

OPINION NO. 2008-011**Syllabus:**

2008-011

1. R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, 121st Gen. A. (1996) (eff. July 1, 1996), restores the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court.
2. R.C. 2961.02(B), as enacted by Sub. H.B. 181, 125th Gen. A. (2004) (eff. May 18, 2005), does not apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005.

To: Stephen A. Schumaker, Clark County Prosecuting Attorney, Springfield, Ohio

By: Marc Dann, Attorney General, April 10, 2008

You have requested an opinion whether a person convicted of a felony theft offense under the laws of Ohio may serve as a member of the legislative authority of a statutory village¹ when the person has completed the period of probation that was imposed by the sentencing court, but has not been granted a full pardon by the Governor² or had his conviction reversed or annulled or the record of his conviction sealed.³ In your letter you explain that your office

¹ A village may be incorporated and governed under general laws enacted by the General Assembly under Ohio Const. art. XVIII, § 2 or, if a village should prefer a form of government different from those statutorily authorized by the General Assembly, the village may frame and adopt a charter for its government pursuant to Ohio Const. art. XVIII, § 7. General laws providing statutory forms of government for villages that have not adopted a charter are found in R.C. Chapters 731 and 733 (organization and officers of a village) and R.C. Chapter 705 (creating three optional forms of statutory government, *see* R.C. 705.41-.48 (commission plan); R.C. 705.51-.60 (city manager plan); and R.C. 705.71-.86 (federal plan)).

² The Governor of Ohio is empowered by the Ohio Constitution to grant “pardons, for all crimes and offenses, except treason and cases of impeachment,

has learned that a member of the village council of a statutory village in Clark County has a felony conviction from 1985. The case was resolved by way of a plea bargain, wherein the individual pleaded guilty to a lesser included offense of theft, a fourth degree felony, in violation of former R.C. 2913.02. An eighteen month prison sentence was suspended, and the individual received probation⁴ for five years. Probation was terminated in 1988, after fines and costs were paid.⁵ To the knowledge of this office, the individual has not taken any steps toward expungement (and would not be eligible based on prior convictions), and no other steps toward the restoration of rights and privileges (such as reversal on appeal or pardon) have been taken. (Footnote omitted and footnotes added.)

In light of the specific circumstances described in your letter, you wish to know the following:

1. Does R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, 121st Gen. A. (1996) (eff. July 1, 1996), restore the privilege of holding an office of honor, trust, or profit, which had been forfeited by opera-

upon such conditions as the Governor may think proper; subject, however, to such regulations, as to the manner of applying for . . . pardons, as may be prescribed by law.” Ohio Const. art. III, § 11. *See generally* R.C. 2967.01(B) (as used in R.C. Chapter 2967, which sets out the procedures governing the manner of applying for pardons, “[p]ardon’ means the remission of penalty by the governor in accordance with the power vested in the governor by the constitution”).

³ R.C. 2953.33(A) sets forth provisions governing the restoration of rights and privileges forfeited by a person who has committed a felony under the laws of Ohio when the person has had the record of his conviction sealed under R.C. 2953.32.

⁴ Former R.C. 2951.02 authorized a court to place a person who committed a felony under the laws of Ohio on probation. *See* 1995-1996 Ohio Laws, Part II, 2245, 2278 (Sub. H.B. 167, eff. Nov. 15, 1995, with certain sections effective on other dates); 1995-1996 Ohio Laws, Part I, 100, 117 (Sub. H.B. 4, eff. Nov. 9, 1995). This sentencing option was repealed by the General Assembly in 1995-1996 Ohio Laws, Part IV, 7136, 7470-78, 7545 (Am. Sub. S.B. 2, eff. Nov. 9, 1995, with certain sections effective on other dates). In its place, the General Assembly authorized a court to impose a period of one or more community control sanctions on a person who committed a felony under the laws of Ohio on or after July 1, 1996. *Id.*

⁵ Former R.C. 2951.09 and its predecessor, G.C. 13452-7, authorized a judge to restore to a person who was convicted of a felony and completed his probation the rights and privileges forfeited under R.C. 2961.01. *See* 1933 Ohio Laws 530, 532 (Am. Sub. S.B. 90, approved July 14, 1933) (amending G.C. 13452-7, which later became R.C. 2951.09); *see also* Am. Sub. S.B. 2 (repealing the language of R.C. 2951.09 authorizing a judge to restore rights and privileges forfeited by a conviction). You have informed us that your questions concern a situation in which the person has not had the rights and privileges forfeited under R.C. 2961.01 restored to him in accordance with former R.C. 2951.09 or G.C. 13452-7.

