967.13 several times since 1983. *See* Sub. S.B. 331, 119th Gen. A. (1992) (eff. Nov. 13, 1992); 1987-1988 Ohio Laws, Part III, 4853 (Sub. H.B. 708, eff. April 19, 1988); 1987-1988 Ohio Laws, Part II, 3100 (Am. Sub. H.B. 261, eff. Nov. 1, 1987); 1987-1988 Ohio Laws, Part I, 1761 (Am. H.B. 5, eff. Sept. 28, 1987). None of the amended versions of R.C. 2967.13, however, have set forth when an individual serving a life sentence for the forcible rape of a juvenile consecutive to another sentence of imprisonment, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, is eligible to be considered for parole.

whether the General Assembly intended to grant a right of eligibility to be considered for parole to an individual serving a life sentence for the forcible rape of a juvenile consecutive to another sentence of imprisonment, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03.

In Ohio, as in most other states, an individual "has no constitutional right to parole. It is conferred as a matter of grace--a privilege and not a right." *DiMarco v. Greene*, 385 F.2d 556, 563 (6th Cir. 1967); accord *State ex rel. Ubienski v. Shoemaker*, 17 Ohio St. 3d 145, 146, 478 N.E.2d 768, 769 (1985); see also *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) ("[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"). The General Assembly, however, has, in R.C. Chapter 2967, provided a comprehensive statutory scheme for the granting of paroles. Under this statutory scheme, an individual is not granted a right to be paroled, *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979); *State ex rel. Blake v. Shoemaker*, 4 Ohio St. 3d 42, 446 N.E.2d 169 (1983), but is granted, pursuant to R.C. 2967.13 and R.C. 2967.25,⁷ a right of eligibility to be considered for parole. *State v. Packer*, 16 Ohio App. 2d 171, 174, 243 N.E.2d 115, 117 (Marion County 1969); *State v. Hawkins*, 97 Ohio App. 477, 485-86, 124 N.E.2d 453, 458 (Belmont County 1954); 1936 Op. No. 5737 at 901. R.C. 2967.13 and R.C. 2967.25 thus evidence a legislative intent to grant a right of eligibility to be considered for parole to all imprisoned individuals,⁸ except those individuals sentenced to

⁷ R.C. 2967.25, as in effect on January 16, 1984, provided: "A person serving several indeterminate sentences consecutively becomes eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences diminished as provided in section 2967.19 of the Revised Code." 1971-1972 Ohio Laws, Part II, 1866, 2006 (Am. Sub. H.B. 511, eff. Jan. 1, 1974). R.C. 2967.25 has not been amended since January 16, 1984.

⁸ R.C. 2967.13(G)-(J) expressly grant a right of parole eligibility to an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03. On the other hand, R.C. 2967.13 does not, by its express terms, grant a right of eligibility to be considered for parole to an individual serving a life sentence for the forcible rape of a juvenile consecutive to (1) a sentence of imprisonment for a felony offense that does not impose a life sentence, or (2) another life sentence, excluding a sentence of imprisonment for life for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or imposed pursuant to R.C. 2929.022 or R.C. 2929.03. It is, thus, possible that under R.C. 2967.13 an individual serving cumulatively longer sentences would have a right to be considered for parole, whereas an individual serving cumulatively shorter sentences would not be eligible to be considered for parole. For example, an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life imposed pursuant to R.C. 2929.022 would have a right to be considered for parole, whereas an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for a felony offense that does not impose a life sentence would not be eligible to be considered for parole.

It is axiomatic that, if it fairly permits, or unless restricted by the clear language thereof, a statute is to be construed so as to avoid unreasonable consequences. *In re Little*

death pursuant to R.C. 2929.022, R.C. 2929.03, and R.C. 2929.04. *See generally State v. Packer*, 16 Ohio App. 2d at 174, 243 N.E.2d at 117 (although an individual is granted a right of eligibility to be considered for parole, "the granting of parole is within the discretion of the adult parole authority").

Moreover, in *State ex rel. Gregory v. Stein*, No. 1572 (Ct. App. Scioto County May 6, 1986) (unreported), the Fourth District Court of Appeals concluded that an individual serving two consecutive life sentences for the forcible rape of a juvenile is eligible for parole after serving twenty full years. In so concluding, the court stated:

Divisions (G), (H), and (I) of [R.C. 2967.13] provide that if a prisoner sentenced to life imprisonment under the new death penalty laws is also sentenced to another consecutive term or terms, the parole eligibility times must be added together. Although the rape provision in division (F) [of R.C. 2967.13] is silent as to whether the eligibility periods for consecutive terms should be added together, *common sense dictates that a person serving two consecutive terms will be eligible for parole after serving two consecutive ten year parole eligibility terms*. We find nothing contrary in the statute.

