OPINION NO. 75-082

Syllabus:

1. The Ohio Department of Rehabilitation and Correction has no authority and, therefore, no duty to independently determine whether to abrogate or modify a prisoner's or parolee's sentence under Section 3 of Substitute House Bill 300, which enacts R.C. Chapter 2925 and amends R.C. Chapter 3719. The prisoner or parolee must petition the court of original sentencing which will determine whether to abrogate or modify a sentence.

2. Section 3 of Substitute House Bill 300 requires the Ohio Department of Rehabilitation and Correction to provide reasonable notice to state prisoners and parolees of its provisions for retroactive application of the lesser penalties under the new drug law. The Department must also modify its records in accordance with a court's order.

To: George F. Denton, Director, Ohio Dept. of Rehabilitation and Correction, Columbus, Ohio

By: William J. Brown, Attorney General, November 21, 1975

Your request for my opinion poses the following questions pertaining to Section 3 of Enrolled Substitute House Bill 300 of the 111th General Assembly:

> "1. Upon written request of a prisoner, parolee, or the attorney for such person, directed to the Department or to the Adult Parole Authority is the Department required to independently determine whether to abrogate the conviction or modify the sentence of such person in the absence of any written request to or action by the courts, particularly the sentencing court?
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> "2. What procedures are the Department required to follow in making such determination?

"3. What is the meaning of the sentence, 'such officers and agencies shall make affected by this section as required by this Section and may make further modifications of such records as in their opinion are made necessary by this section'"?

Enrolled Substitute House Bill 300 of the 111th General Assembly is a comprehensive revision of Ohio's drug laws (enacting R.C. Chapter 2925 and amending R.C. Chapter 3719). Section 3 of the Act provides for the retroactive application of the new penalties provided under the Act, where the new penalties are less than under existing law, to those persons convicted or serving a sentence imposed prior to the Act's effective date, set forth in Section 4 as July 1, 1976. In addition, Section 3 of the Act provides that retroactive application of the lower penalties shall take effect as of November 21, 1975.

Your inquiry is concerned with persons who are presently serving a sentence of imprisonment for a drug offense under existing law and who are under the jurisdiction of the Department of Rehabilitation and Correction as state prisoners or parolees. The language of Section 3 of the new drug law is ambiguous and does not itself answer your questions.

Your first question asks basically whether a court or the Department determines whether to abrogate the conviction or modify the sentences of prisoners and parolees under Section 3. For the reasons discussed below, I conclude only a court can vacate or modify a sentence.

Section 3 of Substitute House Bill 300 provides:

"Notwithstanding Section 4 of this act, this section of this act shall become effective at the earliest time permitted by law. Any person charged, convicted, or serving a sentence of imprisonment for an offense under existing law that would not be an offense on the effective date specified in Section 4 of this act shall have the charge dismissed and the conviction abrogated, shall be finally released from imprisonment, and shall have his records expunged of all information concerning that offense. Any person charged with an offense committed prior to the effective date specified in Section 4 of this act that shall be an offense under this act shall be prosecuted under the law as it existed at the time the offense was committed and any person convicted or serving a sentence of imprisonment for an offense under existing law that would be an offense on the effective date specified in Section 4 of this act but would entail a lesser penalty than the penalty provided for the offense under existing law shall be sentenced according to the penalties provided in this act or have his existing sentence modified in conformity with the penalties provided in this act. Such modification shall grant him a final release from imprisonment if he has already completed the period of imprisonment pro-

vided under this act or shall render him eligible for parole release from imprisonment if he has completed a period of imprisonment that would render him eligible for parole under the provisions of this act.

"Courts, the Department of Rehabilitation and Correction, persons responsible for the superintendence of municipal and county jails and workhouses, the Adult Parole Authority, county departments of probation, and any other state or local governmental officer or agency having responsibility for prisoners or parolees shall provide reasonable notice, by publication or otherwise, of the provisions of this section and shall, upon written request from any person so affected by this section, or his attorney, take all action necessary to accomplish the release, modification of sentence, or modification of record required by this section. Such officers and agencies may make further modifications of such records as in their opinion are made necessary by this section." (Emphasis added.)

Analysis of traditional concepts of separation of governmental functions and delegation of authority provides the answer to your question.

Ohio Constitution, Article IV, Section 1 provides:

"The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law."