tion of R.C. 2961.01, to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court?⁶

2. Does R.C. 2961.02(B), as enacted by Sub. H.B. 181, 125th Gen. A. (2004) (eff. May 18, 2005), apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005?
3. If R.C. 2961.02(B), as enacted by Sub. H.B. 181, applies to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005, does R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, restore the privilege of holding a public office or position of employment that involves substantial management or control over the property of a political subdivision, which had been forfeited by operation of R.C. 2961.02(B), to a person who has completed the period of probation that was imposed by the sentencing court and, if the privilege is not restored, does R.C. 2961.02(B) prohibit the person from serving as a member of the legislative authority of a statutory village?

Based upon the following, we conclude that R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, restores the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court.⁷ We also conclude that R.C. 2961.02(B), as enacted by Sub. H.B. 181, does

⁶ As correctly stated in your letter, R.C. 2961.01 prohibits a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, from “holding an office of honor, trust, or profit (such as elected village council member),” unless the person’s conviction is reversed, expunged, or annulled or the person is granted a full pardon by the Governor. *See* note ten, *infra*; *see also* 1998 Op. Att’y Gen. No. 98-013 at 2-68 (the position of member of the legislative authority of a village is an office of honor, trust, or profit for purposes of R.C. 2961.01).

⁷ Various provisions of Ohio law may deprive a person who was convicted of a felony under the laws of Ohio prior to July 1, 1996, of other rights or privileges. *See, e.g.,* Ohio Const. art. II, § 5; R.C. 2915.11(B); R.C. 2921.02(F); R.C. 2921.41(C)(1); R.C. 2923.125(D)(1)(e); R.C. 2923.13(A); R.C. 2961.01(B); R.C. 2961.02(B); R.C. 3501.27(A); R.C. 3721.07(A); R.C. 3770.05(C); R.C. 4303.29(A); R.C. 4507.16; R.C. 4508.04(B)(1); R.C. 4738.07(D); R.C. 4749.03(A)(1)(a); R.C. 4751.10(D); R.C. 5104.09(A)(1). In this opinion we conclude that the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, can be restored pursuant to R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, 121st Gen. A. (1996) (eff. July 1, 1996), to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996. We have not determined whether R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269,

not apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005.

Before proceeding, we note that our obligation in responding to your questions is to read and apply the law as it has been enacted by the General Assembly. *See generally* 1938 Op. Att’y Gen. No. 2854, vol. II, p. 1596, at 1597 (“where legislative intent is clearly and definitely expressed, this office is bound to give effect to it and cannot, however liberal it may wish to be, nullify, change or amend by its rulings the express provisions of a statute”). This opinion therefore reflects a detailed and careful study of R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269,⁸ and R.C. 2961.02(B), as enacted by Sub. H.B. 181.⁹ Whether or not persons who have been convicted of a felony theft offense under the laws of Ohio *should* be permitted to hold a public office or position of public employment, absent a gubernatorial pardon, is a wholly separate question of policy that the Ohio Constitution empowers the General Assembly to decide. Ohio Const. art. V, § 4. Any concerns about the policy reflected in R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, and R.C. 2961.02(B), as enacted by Sub. H.B. 181, thus should be directed to the General Assembly, as that body alone has the power to change the law.

In addition to R.C. 2961.01 and R.C. 2961.02(B), as enacted by Sub. H.B. 181, other provisions of law may prohibit a person who was convicted of a felony theft offense under the laws of Ohio from holding a public office or position of public employment. *See, e.g.*, R.C. 2921.41(C)(1) (“[a] public official or party official who is convicted of or pleads guilty to theft in office is forever disqualified from holding any public office, employment, or position of trust in this state”). Because your questions concern the application of R.C. 2961.01 and R.C. 2961.02(B), as enacted by Sub. H.B. 181, this opinion does not consider whether a person who was convicted of a felony theft offense under the laws of Ohio is barred by other constitutional or statutory provisions from holding the position of member of the legislative authority of a statutory village.

restores to such a person any specific right or privilege forfeited, revoked, or otherwise lost under any other statute. *See generally, e.g., State ex rel. Fink v. Registrar, Ohio Bur. of Motor Vehicles*, Case No. CA98-02-021, 1998 Ohio App. LEXIS 4261 (Butler County Sept. 14, 1998) (R.C. 2967.16 was never intended by the General Assembly to restore a privilege which had been permanently revoked by a more specific statute).

