

OPINION NO. 68-020

Syllabus:

Even though sentenced to be imprisoned for life a convict may be removed from a penal institution to attend a hearing on his petition for vacation of sentence under the so-called post conviction remedy procedures provided for in Sections 2953.21, et seq., Ohio Revised Code. The restriction in Section 2941.40 of the Revised Code is not applicable to the forementioned proceedings.

To: David D. Dowd, Jr., Stark County Pros. Atty., Canton, Ohio
By: William B. Saxbe, Attorney General, January 24, 1968

Your letter to E. L. Maxwell, Warden of the Ohio Penitentiary, regarding removal of a convict from the penitentiary for an evidentiary hearing on his petition to vacate his judgment of sentence has been referred to me for reply.

You point out that in State v. Lawson, 12 Ohio St. 2d 9 the Court held:

"Although Section 2953.22, Revised Code, as

now in effect, provides that it is not necessary that the prisoner be present at the hearing, a hearing certainly contemplates that each party have an opportunity to introduce evidence.

"In the instant case, the record does not show that appellant was present, was given an opportunity to present witnesses or to testify, was represented by counsel or was given an opportunity to cross-examine the state's witness. This does not conform to the requirements of an evidentiary hearing as ordered by the Court of Appeals.

"The motion to certify is allowed, the judgment of the Court of Appeals is reversed and the cause is remanded to the Court of Common Pleas for a proper evidentiary hearing."

You then inquire whether the restriction in Section 2941.40 of the Revised Code, concerning convicts serving life sentences, applies to so-called post conviction remedy proceedings.

Section 2941.40, Ohio Revised Code, provides:

"A convict in the penitentiary or a state reformatory, who escaped, or forfeited his recognizance before receiving sentence for a felony, or against whom an indictment or information for felony is pending, may be removed to the county in which such conviction was had or such indictment or information was pending, for sentence or trial, upon the warrant of the court of common pleas of such county.

"This section does not extend to the removal of a convict sentenced to be imprisoned for life, unless the sentence to be imposed or the indictment or information pending against him is for murder in the first degree."

Early drafts of House Bill No. 742, which became the new Sections 2953.21, et seq., of the Revised Code, provided in pertinent part:

"Sec. 2953.22. If a hearing is granted pursuant to section 2953.21 of The Revised Code, the petitioner shall be permitted to attend such hearing unless he is a convict sentenced to be imprisoned for life or sentenced to be executed. Testimony of the prisoner or other witnesses may be offered by deposition."

During processing of the bill in the legislature various discussions were had regarding the foregoing provision and the conclusion was reached that it was unacceptable. This portion of the bill was, therefore, amended and passed in the following form:

"Sec. 2953.22. If a hearing is granted pur-

suant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend such hearing. Testimony of the prisoner or other witnesses may be offered by deposition."

We thus have a clear reflection of a legislative intent that the restriction in Section 2941.40, Ohio Revised Code, should not apply to proceedings under Sections 2953.21, et seq., Ohio Revised Code.

It is, therefore, my opinion and you are hereby advised that even though sentenced to be imprisoned for life a convict may be removed from a penal institution to attend a hearing on his petition for vacation of sentence under the so-called post conviction remedy procedures provided for in Sections 2953.21, et seq., Ohio Revised Code. The restriction in Section 2941.40 of the Revised Code is not applicable to the forementioned proceedings.