OPINION NO. 87-068

Syllabus:

An inmate in a penitentiary or state reformatory institution may not be removed from such institution to be tried upon an indictment or information charging the inmate with the commission of a misdemeanor.

To: Richard P. Selter, Director, Ohio Department of Rehabilitation and Correction, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 22, 1987

I have before me your request for my opinion concerning the prosecution of an inmate who has been charged with a misdemeanor. In light of additional information which you have provided to my staff, I have rephrased your questions as follows:

1. May an inmate in a penitentiary or state reformatory institution be removed from such institution to be tried on a misdemeanor charge?

2. If such removal is proper, what statutory authority or legal precedent will enable the Law Director to prosecute the inmate?

Pursuant to R.C. 5120.05, the Department of Rehabilitation and Correction may maintain, operate, manage, and govern all state institutions "for the custody, control, training, and rehabilitation of persons convicted of crime and sentenced to penal or reformatory institutions." Those institutions under the Department's direct control include the state penal and reformatory institutions. See R.C. 5120.05. In addition, the department also has the authority to investigate, supervise, and set minimum standards for jails and workhouses. See R.C. 5120.10; see also R.C. 2929.221 (designating, according to the classification of the offense, the type of institution in which a term of imprisonment is to be served). R.C. 5120.16 further provides that persons sentenced to any institution, division, or place under the control and management of the Department "are committed to the control, care, and custody of the department."

In your first question, you ask whether an inmate may be removed from a penitentiary or a state reformatory institution to be tried for the commission of a misdemeanor.[1] While I am not aware of any statutory provisions which expressly authorize the removal of inmates for trial on misdemeanor charges, I am aware of several provisions which demonstrate that the General Assembly did not intend for inmates in penitentiaries and state reformatory institutions to be removed from such institutions to be tried for the commission of misdemeanors.

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[1] Pursuant to Ohio R. Crim. P. 7(A), "[a] misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in courts inferior to the court of common pleas." Prosecutions for misdemeanors may also be instituted by a prosecuting attorney by affidavit "or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors." R.C. 2941.35.

As you note in your letter of request, the General Assembly has provided a detailed mechanism through which an inmate may be removed from a penitentiary or state reformatory institution for trial when charged with a felony. Where the felony was committed during the inmate's incarceration, R.C. 2941.39[2] provides that:

> When a convict in the penitentiary or a state reformatory is indicted for a felony committed while confined therein, he shall remain in the custody of the warden or superintendent of such penitentiary or reformatory subject to the order of the court of common pleas of the county in which such institution is located. (Emphasis added.)

Where the felony was not committed during the inmate's incarceration, the provisions of R.C. 2941.40-.43 are applicable. R.C. 2941.40 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. (Emphasis added.)

In addition, where the felony was not committed during the inmate's incarceration, R.C. 2941.41 provides that the warrant should be directed to the sheriff of the county in which the indictment or information is pending. When a copy of the

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[2] The provisions of the Ohio Administrative Code promulgated under R.C. 2941.39 also limit the prosecution of an inmate for his action while incarcerated in a state penitentiary or reformatory institution to instances where the inmate's actions constitute a felony. 8 Ohio Admin. Code 5120-9-10 provides in pertinent part:

> (A) When incidents of a felonious nature occur resulting in personal injury to staff, inmates, or residents of community-based programs, or serious damage to State property and criminal prosecution is indicated, the Highway Patrol or Sheriff shall be advised at the discretion of the Managing Officer. In addition, such incidents shall be immediately reported to the Director or designee.
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> ...
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> (E) Following...investigations, the decision to prosecute the felonious conduct by an inmate while in the custody of an institution shall be made by the Director, upon recommendation by the inmate's Managing Officer. (Emphasis added.)

Like the portions of R.C. 2941.39 quoted above, 8 Ohio Admin. Code 5120-9-10 provides for the criminal prosecution of inmates in state penitentiaries and reform institutions for felonious conduct only. 8 Ohio Admin. Code Chapter 5120-9 does not make provision for the prosecution of an inmate for the commission of a misdemeanor.

warrant is presented to the warden of the penitentiary or to the superintendent of a state reformatory, the warden or superintendent is then required to "deliver the convict to the sheriff who shall convey him to such county and commit him to the jail thereof." R.C. 2941.41. Pursuant to R.C. 2941.42, a convict so removed shall be kept in jail subject to being taken into court for sentence or trial. R.C. 2941.42 further provides that if the case is continued, the court may order the convict "to be returned to the penitentiary by the sheriff, who shall deliver him, with a certified copy of such order, to the warden, who shall again deliver the convict to the sheriff upon another certified order of the court." See also R.C. 2941.43 (return of prisoner to penitentiary or reformatory upon acquittal or conviction).

As quoted above, the express language of R.C. 2941.39 and .40 strictly limits the removal of inmates to instances where the inmate is to stand trial for the commission of a felony. In accordance with the maxim expressio unius est exclusio alterius, the naming of a specific class implies the exclusion of those not named. Kroger v. Bowers, 3 Ohio St. 2d 76, 209 N.E.2d 209 (1965); Speeth v. Carney, 163 Ohio St. 159, 126 N.E.2d 449 (1955); State v. Amman, 78 Ohio App. 10, 12-13, 68 N.E.2d 816, 818 (Hamilton County 1946) (the express mention of a person, thing, or consequence in a statute is tantamount to an express exclusion of all others). R.C. 2941.39 and .40 specifically apply only where the inmate has been formally charged with the commission of a felony. Thus, by expressly providing for the removal of inmates who have committed felonies, the General Assembly has demonstrated that it did not intend to allow for the removal of inmates who have committed misdemeanors.