⁸ R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, appears in 1995-1996 Ohio Laws, Part VI, at 11014. Since the enactment of Am. Sub. S.B. 269, the General Assembly has amended R.C. 2967.16 twice, but neither of these amendments changed the language of R.C. 2967.16(C)(3). *See* 2001-2002 Ohio Laws, Part IV, 7536, 7589-90 (Am. Sub. H.B. 327, eff. July 8, 2002, with certain sections effective on other dates); 1999-2000 Ohio Laws, Part IV, 8674, 8808 (Am. Sub. S.B. 107, eff. Mar. 23, 2000).

⁹ R.C. 2961.02(B) has not been amended since it was enacted by Sub. H.B. 181, 125th Gen. A. (2004) (eff. May 18, 2005).

The Privilege of Holding Office: Forfeiture under R.C. 2961.01 and R.C. 2961.02(B)

The General Assembly is empowered by Article V, § 4 of the Ohio Constitution “to exclude from the privilege . . . of being eligible to office, any person convicted of a felony.” Under this grant of authority, the General Assembly has enacted R.C. 2961.01 and R.C. 2961.02(B). R.C. 2961.01 provides, in part, as follows:

(A) A person convicted of a felony under the laws of this or any other state or the United States, unless the conviction is reversed or annulled, is incompetent . . . to hold an office of honor, trust, or profit The full pardon of a person convicted of a felony restores the rights and privileges so forfeited under this division, but a pardon shall not release the person convicted of a felony from the costs of a conviction in this state, unless so specified.

R.C. 2961.01(A)’s prohibitions apply to a person who committed a felony under the laws of Ohio prior to, or on or after July 1, 1996.¹⁰

R.C. 2961.02(B), as enacted by Sub. H.B. 181, provides further:

Any person who is convicted of a disqualifying offense¹¹ is

¹⁰ Throughout most of Ohio’s history the General Assembly has exercised its prerogative under Ohio Const. art. V, § 4 by enacting legislation that deprives persons convicted of a felony under the laws of Ohio of the privilege of holding an office of honor, trust, or profit. *See generally* 2006 Op. Att’y Gen. No. 2006-030 at 2-275 through 2-285 (reviewing the provisions of law requiring an Ohio felon to forfeit the privilege of holding an office of honor, trust, or profit under R.C. 2961.01 and its predecessors). Since 1880, R.C. 2961.01 and its antecedents have declared that, unless a person’s conviction for a felony under the laws of Ohio is reversed or annulled or the person is granted a full pardon, the person is incompetent to hold an office of honor, trust, or profit. *Id.* at 2-277 through 2-285; *see also* R.C. 1.54 (“[a] statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute”). Accordingly, R.C. 2961.01(A)’s prohibitions apply to any person who was convicted of a felony theft offense under the laws of Ohio prior to, or on or after July 1, 1996. *See* 2006 Op. Att’y Gen. No. 2006-031 at 2-292. *See generally* Am. Sub. S.B. 269 (uncodified section three) (“[t]he provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and, notwithstanding [R.C. 1.58(B)], to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposes a term of imprisonment for an offense that was committed prior to that date. The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date”).

¹¹ For purposes of R.C. 2961.02(B), a “disqualifying offense” means an offense that has both of the following characteristics:

incompetent to hold a public office or position of public employment or to serve as a volunteer, if holding the public office or position of public employment or serving as the volunteer involves substantial management or control over the property of a state agency, political subdivision, or private entity. (Footnote added.)

R.C. 2961.02(B) does not, however, apply when a person's conviction for a disqualifying offense is reversed, expunged, or annulled or the person is granted a full pardon by the Governor. R.C. 2961.02(C). Moreover, for the reasons discussed later in this opinion, R.C. 2961.02(B), as enacted by Sub. H.B. 181, does not apply to a person who committed a felony under the laws of Ohio prior to May 18, 2005.