Id., slip op. at 5 (emphasis added); *accord* 1990 Op. Att'y Gen. No. 90-090 (determining that an individual who is convicted on more than one count of forcible rape of a juvenile and who is sentenced to serve a term of imprisonment for life with respect to each count is eligible for parole after serving ten full years of imprisonment with respect to each such term imposed if the terms of imprisonment for life are to be served consecutively). *See generally* R.C. 2967.13(F) (an individual serving a sentence of imprisonment for life for rape becomes eligible for parole after serving a term of ten full years of imprisonment).

Thus, the court in *State ex rel. Gregory v. Stein* examined the language of R.C. 2967.13 and determined that, insofar as R.C. 2967.13 requires that the parole eligibility periods of an individual serving a life sentence (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, consecutive to an indefinite sentence of

Printing Co., 4 Ohio St. 3d 214, 216, 448 N.E.2d 152, 154 (1983); *Gulf Oil Corp. v. Kosydar*, 44 Ohio St. 2d 208, 339 N.E.2d 820 (1975) (syllabus, paragraph two). There is no language in R.C. 2967.13 specifically prohibiting the granting of a right of eligibility to be considered for parole to an individual serving a life sentence for the forcible rape of a juvenile consecutive to (1) a sentence of imprisonment for a felony offense that does not impose a life sentence, or (2) another life sentence, excluding a sentence of imprisonment for life for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or imposed pursuant to R.C. 2929.022 or R.C. 2929.03. Moreover, it is possible to construe R.C. 2967.13 as granting such a right to the aforementioned individuals, thereby avoiding a construction that leads to the unreasonable consequences described above. *See generally State ex rel. Gregory v. Stein*, No. 1572 (Ct. App. Scioto County May 6, 1986) (unreported) (an individual serving two consecutive terms of imprisonment for life for the forcible rape of a juvenile is eligible for parole consideration after serving two consecutive ten year parole eligibility terms). Accordingly, it appears that R.C. 2967.13 fairly permits granting a right of eligibility to be considered for parole to all imprisoned individuals, except those individuals sentenced to death pursuant to R.C. 2929.022, R.C. 2929.03, and R.C. 2929.04.

imprisonment, must be added together, the General Assembly intended that an individual serving consecutive terms of imprisonment for life for the forcible rape of a juvenile be eligible for parole consideration after serving ten full years of imprisonment as to each such life sentence. *Accord* Op. No. 90-090. In view of the language of R.C. 2967.13(F)-(J) and the analysis and holding in *State ex rel. Gregory v. Stein*, it is reasonable to conclude that the General Assembly also intended that an individual serving a life sentence for the forcible rape of a juvenile consecutive to another life sentence, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible for parole after serving ten full years of imprisonment, plus the number of years before parole eligibility that pertains to the other life sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable. Similarly, an individual serving a life sentence for the forcible rape of a juvenile consecutive to an indefinite sentence of imprisonment becomes eligible for parole after serving ten full years of imprisonment, plus the minimum term or terms that pertain to the indefinite sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12.⁹

Former Rule 5120:1-1-05(D)(1)(d) Conflicts with R.C. 2967.13

A review of the foregoing discloses that the former provision of rule 5120:1-1-05(D)(1)(d) that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years conflicts with R.C. 2967.13. As noted above, pursuant to R.C. 2967.13, such an individual becomes eligible for parole after serving ten full years of imprisonment, *see* R.C. 2967.13(F), plus the minimum term or terms, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable. Hence, it is possible that an individual would not be eligible for parole under R.C. 2967.13 after serving fifteen years of imprisonment. Former rule 5120:1-1-05(D)(1)(d), therefore, is inconsistent with R.C. 2967.13 to the extent that the rule conferred upon individuals serving a life sentence consecutive to another sentence of imprisonment a right to be considered for parole earlier than permitted by R.C. 2967.13. Because the former provision of rule 5120:1-1-05(D)(1)(d) that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years conflicts with R.C. 2967.13, the Department was not empowered to promulgate that provision. *See University of Toledo v. Heiny*, 30 Ohio St. 3d 143, 146, 507 N.E.2d 1130, 1133 (1987) ("when an agency's interpretation is unreasonable and thwarts the intent of the legislature, it must be overturned"); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331, 337, 471 N.E.2d 492, 500 (Montgomery County 1984) ("where the interpretation by [an] agency is repugnant to a statute, rule, or section, the regulation or interpretation should not be accepted by the courts"). *See generally People ex rel. Abner Jr. v. Kinney*, 30 Ill. 2d 201, 206, 195 N.E.2d 651, 654 (1964) ("[n]either the Parole Board nor the Department of Public Safety can by rules change the

