

OPINION NO. 74-005**Syllabus:**

Prisoners in the custody of the Department of Rehabilitation and Correction on January 1, 1974, the effective date of R.C. 2967.31, are eligible for early release on parole under the terms of that statute.

**To: Bennett J. Cooper, Director, Dept. of Rehabilitation and Correction,
Columbus, Ohio**
By: William J. Brown, Attorney General, January 24, 1974

I have before me your request for a formal opinion which reads as follows:

"The Department of Rehabilitation and Correction respectfully requests your opinion with respect to the following question:

"Are prisoners in the custody of the Ohio Department of Rehabilitation and Correction on January 1, 1974, eligible for early release on parole pursuant to Section 2967.31 of the Ohio Revised Code?

"I should note for your information that the above-referred to statute becomes effective on January 1, 1974."

The newly enacted R.C. 2967.31 reads as follows:

"Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on parole at any time after serving six months in the custody of the department of mental hygiene and correction, when all of the following apply:

(A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.

(B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.

(C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.

(D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.

(E) The history, character, condition, and attitude of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense."

This new Section provides a procedure for the granting of early parole, which in essence, complements the procedure for early release on "shock" probation found in R.C. 2947.061. (Note that R.C. 2947.061 remains unchanged by the new Ohio Criminal Code, Am. Sub. H.B. No. 511, 109th General Assembly. See generally Opinion No. 73-070, Opinions of the Attorney General for 1973.) You ask whether the language, "prisoner confined in a state penal or reformatory institution may be released on parole", is broad enough to include those already confined prior to the effective date of the Act, as well as those who are committed thereafter.

I think the unqualified word, "confined", should be given its plain meaning and applied to all prisoners, whether committed to an institution before or after the effective date of the Act, provided they are able to meet the conditions set forth in R.C. 2967.31. In the only similar case which I have been able to find, State ex rel. Attorney General v. Peters, 43 Ohio St. 629 (1885), the language of the statute was more precise, in that it opened the possibility of parole to any prisoner "now, or hereafter" confined in the Ohio Penitentiary. But this greater degree of precision in the earlier Act does not detract from the fact that the new Section speaks broadly of any "prisoner confined." This is, of course, remedial legislation, which, under ordinary rules of statutory interpretation is to be liberally construed. Van Meter v. Segal-Schadel Co., 5 Ohio St. 2d 185 (1966); Porter v. Fenner, 5 Ohio St. 2d 233

(1966). Furthermore, a strict construction would be open to constitutional objection as a denial of equal protection of the laws to those prisoners previously confined. Such a construction should be avoided. Wilson v. Kennedy, 15 Ohio St. 485, 491-493 (1949); Chambers v. Owens-Ames-Kimball Co., 146 Ohio St. 559, 566-571 (1946); State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 277-286 (1942); Opinion No. 73-116, Opinions of the Attorney General for 1973.

It may be urged that such an interpretation gives the legislation a retroactive effect in violation of Article II, Section 28, of the Ohio Constitution. In response to a similar contention in State, ex rel. Attorney General v. Peters, supra, the Supreme Court said (43 Ohio St. at 650, 651-652):

"This legislation applies to convicts who became such before as well as after the passage of the act. It can not seriously be contended this is an interference with the judicial functions of the court, but is rather the exercise of that guardianship and power of discipline, which is vested in the state, to be exercised through the legislative department, for the safe-keeping, proper punishment, and welfare of the prisoner. Neither is it an interference with the exclusive power vested in the governor to grant reprieves, commutations, and pardons.
* * *

"It may be claimed that this act, so far as it affects past sentences, is retroactive, and therefore unconstitutional. This can not be, as by this provision the legislature is only prevented from interfering with the vested rights of individuals.

"It does not hinder the state from divesting itself of any right of claim of its own. The only party who could object is the prisoner, and he can not, where it is clearly for his benefit. If the provisions of the law are not ex post facto in their nature, he can not complain."

Your attention is also directed to the discussion of Article II, Section 28, in Opinion No. 72-009, Opinions of the Attorney General for 1972, in which I said:

"* * *Section 28, supra, states:

'The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.'

"A retroactive statute has been defined by Justice Story, as quoted in Rairden v. Holden, 15 Ohio St. 207, 210 (1864):

'Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'

"It has also been defined by the Ohio Supreme Court as, 'A statute which imposes a new or additional burden, duty, obligation or liability as to past transactions.' Miller v. Hixon, 64 Ohio St. 39 (1901). A more recent Court of Appeals case stated, 'Where private rights are not infringed, the Legislature of the State of Ohio may pass retrospective laws waiving or impairing its own rights.' State ex rel. Department of Mental Hygiene v. Eichenberg, 2 Ohio App. 2d 274 (1965). In that opinion the Court of Appeals cited an Ohio Supreme Court case which said, '* * * the constitutional inhibition [Article II, Section 28, supra] does not apply to legislation recognizing or affirming the binding obligation of the state, or any of its subordinate agencies, with regard to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.' Kumler v. Silsbee, 38 Ohio St. 445, 447 (1882), quoting New Orleans v. Clark, 95 U.S. 644, 655 (1877).
* * *

Clearly, no person's vested rights are impaired by R.C. 2967.31 as construed herein.

Since the statute does not impair vested rights or create new obligations with respect to past transactions, it is remedial rather than substantive, and therefore cannot be retroactive for purposes of Article II, Section 28. In point is Kilbreath v. Rudy, 16 Ohio St. 2d 70 (1968), which upheld the application of Ohio's "long arm" statute to causes of action which arose before its effective date. The syllabus of that case reads as follows:

"1. Section 28, Article II of the Ohio Constitution prohibiting the passage of retroactive laws, has application to laws affecting substantive rights, and has no reference to laws of a remedial nature providing rules of practice, courses of procedure or methods of review. * * *

"2. Laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws. * * *

"3. Section 2307.382 and 2307.383, Revised Code, which expand the personal jurisdiction of local courts, are laws of a remedial nature, and as such are applicable to causes of action accrued, but not filed, before their effective date, September 28, 1965."

In specific answer to your question it is my opinion, and you are so advised, that prisoners in the custody of the Department of Rehabilitation and Correction on January 1, 1974, the effective date of R.C. 2967.31, are eligible for early release on parole under the terms of that statute.