R.C. 2967.16(C), as Enacted by Am. Sub. S.B. 269, Applies to a Felon Convicted Prior to July 1, 1996

We turn now to your first question, whether R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, restores the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court. R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, states:

(C) The following prisoners or person shall be restored to the rights and privileges forfeited by a conviction:

• • •

(3) A person who has completed the period of a community control sanction or combination of community control sanctions, as defined in [R.C. 2929.01], that was imposed by the sentencing court.

In 2006 Op. Att'y Gen. No. 2006-030 at 2-285 and 2-286 the Attorney General advised that R.C. 2967.16(C) restores the privilege of holding an office of honor, trust, or profit to a person who had that privilege forfeited by a felony conviction.

(a) It is one of the following:

(i) A theft offense that is a felony;

(ii) A felony under the laws of this state, another state, or the United States, that is not covered by division (A)(1)(a)(i) of this section and that involves fraud, deceit, or theft.

(b) It is an offense for which the laws of this state, another state, or the United States do not otherwise contain a provision specifying permanent disqualification, or disqualification for a specified period, from holding a public office or position of public employment, or from serving as an unpaid volunteer, as a result of conviction of the offense, including, but not limited to, a provision such as that in [R.C. 2921.41(C)(1)].

R.C. 2961.02(A)(1).

tion under R.C. 2961.01 when the person complies with the conditions set forth in R.C. 2967.16(C)(1), (2), or (3):

[T]he General Assembly has, throughout most of our state's history, exercised its prerogative under Ohio Const. art. V, § 4 by enacting legislation that deprives Ohio felons of rights and privileges that are incidents of state citizenship. During that same period the General Assembly has identified the means by which such rights and privileges might be restored to a convicted felon. At various times those rights and privileges could be restored by the reversal or annulment of a person's felony conviction, the issuance of a gubernatorial pardon, or the satisfaction of certain statutory conditions.

Prior to 1881, the privilege of holding an office of honor, trust, or profit could be restored only if a felon succeeded in having his conviction reversed or annulled, or persuaded the Governor to grant him a pardon. With the enactment of Am. H.B. 372 in 1881, the General Assembly made it possible for a felon to be restored the privilege of holding public office if certain statutory conditions, which now are set forth in R.C. 2967.16(C), were satisfied. *See generally* 1932 Op. Att'y Gen. No. 4650, vol. II, p. 1130, at 1131 ("a person who has been convicted of a felony is no longer an elector, unless he shall have been pardoned or has had his citizenship and other rights restored in the manner provided by law"); 1916 Op. Att'y Gen. No. 1741, vol. II, p. 1113 (a person who has served the entire term fixed by a commutation of sentence, conditional or otherwise, is entitled to receive a certificate restoring the rights and privileges forfeited by his conviction on his compliance with G.C. 2161 (analogous provisions now set forth in R.C. 2967.16(C))).

We conclude, therefore, that, in addition to R.C. 2961.01, R.C. 2967.16(C) provides the means by which a person may have the privilege of holding an office of honor, trust, or profit restored to him.¹² *See State ex rel. Gains v. Rossi*, 86 Ohio St. 3d at 622, 716 N.E.2d 204 ("R.C. 2961.01 does not expressly provide that the reversal, annulment, or pardon mentioned in that statute are the *sole* methods for a convicted felon to restore that person's competency to hold an office of honor, trust, or profit"). *See generally Meeks v. Papadopoulos*, 62 Ohio St. 2d 187, 191-92, 404 N.E.2d 159 (1980) ("the General Assembly, in enacting a statute, is assumed to have been aware of other statutory provisions concern-

¹² As additional support for its conclusion, 2006 Op. Att'y Gen. No. 2006-030 at 2-286 through 2-288 stated that language used in R.C. 2953.33(A) and R.C. 2967.17(B) demonstrates further that the General Assembly intended to restore the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, to a person who was convicted of a felony under the laws of Ohio when the person satisfies any of the conditions set forth in R.C. 2967.16(C).

ing the subject matter of the enactment even if they are found in separate sections of the Code”); *Eggleston v. Harrison*, 61 Ohio St. 397, 404, 55 N.E. 993 (1900) (“[t]he presumption is that laws are passed with deliberation and with knowledge of all existing ones on the subject”). A person convicted of a felony under the laws of Ohio who satisfies the conditions set forth in R.C. 2967.16(C) is restored the privilege of holding an office of honor, trust, or profit. (Footnote added.)

