November 16, 1993

OPINION NO. 93-035

Reginald A. Wilkinson, Director
Department of Rehabilitation and Correction
1050 Freeway Drive, North
Columbus, Ohio 43229

Dear Director Wilkinson:

You have requested an opinion concerning the Adult Parole Authority's ("APA") duties under R.C. 2929.23 and R.C. 2967.191. Your specific questions are as follows:

1. What is the [APA's] responsibility to credit time served in confinement in light of [R.C. 2929.23 and R.C. 2967.191]?

2. What procedure is necessary in order to deny an offender credit for time served on electronically monitored house arrest and who must provide any required hearing?

3. Who is to provide the [APA] with notice of the amount of time to be credited, the amount of time to [be] denied, and what action should the [APA] take if someone else provides the information instead or if conflicting information is received?

4. If the [APA] receives information that credit is to be denied but it is obvious that no hearing was conducted, what action should [the APA] take?

## I. R.C. 2929.23 and R.C. 2967.191

R.C. 2929.23(B)(1) authorizes a sentencing court to impose a period of electronically monitored house arrest upon an individual. For purposes of R.C. 2929.23, "electronically monitored house arrest" denotes

*a period of confinement* of an eligible offender in his home or in other premises specified by the sentencing court, during which period of confinement all of the following apply:
(a) The eligible offender wears, otherwise has attached to his person, or otherwise is subject to monitoring by a certified electronic monitoring device, or he is subject to

> monitoring by a certified electronic monitoring system;
> (b) The eligible offender is required to remain in his home or other premises specified by the sentencing court for the specified period of confinement, except for periods of time during which the person is at his place of employment or at other premises as authorized by the sentencing court;
> (c) The eligible offender is subject to monitoring by a central system that monitors the certified electronic monitoring device that is attached to his person or that otherwise is being used to monitor him and that can monitor and determine his location at any time or at a designed point in time, or he is required to participate in monitoring by a certified electronic monitoring system;
> (d) The eligible offender is required by the sentencing court to report periodically to a person designated by the court;
> (e) The eligible offender is subject to any other restrictions and requirements that may be imposed by the sentencing court. (Emphasis added.)

R.C. 2929.23(A)(4). When a sentencing court imposes a period of electronically monitored house arrest upon an individual, the individual is required "to enter into a written contract with the court agreeing to comply with all restrictions and requirements imposed by the court." R.C. 2929.23(B)(1). An individual who violates any of the restrictions or requirements imposed upon him as part of his sentence of electronically monitored house arrest does not receive credit for any time thus served toward any sentence of imprisonment that had been imposed upon him. R.C. 2929.23(B)(2).[1]

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[1] You have indicated that R.C. 2929.23(B)(2) may conflict with the holding in *White v. Gilligan,* 351 F. Supp. 1012 (S.D. Ohio 1972). The court in *White v. Gilligan* held that "where, for whatever reason, a defendant remains in jail prior to his trial he must be given credit on the statutorily fixed sentence ultimately imposed for all periods of actual confinement." *Id.* at 1014.

Although the decision reached in *White v. Gilligan* indicates a judicial policy to grant credit for time spent in confinement prior to trial, the General Assembly, through R.C. 2929.23(B)(2), has explicitly stated that individuals who violate the provisions of a sentence of electronically monitored house arrest are not entitled to credit for time served on electronically monitored house arrest. Insofar as no court, including the court in *White v. Gilligan*, has held R.C. 2929.23(B)(2) unconstitutional, R.C. 2929.23(B)(2) is presumed constitutional, *see* R.C. 1.47; *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147, 128 N.E.2d 59, 63 (1955), and is entitled to be enforced as it is written, *see Probasco v. Raine,* 50 Ohio St. 378, 391, 34 N.E. 536, 538 (1893) ("when the legislature has spoken, within the powers conferred by the constitution, its duly enacted statutes form the public policy, and prescribe the rights of the people, and such statutes must be enforced"). Accordingly, R.C. 2929.23(B)(2) must be given full force and effect unless it is determined that R.C. 2929.23(B)(2) is unconstitutional, or that another statute controls the credit for time served to be given to individuals who violate their sentence of electronically monitored house arrest.

Moreover, *White v. Gilligan* concerned the granting of credit for jail time served prior to trial. In contrast, R.C. 2929.23(B)(2) relates to the denial of credit to individuals who have violated a provision of a sentence imposed by a court. Thus, the situation the General Assembly addressed in R.C. 2929.23(B)(2) raises very different concerns from those the court addressed in *White v. Gilligan.*

R.C. 2967.191, the other statute with which you are concerned, governs jail-time credit and provides:

> The adult parole authority shall reduce the minimum and maximum sentence or the definite sentence of a prisoner by the total number of days that the prisoner *was confined for any reason arising out of the offense for which he was convicted and sentenced,* including confinement in lieu of bail while awaiting trial, confinement for examination to determine his competence to stand trial or sanity, confinement in a community based correctional facility and program or district community based correctional facility and program, and confinement while awaiting transportation to the place where he is to serve his sentence. (Emphasis added.)

