OPINION NO. 2005-019

Syllabus:

A board of county commissioners is not authorized by R.C. 307.93(D) or R.C. 2929.37(A) to adopt a policy that requires a convicted offender serving in a local detention facility to repay the county for the costs it incurred as a result of his confinement in the facility prior to the commencement of his sentence.

To: Stephen J. Pronai, Madison County Prosecuting Attorney, London, Ohio

June 2005

By: Jim Petro, Attorney General, April 29, 2005

You have asked whether a board of county commissioners may require a convicted criminal offender to reimburse the county for the costs it incurred as a result of his confinement in a local detention facility prior to the commencement of his sentence (as when he was first arrested or because of his inability to make bail). You also ask whether the answer depends upon whether the court has credited the time the offender spent in pre-sentence confinement against his ultimate sentence. In order to answer your questions, we will first examine the statutory schemes that describe when a prisoner may be required to pay for the costs of his confinement, and that govern the sentencing of convicted offenders. We will then examine how these two statutory schemes interrelate to preclude the county from requiring a prisoner to repay the costs of his pre-sentence confinement under either scenario.

Costs of Confinement

A board of county commissioners is authorized to participate in the establishment and administration of a multi-jurisdictional correctional center pursuant to R.C. 307.93.[1] If it does so, the board of commissioners may require a person, "who was convicted of an offense, who is under the charge of the sheriff of their county ... and who is confined in the ... correctional center as provided in [R.C. 2929.37(A)], to reimburse the applicable county ... for its expenses incurred by reason of the person's confinement in the center." R.C. 307.93(D). Before a county may require reimbursement, however, it must adopt an appropriate policy, as specified in R.C. 2929.37, through an agreement with the local detention facility. R.C. 307.93(D); R.C. 2929.37(A). In order to determine the scope of the board of commissioners' authority to require reimbursement, we must examine closely the exact language of R.C. 2929.37(A), which reads as follows:

> A board of county commissioners, in an agreement with the sheriff, a legislative authority of a municipal corporation, a corrections commission, a judicial corrections board, *or any other public or private entity that operates a local detention facility*[2] *at which a prisoner who is convicted of an offense and who is confined in the facility under a sanction or term of imprisonment* ... may adopt, pursuant to section 307.93 ...

[1] More specifically, R.C. 307.93(A) authorizes a board of county commissioners to contract with other counties and with municipal corporations for the joint establishment of a multi-jurisdictional correctional center. The center is intended to "augment county ... jail programs and facilities by providing custody and rehabilitative programs for those persons under the charge of the sheriff ... who, in the opinion of the sentencing court, need programs of custody and rehabilitation not available at the county ... jail." *Id.* Each correctional center is administered by a corrections commission, composed of certain officials from the participating jurisdictions, unless the jurisdictions contract for the private operation and management of the center. R.C. 307.93(A),(G).

[2] A "local detention facility" is defined to include a multicounty and other multi-jurisdictional correctional centers. R.C. 2929.36(E).

> of the Revised Code, a policy that requires the prisoner to pay all or part of the costs of confinement in that facility.[3] (Emphasis and footnotes added.)

R.C. 2929.37(A) and R.C. 307.93(D) clearly authorize a board of county commissioners to adopt a policy requiring an offender, who is found guilty (or pleads guilty), and is sentenced to confinement in a local detention facility, to repay the county for the costs of his confinement that began accruing upon commencement of his sentence of imprisonment.[4] Your question is whether R.C. 307.93(D) and R.C. 2929.37(A) may be read more broadly to authorize a board of county commissioners to include in its policy an obligation for a convicted prisoner to repay the costs of his confinement that were incurred prior to the commencement of his sentence as well as after.