See generally 2006 Op. Att’y Gen. No. 2006-031 at 2-299 (the privilege of serving on a petit jury, which had been forfeited by operation of R.C. 2961.01, “can be restored to an Ohio felon pursuant to the plain language of R.C. 2967.16(C)(3)”).

R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, thus restores the privilege of holding an office of honor, trust, or profit to a person who had that privilege forfeited by a felony conviction under R.C. 2961.01 when the person “has completed the period of a community control sanction or combination of community control sanctions, as defined in [R.C. 2929.01], that was imposed by the sentencing court.” For purposes of R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, a “community control sanction” is defined as follows:

[A] sanction that is not a prison term and that is described in [R.C. 2929.15, R.C. 2929.16, R.C. 2929.17, or R.C. 2929.18] or a sanction that is not a jail term and that is described in [R.C. 2929.26, R.C. 2929.27, or R.C. 2929.28]. “Community control sanction” includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004. (Emphasis added.)

R.C. 2929.01(F); see R.C. 2967.01(P) (as used in R.C. Chapter 2967, the term “community control sanction” has the same meaning as in R.C. 2929.01).

Because the term “community control sanction,” as used in R.C. 2967.16(C)(3), includes “probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996,” R.C. 2929.01(F), it follows that R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, applies to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court.

We are aware that R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, took effect on July 1, 1996, and applies “to a person who commits an offense on or after” July 1, 1996. Am. Sub. S.B. 269 (uncodified section three); see R.C. 2967.021(B). Further, no language in R.C. 2967.16, as it existed prior to July 1, 1996, restored to a person who committed a felony under the laws of Ohio prior to July 1, 1996, the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, once the person completed his probation. See 1993-1994 Ohio Laws, Part III, 5390, 5394 (Sub. H.B. 314, eff. Sept. 29, 1994) (setting forth the version of R.C. 2967.16 that applies to a person who committed a felony prior to July 1, 1996). Thus, it could be argued that R.C.

2967.16(C)(3), as enacted by Am. Sub. S.B. 269, does not apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court.

In 2006 Op. Att'y Gen. No. 2006-031 the Attorney General addressed whether R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, restores the privilege of serving as a juror on a petit jury, which was forfeited by operation of R.C. 2961.01, to a person who was convicted of a felony under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court. While rejecting the argument that R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, does not apply to a person who was convicted of a felony under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court, the opinion explained:

[I]nsofar as the definition of "community control sanction," as used in R.C. 2967.16, as it exists on and after July 1, 1996, includes "probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996," R.C. 2929.01(F); *see* R.C. 2967.01(P), it reasonably follows that the General Assembly intended to extend the restoration benefits of R.C. 2967.16, as it exists on and after July 1, 1996, to a person who committed a felony prior to July 1, 1996, and completed his probation.

If this were not so, a person who committed a felony prior to July 1, 1996, and completed his probation would not have the privilege of serving as a juror on a petit jury restored by R.C. 2967.16, whereas a person who committed a felony prior to July 1, 1996, and served his entire sentence in a state correctional institution would have this privilege restored upon his compliance with the conditions in R.C. 2967.16. Also, any person who committed a felony on or after July 1, 1996, would have the privilege of serving as a juror on a petit jury restored upon his compliance with the conditions in R.C. 2967.16, while a person who committed a felony prior to July 1, 1996, and completed his probation would not have this privilege restored by R.C. 2967.16.

Because R.C. 2901.04(A) directs that statutes "defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused[.]" any ambiguity in the construction of R.C. 2967.16 must be resolved in favor of a person who committed his felony prior to July 1, 1996. *See generally* 1950 Op. Att'y Gen. No. 1499, p. 106, at 108 (since G.C. 13458-1 (now R.C. 2961.01) is a penal statute, it should be strictly construed); 1938 Op. Att'y Gen. No. 2822, vol. II, p. 1565 (G.C. 13452-7, which was former R.C. 2951.09, is a remedial statute that should be given a liberal interpretation). Accordingly, R.C. 2967.16, as it exists on and after July 1, 1996, restores to a person who was convicted of a felony under the laws of Ohio prior to July 1, 1996, the privilege of serving as a juror on a petit jury once the person has

completed his probation. *See generally State v. Moon*, Case No. 76AP-736, 1977 Ohio App. LEXIS 9189, at *4 (Franklin County Jan. 27, 1977) (“[t]he obvious implication of both R.C. 2961.01 and [R.C.] 2951.09 is that a convicted felon who receives no jail sentence or is not placed on probation is immediately eligible to be an elector pursuant to R.C. [2961.01] and is immediately eligible for consideration for restoration of his citizenship rights pursuant to R.C. 2951.09. A contrary holding would mean that the person committing the more aggravated offense and thus imprisoned or placed on probation would have superior rights to restoration of full citizenship than the offender whose offense was less aggravated and who received no prison sentence or whom the court did not believe required probation supervision”).