In attempting to ascertain the General Assembly's intent in the enactment of a statute, it is also sometimes helpful to compare the language of related statutes. See Lake Shore Electric Railway Co. v. Public Utilities Commission of Ohio, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections). In this context, the General Assembly has not employed the same limitation to offenses constituting a felony in other closely related statutes. For example, R.C. 2941.45 provides with reference to the prosecution of persons confined in jails or workhouses:

> Any person serving a sentence in jail or the workhouse, who is indicted or informed against for another offense, may be brought before the court of common pleas upon warrant for that purpose, for arraignment and trial. Such persons shall remain in the custody of the jailer or keeper of the workhouse, but may be temporarily confined the jail, if a prisoner in the workhouse. (Emphasis added.)

By employing the word "offense" rather than the more restrictive term "felony," the General Assembly has demonstrated that it intended for persons confined in jails and workhouses to be removed to stand trial for the commission of both misdemeanors and felonies. Similarly, the General Assembly has established procedures for the removal of an inmate confined in a state penitentiary or reformatory for other purposes without reference to a specific classification of crimes. See e.g., R.C. 2953.21 and R.C. 2953.22 (allowing

the removal of an inmate who has petitioned for post-conviction relief and providing for the return of the inmate to the institution); R.C. 2945.47 (establishing the procedure for the temporary removal of an inmate from an institution to appear before a court when it is necessary to procure the testimony of the inmate in a criminal proceeding and for the return of such inmate to the institution). Thus, it is apparent that if the General Assembly had intended for inmates in penitentiaries and state reformatory institutions to be removed from such institutions to stand trial for the commission of misdemeanors, it could have easily expressed that intention, having used the appropriate language elsewhere in the same chapter.

Furthermore, it has long been recognized that statutory amendments are presumed to have substantive effect, R.C. 1.30; Dennison v. Dennison, 165 Ohio St. 146, 134 N.E.2d 574 (1956); Lytle v. Baldinger, 84 Ohio St. 1, 95 N.E. 389 (1911), and such amendments may be properly considered in construing a statute. State v. Schmuck, 77 Ohio St. 438, 83 N.E. 797 (1908); Heck v. State, 44 Ohio St. 536, 9 N.E. 305 (1886). The predecessor of R.C. 2941.39, G.C. 13600, did not specifically limit the prosecution of an inmate to instances where the inmate had been formally charged with the commission of a felony:

> When a convict in the penitentiary is indicted for an offense committed while confined therein, he shall remain in the custody of the warden of the penitentiary, subject to the order of the court of common pleas of Franklin county. (Emphasis added.)

G.C. 13600 was amended in 1929. See 113 Ohio Laws p. 321 (eff. July 21, 1929). The primary change effected by this amendment was the deletion of the word "offense" and the substitution of the word "felony." This amendment clearly demonstrates that the use of the word "felony" was the product of deliberate choice and was specifically intended by the General Assembly to limit the removal of inmates confined within penitentiaries and state reformatory institutions to those inmates charged with felonies. Thus, I must conclude that an inmate in a penitentiary or state reformatory institution may not be removed to answer an indictment or information charging the inmate with the commission of a misdemeanor.

With reference to the provisions of R.C. 2941.40, my conclusion is further supported by yet another rule of statutory construction. Pursuant to R.C. 1.49(A), the "object sought to be attained" through the enactment of a provision may be examined in the interpretation of statutory language. See also State v. Sidell, 30 Ohio St. 2d 45, 282 N.E.2d 367 (1972)(through R.C. 1.49, the General Assembly has recognized certain rules of statutory construction); Pylant v. Pylant, 61 Ohio App. 2d 247, 401 N.E.2d 940 (Huron County 1978); (consideration of the apparent object of a statute is an appropriate means to construe a statute); 1987 Op. Att'y Gen. 87-004. In this context, a sound empirical rationale exists for drawing a distinction between inmates who have committed felonies and those who have committed misdemeanors. The transportation of inmates for court appearances necessarily involves a great security risk. The legislative history of R.C. 2941.40 demonstrates that this risk was a strong consideration in the General Assembly's decision to limit the prosecution of inmates to instances where the inmate has committed a felony. At one time, the statute authorized the removal of any convict who had been indicted for any "crime punishable by the laws of this state by imprisonment in the

penitentiary." See 66 Ohio Laws p. 118 (eff. May 6, 1869). This provision was later amended to restrict the removal of inmates who had been sentenced to life imprisonment to situations in which the inmate is charged with murder in the first degree. See 113 Ohio Laws p. 171 (eff. July 21, 1929). As noted above, the current version of R.C. 2941.40 expressly permits the removal of inmates who have been formally charged with the commission of a felony. The legislative history of R.C. 2941.40 thus suggests that through the enactment of R.C. 2941.40, the General Assembly has sought to limit the inherent risks involved in the transportation of dangerous individuals, by restricting the removal of such persons to those instances where the inmate's actions constitute a felony.

I am certainly aware that it is possible to formulate arguments contrary to those presented above. It must be emphasized, however, that it is the General Assembly's determination of policy, as communicated through the language of the statutes it enacts, which must be given effect. State v. Hoopern, 57 Ohio St. 2d 87, 386 N.E.2d 1348 (1979); Stewart v. Board of Elections, 34 Ohio St. 2d 129, 296 N.E.2d 676 (1973). Finally, because I have determined that your first question must be answered in the negative, it is unnecessary for me to address your second question concerning the authority of a municipal law director to prosecute inmates.

Accordingly, it is my opinion and you are hereby advised that an inmate in a penitentiary or state reformatory institution may not be removed from such institution to be tried upon an indictment or information charging the inmate with the commission of a misdemeanor.