The language used in the final phrase of R.C. 2929.37(A), as set forth above, authorizes a board of county commissioners to adopt a policy in accordance with R.C. 307.93(D), and in agreement with a local detention facility, that requires repayment by "the prisoner"—the antecedent being "a prisoner who is convicted of an offense and who is confined in the facility under a sanction or term of imprisonment"—for the costs of confinement in "that facility"—the antecedent being the local detention facility where the prisoner is serving his term of imprisonment, and which is the other party to the agreement with the board of commissioners. *See*

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[3] The costs of confinement include, "but are not limited to, the costs of repairing property damaged by the prisoner while confined, a per diem fee for room and board, medical and dental treatment costs, the fee for a random drug test ... and a one-time reception fee for the costs of processing the prisoner into the facility at the time of the prisoner's initial entry into the facility." R.C. 2929.37(A). *See also* R.C. 2929.38.

[4] A policy adopted pursuant to R.C. 307.93(D) and R.C. 2929.37 may be applied, however, only to an offender who was not sentenced by the court to pay reimbursement for the costs of his confinement. R.C. 2929.18(A)(5)(b); R.C. 2929.28(A)(3)(b); R.C. 2929.37(A). A court may sentence a felony offender to financial sanctions, including reimbursement for the costs of his confinement, when he is sentenced to a prison term or community residential sanctions. R.C. 2929.18(A)(5)(a)(ii). Similarly, a court may sentence a misdemeanant to reimbursement for "[a]ll or part of the costs of confinement in a jail or other residential facility, including, but not limited to, a per diem fee for room and board, the costs of medical and dental treatment, and the costs of repairing property damaged by the offender while confined." R.C. 2929.28(A)(3)(a)(ii).

If a court does not impose financial sanctions, but sentences an offender to a facility covered by a policy adopted pursuant to R.C. 2929.37, the court must include the obligation of repayment as part of the sentence. R.C. 2929.19(B)(7); R.C. 2929.24(D). The sentence automatically includes any certificate of judgment that is issued against the offender for failure to pay these costs. R.C. 2929.19(B)(7); R.C. 2929.24(D); R.C. 2929.37(B)-(D).

Webster's New World Dictionary 1473 (2nd college ed. 1984) (defining the adjective, ''that,'' as ''designating the person or thing mentioned or understood''). Thus, under R.C. 2929.37(A), the only costs that a convicted offender may be required to repay, pursuant to a policy adopted by the board of county commissioners, are those that were incurred in the facility to which he was sentenced.

This interpretation is consistent with R.C. 307.93(D), which addresses the obligation of a convicted offender, who is confined in a correctional center with a repayment policy, to reimburse the county for those expenses it incurred by reason of the offender's ''confinement in *the center*''—that is, the center to which the offender was sentenced after conviction. *See Webster's New World Dictionary* 1473 (2nd college ed. 1984) (defining the term, ''the,'' as: ''for base see THAT; the meaning is controlled by the basic notion 'a previously recognized, noticed, or encountered' in distinction to A, AN'').

Both R.C. 2929.37(A) and R.C. 307.93(D) speak in terms of offenders who are in post-conviction confinement and the costs associated with their confinement in the facility to which they were sentenced. Neither is broad enough to authorize a county to adopt a policy that requires a convicted offender to repay the costs of his pre-sentence confinement in a facility if that facility is not the one to which he was sentenced.

The question remains, however, whether R.C. 2929.37(A) and R.C. 307.93(D) authorize a county to adopt a policy that imposes pre-confinement costs on a convicted offender when he is sentenced to the same facility in which he was confined prior to sentence. Again, such a reading ignores the statutes' focus on post-sentence confinement, in terms of the type of detainee—a convicted offender serving a term of imprisonment—and the type of costs—those incurred in the facility where the convicted offender is serving his term of imprisonment. Nothing in the statutory language indicates that a county may look back in time to include expenses incurred prior to the offender's conviction, sentencing, and confinement under a term of imprisonment.