This provision is a specific limitation on the power of the Legislature with respect to judicial power. Ohio Constitution, Article II, Section 1. The Legislature may not enact legislation limiting the power vested in the judiciary. State ex rel. Portage County Welfare Dept. v. Summers, 38 Ohio St. 2d 144 (1974); In Re Black, 36 Ohio St. 2d 124 (1973). Moreover, the Legislature may not delegate judicial power to an administative agency or to an executive official. Ohio Civil Rights Commission v. Lysyj, 38 Ohio St. 2d 217 (1974); State ex rel. Doerffler v. Price, 101 Ohio St. 50 (1920); State ex rel. Shafer v. Otter, 106 Ohio St. 415 (1922).

The answer to your question depends upon whether the power to vacate and/or modify a sentence are judicial functions. In construing the ambiguous language of Section 3, it must be presumed that the Legislature acted within its constitutional authority. R.C. 1.47 (A). If vacation or modification of a sentence are judicial functions, then the Legislature cannot delegate these functions to officials of the Department to perform, and Section 3 must be interpreted accordingly.

In State, ex rel. Portage County Welfare Department v. Summers, supra, the Court explained the concept of judicial power:

> "It is true that the power to ascertain and decide is not necessarily a judicial power, and it is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. While it is not supposed that any definition of judicial power, sufficient for all conceivable purposes, has ever been attempted, it is clear that 'to adjudicate upon and protect the rights and interests of individual citizens and to that end to construe and apply the laws, is the particular province of the judicial department'." Id. at 151.

The subject matter of Section 3 of Sub. H.B. 300 is the redetermination of criminal sentences determined in the first instance by a court. The parties potentially affected are both the state and the individual prisoner, and the effect of redetermination may result in the release of certain prisoners from Ohio's institutions. In such situation, it would appear that the power is judicial. The Legislature has traditionally considered the power to impose a sentence in the first instance and to subsequently vacate or modify that sentence as judicial in nature. See R.C. 2953.21 and 2929.51. Accordingly, it is my opinion that the power is judicial in nature and was not intended by the Legislature to be delegated to an administrative official or agency. Therefore, the Department does not have authority, and thus no duty, to independently determine whether to abrogate or modify a prisoner's sentence under Section 3 of Sub. H.B. 300.

Section 3 of Sub. H.B. 300 does not contain any procedures to request retroactive application of penalties. After consultation with representatives of the courts, I believe the procedures contained in R.C. 2953.21 (petition to vacate or set aside sentence) are a good model. The prisoner or parolee must petition the court of original sentencing. At any hearing to consider such a petition the state shall be represented by the county prosecutor's office which prosecuted the case initially and participated in the initial sentencing.

Your second question is essentially answered by resolution of the first. Although the Department has no authority or duty to modify or abrogate a prisoner's or a parolee's sentence, Section 3 does require the Department to provide reasonable notice to prisoners and parolees under its jurisdiction of the provisions of the section.

After consulting with representatives of the courts, prosecutors, police and sheriffs, I provided you with suggested written notices with which your Department can notify prisoners and parolees of the provisions of Section 3. I have also provided you forms, patterned after the procedures of R.C. 2953.21, which the Department may make available to prisoners and parolees to request sentence reevaluation.

Section 3 also requires that upon receipt of an order of a court, the Department shall modify and correct its records consistent with both the order of the court and the administrative purposes for which such records are kept.

In response to your third question, the language quoted in your inquiry was contained in the last sentence of an earlier version of Section 3 and is not contained in the final Act. By the Senate clerk's amendment, the language quoted in your inquiry was corrected to read as quoted above. As enacted this sentence requires the Department, as discussed above, to modify and correct its records as required by court order, and to notify other administrative agencies affected by such modification or correction of this fact.

In specific response to your questions, then, it is my opinion and you are so advised that:

1. The Ohio Department of Rehabilitation and Correction has no authority and, therefore, no duty to independently determine whether to abrogate or modify a prisoner's or parolee's sentence under Section 3 of Substitute House Bill 300, which enacts R.C. Chapter 2925 and amends R.C. Chapter 3719. The prisoner or parolee must petition the court of original sentencing which will determine whether to abrogate or modify a sentence.

2. Section 3 of Substitute House Bill 300 requires the Ohio Department of Rehabilitation and Correction to provide reasonable notice to state prisoners and parolees of its provisions for retroactive application of the lesser penalties under the new drug law. The Department must also modify its records in accordance with a court's order.