⁹ R.C. 2967.13, as enacted by 1983-1984 Ohio Laws, Part I, 583, 607 (Am. S.B. 210, eff. July 1, 1983), permitted the number of years before parole eligibility to be diminished by R.C. 2967.19, the statute providing time off for good behavior. The current version of R.C. 2967.13 permits the number of years before parole eligibility to be diminished by R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12. *See* R.C. 2967.13(A), (C)-(E), and (G)-(K).

statutory provisions of eligibility for parole"); 1982 Op. Att'y Gen. No. 82-066 at 2-185 (the General Assembly by defining the term "physical measures" appears to have pre-empted any effort by the Physical Therapy Section that would seek to otherwise interpret this term and "any doubt in this respect must be resolved against the exercise of the Section's rule-making power in this matter").

The Term of Incarceration Prior to Parole Eligibility of an Individual Who Committed His Crimes or Who Was Placed in the Custody of the Department between January 16, 1984, and February 29, 1988, Is Not Limited to Fifteen Years

Insofar as the Department was not empowered to promulgate the forementioned provision, it is unnecessary to answer your second question, which assumes authority on the part of the Department to promulgate that provision and asks about effect of the repeal of the rule that set forth that provision. Your third question, however, asks whether, if the Department did not have the authority to promulgate such a provision, the term of incarceration prior to parole eligibility of an individual who committed his crimes or who was placed in the custody of the Department between January 16, 1984, and February 29, 1988, is limited to fifteen years.

The fourteenth amendment to the United States Constitution prohibits a state from depriving a person of life, liberty, or property without due process of law. In order to determine whether due process requirements apply, it must be determined whether a life, liberty, or property interest within the meaning of the due process clause is implicated. An individual has a protectible property interest when he has a legitimate claim of entitlement to that property interest. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

As indicated above, pursuant to R.C. 2967.13, the General Assembly intended to grant a statutory right of eligibility to be considered for parole to an individual serving a life sentence for the forcible rape of a juvenile consecutive to another sentence of imprisonment. This section also defines when such an individual becomes eligible for parole consideration. Moreover, the former provision of rule 5120:1-1-05(D)(1)(d) that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years conflicts with R.C. 2967.13. An administrative rule that is in conflict with a statutory enactment that addresses the same subject matter does not have the force and effect of law; rather, the rule is invalid. *Williams v. Morris*. Because the former provision of rule 5120:1-1-05(D)(1)(d) that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years did not have the force and effect of law, it is reasonable to conclude that this provision did not create on the part of an Ohio prisoner a legitimate claim of entitlement to parole consideration. Rather, if an individual serving a life sentence consecutive to another sentence of imprisonment has a legitimate claim of entitlement to be considered for parole, it is created pursuant to R.C. 2967.13. Hence, the former provision of rule 5120:1-1-05(D)(1)(d), which provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years, did not create a legitimate claim of entitlement to eligibility to be considered for parole to which due process protection attaches.

In addition to the foregoing constitutional issue, there also is a question whether the repeal of former rule 5120:1-1-05(D)(1)(d) results in a violation of the ex post facto clause of article I, §9 of the United States Constitution, which provides that no bill of attainder or ex post facto law shall be passed. Under the ex post facto clause, a state is prohibited from imposing

a greater or more severe punishment than was prescribed by law at the time of the offense. It has been stated that for a law to be considered ex post facto "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnote omitted).

