6. As to your final question, Sec. 24 specifically provides that:

"The survivor of a deceased participant *or retirant* . . . shall be entitled to receive a survivors retirement allowance payable from the survivors retirement fund, . . . Such retirement allowance shall be payable beginning (1) on the date of death of such participant or *retirant* if . . ." [following which certain conditions relating to age, marriage, remarriage, children and death are spelled out in detail].
(Emphasis supplied)

Since, as I have stated, a legislator who has become a retirant and is then returned to the legislature does not thereby lose his status as a "retirant," it is clear that his widow is entitled to the benefits of Sec. 24 subject to the conditions stated therein.

FRANK J. KELLEY,
Attorney General.

670705.1

CRIMINAL LAW: Sentences.

Act 213, P.A. 1965, construed. A judge may not order a conviction set aside pursuant to Act 213, P.A. 1965, while the sentence based on such conviction is still being served.

No. 4536 July 5, 1967.

Mr. Bruce Barton
Prosecuting Attorney
County Building
Jackson, Michigan

Your predecessor asked whether, pursuant to Act 213, P.A. 1965, being M.S.A. 1965 Cum. Supp. §§ 28.1274(101) and (102), a judge may order the conviction of an individual set aside while such person is still serving the sentence.

Act 213 provides:

"Section 1. Any person who is convicted, or pleads guilty to not more than 1 offense, excepting traffic violations and criminal offenses, the maximum punishment for which is life imprisonment, the commission of which occurred before his twenty-first birthday, may move the convicting court for the entry of an order setting aside the conviction in said cause. Such motion shall not be made until the expiration of 5 years from the time of the entry of the guilty plea or rendition of the decision of the court or jury. A copy of such motion shall be served upon the office of the prosecuting attorney or attorney general who prosecuted the crime and an opportunity be given to contest the motion. Upon the hearing of the motion the court may require the filing of such affidavits and may require the taking of such proofs as it deems proper. If the court determines that the circumstances and behavior of the applicant from the date of his conviction to the filing of the motion

warrant setting aside the conviction, it may, in its discretion, enter an order for same.

"Sec. 2. Upon the entry of an order as provided for in section 1 of this act, the applicant, for purposes of the law, shall be deemed not to have been previously convicted."

As a solemn enactment of the legislature, this statute should be given effect unless it is repugnant to some provision of the Constitution for, as stated by Justice Christiancy in *Sears v. Cottrell,* 5 Mich. 251 (1858), at page 259:

> "No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and it is only when they *manifestly* infringe some provision of the constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act."

See also:

Green v. Graves, 1 Doug. 351 (1844);
Attorney General v. Preston, 56 Mich. 177 (1885);
Attorney General v. State Board of Assessors, 143 Mich. 73 (1906);
Bowman v. Wayne Circuit Judge, 214 Mich. 518 (1921);
Attorney General ex rel. Connolly v. Reading, 268 Mich. 224 (1934);
Young v. City of Ann Arbor, 267 Mich. 241 (1934); and
Fortner v. Koch, 272 Mich. 273 (1935).

The specific provision of the Michigan Constitution of 1963 which must be considered is Article V, Section 14 which provides:

> "The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor."

The issue, therefore, is whether the provisions of Act 213 infringe upon the prerogatives of the governor to grant reprieves, commutations and pardons.

In *People v. Fox* 312 Mich. 577 (1945), the Michigan Supreme Court considered the question of whether, by virtue of Section 27 of Act 175, P.A. 1927, being C.L. 1948 § 769.27; M.S.A. 1959 Rev. Vol. § 28.1097, any sentence imposed by a judge could be changed by the sentencing judge after the person convicted of a crime has served a portion of his sentence and it was therein held that the judge did not have such power. In this opinion the Court said at page 581:

> "To hold with defendant under the circumstances of this case that the court has power to amend a sentence after the prisoner has served a part of it would infringe upon the exclusive power of the governor

> under the Constitution to commute sentence. It would violate the jurisdiction of the parole board. Section 27 of chapter 9 of the code of criminal procedure relied upon by defendant does not give the trial court the power to reduce a sentence after it has been partly served."