2006 Op. Att’y Gen. No. 2006-031 at 2-295 n.6.

Because we find the analysis set out in 2006 Op. Att’y Gen. No. 2006-031 persuasive, that analysis also applies to the privilege of holding an office of honor, trust, or profit, which a person forfeits under R.C. 2961.01 upon being convicted of a felony under the laws of Ohio. Accordingly, R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, restores the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation of R.C. 2961.01, to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court.

R.C. 2961.02(B), as Enacted by Sub. H.B. 181, Does Not Apply to a Felon Convicted Prior to May 18, 2005

Your second question asks whether R.C. 2961.02(B), as enacted by Sub. H.B. 181, applies to a person who was convicted of a felony theft offense¹³ under the laws of Ohio prior to May 18, 2005.¹⁴ Resolution of your question therefore turns on whether R.C. 2961.02(B), as enacted by Sub. H.B. 181, applies retroactively to a person convicted of a felony theft offense under the laws of Ohio before R.C. 2961.02(B) became effective on May 18, 2005.

It is well established that two provisions of Ohio law limit the retroactive application of a statute. First, R.C. 1.48 provides that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.”¹⁵ *Accord Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, ¶7 (2008); *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶9 (2007); *State v. Cook*, 83 Ohio

¹³ For the purpose of this question, it is assumed that the felony theft offense is included within the definition of disqualifying offense set forth in R.C. 2961.02(A)(1). *See* note eleven, *supra*.

¹⁴ R.C. 2961.02(B), as enacted by Sub. H.B. 181, became effective May 18, 2005.

¹⁵ The Ohio Supreme Court has stated that “[t]he terms ‘retroactive’ and ‘retrospective’ may be used interchangeably to refer to a law that affects ‘acts or facts occurring, or rights accruing, before it came into force.’” *Hyle v. Porter*, 117 Ohio St.

St. 3d 404, 410, 700 N.E.2d 570 (1998). In addition, Article II, section 28 of the Ohio Constitution prohibits the General Assembly from passing laws that retroactively impair vested substantive rights.¹⁶ *Hyle v. Porter*, at ¶7; *State v. Consilio*, at ¶9; see *State v. Cook*, at 410-11. Instead, the power of the General Assembly to enact retroactive legislation is limited to “legislation that is merely remedial in nature.” *State v. Consilio*, at ¶9; accord *Hyle v. Porter*, at ¶7; *State v. Cook*, at 411.

As recently explained in *State v. Consilio*, at ¶10, the Ohio Supreme Court has distilled the foregoing legal provisions into the following two-part test for evaluating whether a statute may be applied retroactively:

First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive. The General Assembly’s failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively. If a statute is clearly retroactive, though, the reviewing court must then determine whether it is substantive or remedial in nature. (Citations omitted.)

Accord Hyle v. Porter, at ¶8; *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶10 (2002). Thus, for purposes of the retroactivity analysis, “[t]he first part of the test determines whether the General Assembly ‘expressly made [the statute] retroactive,’ as required by R.C. 1.48; the second part determines whether it was empowered to do so.” *Hyle v. Porter*, at ¶8 (citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 106, 522 N.E.2d 489 (1988)).

In accordance with the foregoing test, we must first determine whether R.C. 2961.02(B), as enacted by Sub. H.B. 181, was expressly made retroactive by the General Assembly. Pursuant to R.C. 1.48, if R.C. 2961.02(B), as enacted by Sub. H.B. 181, is silent on the question of its retroactive application, the presumption in favor of prospective application controls. *Hyle v. Porter*, at ¶10; *State v. Consilio*, at ¶15. In order to overcome this presumption, R.C. 2961.02(B), as enacted by Sub. H.B. 181, must “‘clearly proclaim’ its retroactive application.” *Hyle v. Porter*, at ¶10; accord *State v. Consilio*, at ¶15. Moreover, “[t]ext that supports a mere inference of retroactivity is not sufficient to satisfy this standard” since retroactivity is not to be inferred from suggestive language. *Hyle v. Porter*, at ¶10; accord *State v.*

3d 165, 2008-Ohio-542, ¶7, n.2 (2008) (quoting *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶1, n.1 (2007)).