If the General Assembly had intended to include pre-sentence confinement costs, it likely would have used more explicit and descriptive language to clearly express that intent by specifying that a county could require a convicted offender to repay the costs of his confinement, regardless of when the costs were incurred, and regardless of whether they were incurred in the facility to which the offender was ultimately sentenced. As the U.S. Supreme Court observed, in an early case interpreting the ''among the several States'' language of the Commerce Clause of the U.S. Constitution: ''As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey,'' and ''[t]he phrase [among the several States] is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose.'' *Gibbons v. Ogden,* 22 U.S. 1, 188, 194 (1824). *See also Columbus-Suburban Coach Lines, Inc. v. Public Utilities Comm.,* 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969) ("[i]n determining legislative intent it is the duty of this court to give effect to the words used, not to delete words

used or to insert words not used''); *Lake Shore Electric Railway Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, ''it would not have been difficult to find language which would express that purpose''). Similarly, the language used in R.C. 2929.37(A) and R.C. 307.93(D) is not ''an apt phrase'' for the purpose of including pre-sentence costs, and probably would not have been selected by the General Assembly if indeed that had been its purpose.

Further confirming that the statutes are best read as limited to post-sentence costs, we also note the odd disparity in treatment that would arise if they were read to include pre-sentence costs. In particular, under that reading a convicted inmate would be required to pay his pre-sentence costs *only if* he were sentenced to the same facility in which he was confined prior to sentence. There is no reason to believe that the General Assembly intended to treat prisoners differently for reimbursement purposes based on whether they were held in the same facility (an issue over which the convict has no control) both pre-sentence and post-sentence.

Mindful of the admonition that, ''sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused,'' R.C. 2901.04(A),[5] and because we cannot reasonably construe the statutory language as including the costs incurred in a facility in which an accused is confined prior to conviction and sentencing, we conclude that R.C. 307.93(D) and R.C. 2929.37(A) do not authorize a board of county commissioners to adopt a policy requiring convicted offenders serving a term of imprisonment in a local detention facility to repay the county for the costs it incurred as a result of the prisoner's confinement prior to sentence, even where the offender was confined in the same facility prior to and after the commencement of his sentence.

Credit for Time Served

Your second question is whether this conclusion may differ in cases where the court credits against an offender's ultimate sentence the time he spent in confinement prior to conviction. Your question implies that there may be cases where the court does *not* grant credit for time spent in pre-sentence confinement, and that these types of cases are distinguishable from those where credit for pre-sentence confinement is granted, for purposes of requiring the repayment of pre-sentence costs. Ohio's statutory sentencing scheme requires, however, that *in all cases*, time spent by an offender in pre-sentence confinement be credited towards his ultimate sentence if he is convicted.[6]

When the county sheriff transports a convicted offender (felon or misde-

[5] As we noted in note 4, *supra,* when a court sentences an offender to a facility with a reimbursement policy, the court must include this obligation in its sentence. It clearly constitutes a ''penalty'' for purposes of R.C. 2901.04.

[6] Courts are divided on whether a state is required, as a constitutional matter, to credit a convicted and incarcerated prisoner with time spent in pre-sentence confinement and, if so, the extent of that constitutional obligation. For representative cases

meanant) to the jail[7] where he will serve his term of imprisonment, he must also deliver the prisoner's record of conviction. R.C. 2949.08(A). The record of conviction must specify the total number of days that the defendant "was confined for any reason arising out of the offense for which the person was convicted and sentenced prior to delivery to the jailer," and the record must be used to "determine any reduction of sentence." R.C. 2949.08(B). The "jailer" must then "reduce the sentence of a person delivered into the jailer's custody ... by the total number of days the person was confined for any reason arising out of the offense for which the person was convicted and sentenced, including confinement in lieu of bail while