With respect to your specific question, it is clear that the repeal of the former provision of rule 5120:1-1-05(D)(1)(d) that provided the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment does not run afoul of the ex post facto proscription. As noted above, R.C. 2967.13, not former rule 5120:1-1-05(D)(1)(d), establishes an individual's parole eligibility. As a result, the repeal of former rule 5120:1-1-05(D)(1)(d) does not deprive an individual of his eligibility to be considered for parole granted by R.C. 2967.13. The repeal of this rule, thus, does not deprive an individual of a right to which he had become entitled. Moreover, the repeal of former rule 5120:1-1-05 does not impose a greater or more severe punishment than was prescribed by law at the time of the offense; rather, the repeal of this rule affects the date on which an individual becomes eligible for parole consideration. The repeal of former rule 5120:1-1-05(D)(1)(d), therefore, does not run afoul of the ex post facto clause of the United States Constitution. *See generally In re Davis*, 180 Cal. Rptr. 46, 50 (3rd Dist. Ct. App. 1982) ("parole rules are modes of procedure ... a change in which does not violate the prohibition against ex post facto laws unless it operates to actually deprive a person of a right to which he had become entitled"). Accordingly, it must be concluded that no individual serving a life sentence consecutive to another sentence of imprisonment has been granted, pursuant to the former provision of rule 5120:1-1-05(D)(1)(d) that provided that an individual's term of incarceration prior to parole eligibility must not exceed fifteen years, a right of eligibility to be considered for parole after serving fifteen years of imprisonment.

The Parole Eligibility of an Individual Serving a Life Sentence for the Forcible Rape of a Juvenile Consecutive to an Indefinite Sentence of Imprisonment or Another Life Sentence

Your fourth question asks whether an individual serving a life sentence for the forcible rape of a juvenile consecutive to an indefinite sentence of imprisonment or another life sentence is required to serve ten full years of imprisonment, plus the time necessary to be eligible for parole on the other offense, before becoming eligible for parole. The current version of R.C. 2967.13 provides, in relevant part, as follows:

(A) A prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes eligible for parole at the expiration of his minimum term, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code.

....
(F) A prisoner serving a sentence of imprisonment for life for an offense other than the offense of first degree murder or aggravated murder, which sentence was imposed prior to October 19, 1981, serving a term of imprisonment for life for rape or felonious sexual penetration or for the offense described in section 2927.03 of the Revised Code, or serving a minimum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, imposed under any former law of this state, becomes eligible for parole after serving a term of ten full years' imprisonment.

(G) A prisoner serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an

offense committed prior to October 19, 1981, consecutively to any other term of imprisonment becomes eligible for parole after serving fifteen full years as to each such sentence of life imprisonment, plus the minimum term or terms, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, if applicable, of the other sentences consecutively imposed, except that in no case shall the total number of years that such a person is required to serve before becoming eligible for parole exceed twenty years of imprisonment.

(H) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, consecutively to any other term of imprisonment becomes eligible for parole after serving twenty years as to each such sentence of life imprisonment, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, plus the minimum term or terms, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, if applicable, of the other sentences consecutively imposed.

(I) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving twenty full years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, consecutively to any other term of imprisonment becomes eligible for parole after serving twenty full years as to each such sentence of life imprisonment, plus the minimum term or terms, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, if applicable, of the other sentences consecutively imposed.

(J) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, consecutively to any other term of imprisonment becomes eligible for parole after serving thirty full years as to each such sentence of life imprisonment, plus the minimum term or terms, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, or in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in sections 2967.19, 2967.193, 5145.11, and 5145.12 of the Revised Code, if applicable, of the other sentences consecutively imposed.

The plain language of R.C. 2967.13(F)-(J) thus indicates that an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or a sentence of imprisonment for life imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible to be considered for parole after serving ten full years' imprisonment, *see* R.C. 2967.13(F), plus the time necessary to be eligible for parole on the other offense, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable, *see* R.C. 2967.13(G)-(J). *See generally* *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944) (syllabus, paragraph five) ("[w]here the

language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted"). Accordingly, an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or a sentence of imprisonment for life imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible for parole as follows: (1) if the sentence of imprisonment for life is for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, the individual becomes eligible for parole after serving twenty full years of imprisonment, *see* R.C. 2967.13(G);¹⁰ (2) if the sentence of imprisonment is for life with parole eligibility after serving twenty years imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03, the individual becomes eligible for parole after serving ten full years of imprisonment, plus twenty years, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, *see* R.C. 2967.13(H); (3) if the sentence of imprisonment is for life with parole eligibility after serving twenty full years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03, the individual becomes eligible for parole after serving ten full years of imprisonment plus twenty full years of imprisonment, or a total of thirty full years of imprisonment, *see* R.C. 2967.13(I); (4) if the sentence of imprisonment is for life with parole eligibility after serving thirty full years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03, the individual becomes eligible for parole after serving ten full years of imprisonment plus thirty full years of imprisonment, or a total of forty full years of imprisonment, *see* R.C. 2967.13(J).