¹⁶ Article II, section 28 of the Ohio Constitution provides, in full:

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.

Consilio, at ¶15. See generally *Kelley v. State*, 94 Ohio St. 331, 338-39, 114 N.E. 255 (1916) (when “the intention of the legislature is to give to such repealing or amending act a retroactive effect such intention must not be left to inference or construction, but must be manifested by express provision in the repealing or amending act”).

R.C. 2961.02(B), as enacted by Sub. H.B. 181, reads, in full, as follows:

Any person who is convicted of a disqualifying offense is incompetent to hold a public office or position of public employment or to serve as a volunteer, if holding the public office or position of public employment or serving as the volunteer involves substantial management or control over the property of a state agency, political subdivision, or private entity.

Nothing in the language of R.C. 2961.02(B), as enacted by Sub. H.B. 181, states or clearly indicates that its provisions are to be applied retroactively. Additionally, no language in the other provisions of R.C. 2961.02, as enacted by Sub. H.B. 181, declares that R.C. 2961.02(B) applies to convictions or guilty pleas that occur before the effective date of Sub. H.B. 181. Finally, nowhere in Sub. H.B. 181 is retroactive application of R.C. 2961.02(B) expressly mentioned. Therefore, in the absence of a clear declaration of retroactivity, it must be concluded that R.C. 2961.02(B), as enacted by Sub. H.B. 181, can be applied only prospectively. See *Hyle v. Porter*, at ¶10; *State v. Consilio*, at ¶15.

We are aware that the use of the present tense in R.C. 2961.02(B), as enacted by Sub. H.B. 181, may suggest applying R.C. 2961.02(B) retroactively. However, the Ohio Supreme Court has stated: “‘A statute, employing operative language in the present tense, does not purport to cover past events of a similar nature.’ Absent more express evidence of retroactivity, the general presumption of prospective application controls.” *State v. Consilio*, at ¶17 (quoting *Smith v. Ohio Valley Ins. Co.*, 27 Ohio St. 2d 268, 276, 272 N.E.2d 131 (1971)); accord *Hyle v. Porter*, at ¶22. The use of the present tense in R.C. 2961.02(B), as enacted by Sub. H.B. 181, thus does not permit us to conclude that R.C. 2961.02(B) may be applied retroactively since there is no other express evidence of retroactivity. See *State v. Consilio*, at ¶17.

Our conclusion that R.C. 2961.02(B), as enacted by Sub. H.B. 181, can be applied only prospectively is further supported by the fact that “the General Assembly is presumed to know that it must include expressly retroactive language to create that effect, and it has done so in the past.” *State v. Consilio*, at ¶15; see *Hyle v. Porter*, at ¶18. In this regard, the Ohio Supreme Court has explained:

Two previous cases serve as examples of clear expressions of retroactivity and underscore the absence of a comparable declaration in former R.C. 2950.031.

In *Van Fossen*, we based our finding of a clearly expressed legislative intent for former R.C. 4121.80 to apply retroactively on the

following passage: “This section applies to and governs any action * * * pending in any court on the effective date of this section * * * notwithstanding any provisions of any prior statute or rule of law of this state.” Former R.C. 4121.80(H), 141 Ohio Laws, Part I, 736-737. *Van Fossen*, 36 Ohio St. 3d at 106, 522 N.E.2d 489.

In *State v. Cook* (1998), 83 Ohio St. 3d 404, 700 N.E.2d 570, our finding that the General Assembly specifically made R.C. 2950.09 retroactive was based in part on an express provision making the statute applicable to anyone who “was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after” that date. Former R.C. 2950.09(C)(1), 146 Ohio Laws, Part II, 2620. *Id.* at 410, 700 N.E.2d 570.

Both former R.C. 4121.80(H) and former 2950.09(C)(1) expressly make their provisions applicable to acts committed or facts in existence prior to their effective dates. In addition, R.C. 4121.80(H) expressly proclaimed its applicability in spite of contrary preexisting law by including the phrase “notwithstanding any provisions of any prior statute or rule of law of this state.” Thus, both statutes include strong and unmistakable declarations of retroactivity.