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and further discussion, see, e.g., *Palmer v. Dugger,* 833 F.2d 253 (11th Cir. 1987); *Lewis v. Cardwell,* 609 F.2d 926 (9th Cir. 1979); *King v. Wyrick,* 516 F.2d 321 (8th Cir. 1975); *Godbold v. District Court,* 623 P.2d 862 (Colo. Sup. Ct. 1981); *Hammond v. Commissioner of Correction,* 259 Conn. 855, 792 A.2d 774 (Sup. Ct. 2002); *State v. Phelan,* 100 Wash. 2d 508, 671 P.2d 1212 (Sup. Ct. 1983); *Fitzgerald v. State,* 81 Wis. 2d 170, 259 N.W.2d 743 (Sup. Ct. 1977). *See also Reno v. Koray,* 515 U.S. 50, 55 n.2 (1995) (holding, as a matter of statutory construction, that a defendant is not entitled under the federal sentencing scheme to credit towards his sentence for time spent pre-sentence in a community treatment center; Court declines to decide whether federal statute violated equal protection principles by treating pretrial defendants differently than post-sentenced defendants).

The clearest statement for Ohio can be found in *White v. Gilligan,* 351 F. Supp. 1012 (S.D. Ohio 1972), where a three-judge federal district court held that Ohio's statutory scheme, which, at the time, did *not* allow pre-trial confinement to be credited towards the sentence ultimately imposed, violated constitutional equal protection guarantees. The court found that the failure to provide credit for pre-trial confinement discriminated against indigent defendants who could not post bond, and against all defendants who remained in jail prior to trial because they did not receive full credit on their sentences for all of the time spent in actual confinement, while those who remained free prior to conviction did.

In a second case, the Sixth Circuit declined to rule on the constitutionality issue. In *Workman v. Cardwell,* 338 F. Supp. 893, 901 (N.D. Ohio 1972), the northern district found, as the southern district did in *White,* that: "The Equal Protection Clause requires that *all* time spent in any jail prior to trial and commitment by prisoners who were unable to make bail because of indigency *must* be credited to his sentence" (emphasis in original). The Sixth Circuit dismissed the district court's determination as dictum, however, stating that, "we deem it advisable to defer a resolution of this issue until it is squarely presented to this Court." *Workman v. Cardwell,* 471 F.2d 909, 911 (6th Cir. 1972). The Sixth Circuit did note the *White* decision. *Id.*

[7] R.C. 2929.01(S) (which is applicable to R.C. 2949.08 pursuant to division (E) of that section) defines "jail" to mean "a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state."

awaiting trial, confinement for examination to determine the person's competence to stand trial or to determine sanity, and confinement while awaiting transportation to the place where the person is to serve the sentence." R.C. 2949.08(C)(1).[8] The same process is used for felons sentenced to a community residential sanction in a community-based correctional facility. *See* R.C. 2929.01(E); R.C. 2929.16; R.C. 2949.08(A),(B),(C)(2), and (E).

Because every offender is entitled to credit for his pre-sentence confinement, the analysis and conclusion reached in response to your first question pertain. Again, we believe that the General Assembly would have worded R.C. 2929.37 and R.C. 307.93(D) more explicitly to include an obligation for pre-sentence confinement costs if that had been its intent.

In conclusion, it is my opinion, and you are advised that, a board of county commissioners is not authorized by R.C. 307.93(D) or R.C. 2929.37(A) to adopt a policy that requires a convicted offender serving in a local detention facility to repay the county for the costs it incurred as a result of his confinement in the facility prior to the commencement of his sentence.

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[8] As noted, R.C. 2949.08(C) requires that the time a prisoner spent in confinement, "while awaiting transportation to the place where the person is to serve the sentence," be included to reduce the prisoner's sentence. *See also* 15 Ohio Admin. Code 5120-2-04 (2004-2005 Supp.). This period of time obviously occurs after a person is sentenced. For ease of reference, we have used throughout the opinion the phrase, "pre-sentence," to describe the period of confinement at issue, but by doing so, we do not mean to exclude the "awaiting transportation" time period from our analysis and conclusions.