R.C. 2967.13, however, does not, by its express terms, state when an individual serving a life sentence for the forcible rape of a juvenile consecutive to an indefinite sentence of imprisonment or another life sentence, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible for parole. However, as determined above, it is reasonable to infer that R.C. 2967.13 provides that such an individual becomes eligible for parole after serving ten full years of imprisonment, plus the minimum term or terms, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12 or in the case of another type of life sentence, the

¹⁰ R.C. 2967.13(G) specifically provides that an individual serving a sentence of imprisonment for life for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, consecutively to any other term of imprisonment becomes eligible for parole after serving fifteen full years as to each such sentence of life imprisonment, plus, in the case of another type of life sentence, the number of years before parole eligibility, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable, "except that in no case shall the total number of years that such a person is required to serve before becoming eligible for parole exceed twenty years of imprisonment." An individual serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, consecutively to a sentence of imprisonment for life for the forcible rape of a juvenile becomes eligible for parole after serving fifteen full years of imprisonment plus ten full years of imprisonment, or a total of twenty-five full years of imprisonment; however, because the total number of years that an individual may serve before becoming eligible for parole may not exceed twenty years of imprisonment, such an individual becomes eligible for parole after serving twenty full years of imprisonment.

number of years before parole eligibility, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable. *See State ex rel. Gregory v. Stein*; Op. No. 90-090. Accordingly, an individual serving a life sentence for the forcible rape of a juvenile consecutive to another life sentence, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible for parole after serving ten full years of imprisonment, plus the number of years before parole eligibility that pertains to the other life sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable. Also, an individual serving a life sentence for the forcible rape of a juvenile consecutive to an indefinite sentence of imprisonment becomes eligible for parole after serving ten full years of imprisonment, plus the minimum term or terms that pertain to the indefinite sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12.

Conclusions

Therefore, it is my opinion, and you are hereby advised, that:

1. The Department of Rehabilitation and Correction was not empowered to promulgate the former provision of [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-05(D)(1)(d) at 712 and 713 that provided that the term of incarceration prior to parole eligibility of an individual serving a life sentence consecutive to another sentence of imprisonment must not exceed fifteen years, and the provision is therefore invalid.
2. No individual serving a life sentence consecutive to another sentence of imprisonment has been granted, pursuant to the former provision of [1983-1984 Monthly Record, vol. 1] Ohio Admin. Code 5120:1-1-05(D)(1)(d) at 712 and 713, a right of eligibility to be considered for parole after serving fifteen years.
3. Pursuant to R.C. 2967.13(G), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, becomes eligible for parole after serving twenty full years of imprisonment, not after fifteen years.
4. Pursuant to R.C. 2967.13(H), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life with parole eligibility after serving twenty years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03 becomes eligible for parole after serving ten full years of imprisonment, plus twenty years, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, rather than after only fifteen years.
5. Pursuant to R.C. 2967.13(I), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life with parole eligibility after serving twenty full years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03 becomes eligible for

parole after serving thirty full years of imprisonment, not after fifteen years.

6. Pursuant to R.C. 2967.13(J), an individual serving a life sentence for the forcible rape of a juvenile consecutive to a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment imposed pursuant to R.C. 2929.022 or R.C. 2929.03 becomes eligible for parole after serving forty full years of imprisonment, not after fifteen years.
7. Pursuant to R.C. 2967.13, an individual serving a life sentence for the forcible rape of a juvenile consecutive to another life sentence, excluding a sentence of imprisonment for life (1) for first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, or (2) imposed pursuant to R.C. 2929.022 or R.C. 2929.03, becomes eligible for parole after serving ten full years of imprisonment, plus the number of years before parole eligibility that pertains to the other life sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, if applicable, rather than after only fifteen years.
8. Pursuant to R.C. 2967.13, an individual serving a life sentence for the forcible rape of a juvenile consecutive to an indefinite sentence of imprisonment becomes eligible for parole after serving ten full years of imprisonment, plus the minimum term or terms that pertain to the indefinite sentence, diminished as provided in R.C. 2967.19, R.C. 2967.193, R.C. 5145.11, and R.C. 5145.12, rather than after only fifteen years.