Similarly, in *People v. Freleigh,* 334 Mich. 306 at 310 (1952), the Court said:

> "The Constitution by implication forbids the judiciary to commute a sentence. It does not enable the legislature to pass a law that will infringe upon the exclusive power of the governor to commute a sentence."

Both the *Fox* case and the *Freleigh* case were based upon the provisions of Article VI, Section 9 of the Michigan Constitution of 1908 but the language of Article V, Section 14 of the 1963 Constitution pertinent to the question at hand is substantially the same and would undoubtedly lead to the same result.

Thus, to the extent that an order setting aside a conviction would have the effect of shortening or commuting a sentence, it would operate as an infringement upon the exclusive authority of the governor as defined in *Fox* and *Freleigh.*

On the other hand, under the doctrine of separability, to the extent that the statute does not infringe upon any exclusive prerogative of the governor, it can and should be given effect. This doctrine, as expounded in *2 Sutherland, Statutes and Statutory Construction* (Third Edition by Frank E. Horack, Jr.) § 2417, page 195, recognizes that where a single section of a statute contains language susceptible of both valid and invalid applications, the valid application should be invoked, thereby leaving a workable statute reasonably conforming to the legislative intent.

As applied to Act 213, P.A. 1965, supra, despite the fact that the court does not have the authority to set aside the conviction of a person while the sentence upon which the conviction was based is being served, it would have authority to set aside a conviction thereafter. This result would also appear to be substantially close to the legislative intent since the very provisions of the act assume that the judicial power granted thereunder would be used sparingly and with restraint. The conviction may only be set aside, the act says, where only one offense is involved, where no criminal sentence for which life imprisonment is the maximum punishment is involved and where the crime was committed before the twenty-first birthday of the person; in addition, the motion to set aside the conviction may not be made until the expiration of five years from the date of determination of guilt.

A combination of such circumstances would only occur where the record of the single conviction could constitute a serious impediment to the rehabilitation of an otherwise deserving person who had made a serious error in his youth. This objective is therefore different in purpose from the reduction of sentences by courts which the Michigan Supreme Court in *Fox* and *Freleigh* found to be repugnant to the governor's constitutional prerogatives.

In summary, while an order by a judge setting aside a conviction while a person is serving a sentence pursuant to such conviction would infringe

upon the exclusive authority of the governor to commute sentences, a judge may enter an order setting aside such conviction after the sentence imposed by the court has been served providing that all of the elements required for such action by Act 213, P.A. 1965, supra, are present.

FRANK J. KELLEY,
Attorney General.

670713.2

ADMINISTRATIVE RULES: Legislature – Power to suspend under Act 88, P.A. 1943.

CONSTITUTIONAL LAW: Joint Committee on Administrative Rules – Power to suspend administrative rules under Mich. Const. 1963, Art. IV, Sec. 37.

Only the joint committee on administrative rules, acting between sessions under Mich. Const. 1963, Art. IV, Sec. 37, as to rules promulgated during that period, has the actual power to suspend an administrative rule.

During legislative sessions, the only true power of the legislature to suspend a pending administrative rule or regulation, is by bill, the "legislative disapproval" of a pending rule by concurrent resolution under Section 8c of Act 88, P.A. 1943, being no more than a recommendation to the promulgating agency to withdraw or amend the rule. If the recommendation is disregarded, the legislature must act by bill.

Because of Mich. Const. 1963, Art. IV, Sec. 22, requiring that all legislation be by bill, Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules, acting by concurrent or other resolution, power to suspend an administrative rule promulgated during sessions.

Said Act 88, P.A. 1943, may, however, constitutionally be amended to give the joint committee on administrative rules the "legislative disapproval" authority given the legislature itself under Sec. 8c of said Act, because said authority amounts only to a recommendation.

No. 4586

July 13, 1967.

Honorable Robert J. Huber, Chairman
Joint Committee on Administrative Rules
State Senate
The Capitol
Lansing, Michigan

Your inquiry, under date of May 4, 1967, relative to the legislature's power to suspend administrative rules promulgated under Act 88, P.A. 1943, is respectfully acknowledged.

Since the inquiry comprehensively involves Article IV, Section 37 of the Michigan Constitution of 1963, as well as the provisions of said Act 88 itself, orderly treatment suggests that the applicable constitutional and statutory material first be generally recited, after which your several questions will be stated and answered seriatim.