These examples demonstrate that the drafters of legislation know the words to use in order to comply with the Ohio Constitution and the requirement created by the General Assembly (R.C. 1.48).

The text of R.C. 2950.031, by contrast, does not feature a clear declaration of retroactivity in either its description of convicted sex offenders or its description of prohibited acts. The statute does not proclaim its applicability to acts committed or facts in existence prior to the effective date of the statute or otherwise declare its retroactive application. In the present case, the absence of a clear declaration comparable to the two excerpted above precludes the retrospective application of R.C. 2950.031.

Hyle v. Porter, at ¶14-19.

Because the General Assembly has used language in other statutes to refer to convictions and guilty pleas that occurred prior to the date the statutes became effective, it follows that the absence of such language in R.C. 2961.02(B) further indicates that the General Assembly did not intend for R.C. 2961.02(B) to be applied retroactively. See *Hyle v. Porter*, at ¶14-19. See generally *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (“[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended”); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 66, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

Having concluded that R.C. 2961.02(B), as enacted by Sub. H.B. 181, lacks

a clear indication of retroactive application, it may be applied only prospectively to a person who was convicted of a felony theft offense under the laws of Ohio on or after its effective date, which was May 18, 2005.¹⁷ See R.C. 1.48; *Hyle v. Porter*; *State v. Consilio*. Therefore, in response to your second question, R.C. 2961.02(B), as enacted by Sub. H.B. 181, does not apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005. See generally *State ex rel. Corrigan v. Barnes*, 3 Ohio App. 3d 40, 443 N.E.2d 1034 (Cuyahoga County 1982) (syllabus, paragraph two) (“[a]n amendment to R.C. 2961.01, effective January 1, 1974, which makes the statute applicable to persons convicted of felonies under federal law, may not constitutionally be applied with respect to acts committed prior to January 1, 1974. The amendment, if applied to past acts, would constitute an *ex post facto* law, prohibited under Section 10, Article I of the United States Constitution, and would constitute a retroactive law, prohibited under Section 28, Article II of the Ohio Constitution”).

Restoring under R.C. 2967.16(C), as Enacted by Am. Sub. S.B. 269, the Privileges Forfeited by Operation of R.C. 2961.02(B), as Enacted by Sub. H.B. 181, to a Felon Convicted Prior to May 18, 2005

Your final question asks, if R.C. 2961.02(B), as enacted by Sub. H.B. 181, applies to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005, whether R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, restores the privilege of holding a public office or position of employment that involves substantial management or control over the property of a political subdivision, which had been forfeited by operation of R.C. 2961.02(B), to a person who has completed the period of probation that was imposed by the sentencing court and, if the privilege is not restored, does R.C. 2961.02(B) prohibit the person from serving as a member of the legislative authority of a statutory village. Because we have determined that R.C. 2961.02(B), as enacted by Sub. H.B. 181, does not apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005, it is unnecessary for us to address your final question.

Conclusions

For the reasons discussed above, it is my opinion, and you are hereby advised as follows:

1. **R.C. 2967.16(C)(3), as enacted by Am. Sub. S.B. 269, 121st Gen. A. (1996) (eff. July 1, 1996), restores the privilege of holding an office of honor, trust, or profit, which had been forfeited by operation**

¹⁷ Because we have concluded that R.C. 2961.02(B), as enacted by Sub. H.B. 181, is not expressly made retroactive, it is unnecessary for us to address whether R.C. 2961.02(B) is substantive or remedial in nature. See generally *Hyle v. Porter*, at ¶9 (it is unnecessary to address “the question of constitutional retroactivity unless . . . the General Assembly expressly made the statute retroactive”); *State v. Consilio*, at ¶10 (“[t]he General Assembly’s failure to clearly enunciate retroactivity ends the analysis [as to whether a statute may be applied retroactively], and the relevant statute may be applied only prospectively”).

of R.C. 2961.01, to a person who was convicted of a felony theft offense under the laws of Ohio prior to July 1, 1996, and who has completed the period of probation that was imposed by the sentencing court.

2. R.C. 2961.02(B), as enacted by Sub. H.B. 181, 125th Gen. A. (2004) (eff. May 18, 2005), does not apply to a person who was convicted of a felony theft offense under the laws of Ohio prior to May 18, 2005.