*Accord* 17 Ohio Admin. Code 5120-2-04(A). The term "prisoner," as used in R.C. 2967.191, "means a person who is in actual confinement in a state penal or reformatory institution." R.C. 2967.01(H). R.C. 2967.191 thus imposes a mandatory duty on the APA to reduce the minimum and maximum sentence or definite sentence of an individual who is in actual confinement in a state penal or reformatory institution by the total number of days that the individual was confined for any reason arising out of the offense for which he was convicted and sentenced. *State ex rel. Corder v. Wilson,* 68 Ohio App. 3d 567, 589 N.E.2d 113 (Franklin County 1991); *State v. Logan,* 71 Ohio App. 3d 292, 593 N.E.2d 395 (Franklin County 1991); *State ex rel. Croake v. Trumbull County Sheriff,* 68 Ohio App. 3d 245, 587 N.E.2d 978 (Trumbull County 1990).

The provisions of R.C. 2929.23(B)(2) and R.C. 2967.191 appear to conflict in that R.C. 2929.23(B)(2) mandates that the sentence of an individual who violates any of the restrictions or requirements of his sentence of electronically monitored house arrest is not to be reduced by the total number of days he is confined in his home or other specified premises, while R.C. 2967.191 expressly requires that an individual's sentence is to be reduced by the total number of days that he is confined for any reason arising out of the offense for which he was convicted and sentenced, without regard to any such violation. It is a codified rule of statutory interpretation that "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both." R.C. 1.51; *accord Mechanical Contractors Ass'n v. State,* 64 Ohio St. 2d 192, 196, 414 N.E.2d 418, 421 (1980). A review of the statutory scheme related to the execution of a sentence of imprisonment reveals that it is possible to give effect to both R.C. 2929.23(B)(2) and R.C. 2967.191.

## II. The Execution of a Sentence of Imprisonment

### A. Sentencing Court Calculates the Credit to which an Individual Is Entitled

Generally, unless the execution of sentence is suspended, an individual who is sentenced to serve a term of imprisonment is conveyed to jail, the workhouse, or the reception facility of the Department of Rehabilitation and Correction. *See* R.C. 2949.08(A); R.C. 2949.12; *see also* R.C. 2929.221; R.C. 2929.41(F). If the individual is sentenced to a term of imprisonment in a penal or reformatory institution, the court is required to forward to the institution a copy of the report of any

presentence investigation and any mental or physical examination, the entry of commitment or other appropriate entry, and a statement of the number of days confinement which the individual is entitled by law to have credited to his minimum and maximum sentence. R. Crim. P. 32.2(D); *see* R.C. 2949.12; rule 5120-2-04(B). The sentencing court thus must make a factual determination as to the amount of credit to which an individual is entitled. Rule 5120-2-04(B); *State v. Smith,* 71 Ohio App. 3d 302, 593 N.E.2d 402 (Franklin County 1992); *State ex rel. Corder v. Wilson; see* R.C. 2949.12; R. Crim. P. 32.2(D). "This information is required to be included within the sentence itself." *State v. Smith,* 71 Ohio App. 3d at 304, 593 N.E.2d at 403; *accord* rule 5120-2-04(B); *see* R.C. 2949.12; R. Crim. P. 32.2(D); *see also State ex rel. Corder v. Wilson,* 68 Ohio App. 3d at 573, 589 N.E.2d at 117. Accordingly, a sentencing court is required to calculate and forward to the custodian of a penal or reformatory institution a statement of the number of days confinement which the individual is entitled by law to have credited to his sentence of imprisonment.

**B.Custodian of a Penal or Reformatory Institution Grants Credit to the Individual**

Upon receiving an individual into custody, the custodian of a penal or reformatory institution is under a duty to reduce an individual's sentence of imprisonment by the total number of days that the individual was confined for any reason arising out of the offense for which he was convicted and sentenced. R.C. 2967.191; rule 5120-2-04(A), (D); *see State ex rel. Gooden v. Martin,* 67 Ohio App. 3d 685, 588 N.E.2d 185 (Franklin County 1990). Although the custodian is required to reduce an individual's sentence of imprisonment, it is, as noted above, the sentencing court that makes the factual determination as to the number of days confinement which the individual is entitled by law to have credited to his sentence of imprisonment. Rule 5120-2-04(B); *see State v. Smith*; *State ex rel. Corder v. Wilson.* Moreover, the custodian has no authority to ignore the sentencing court's determination and to substitute his own determination as to the number of days confinement which the individual is entitled by law to have credited to his sentence of imprisonment. *State ex rel. Corder v. Wilson,* 68 Ohio App. 3d at 573, 589 N.E.2d at 117; *see* rule 5120-2-04(E), (H).

Once the sentencing court has calculated and forwarded to the custodian of the penal or reformatory institution a statement of the number of days of confinement which an individual is entitled by law to have credited to his sentence of imprisonment, the sentencing court has discharged its duty. *State ex rel. Corder v. Wilson,* 68 Ohio App. 3d at 573, 589 N.E.2d at 117; *see State ex rel. Gooden v. Martin.* The duty of implementing the reduction of an individual's sentence of imprisonment by the total number of days that the individual was confined for any reason arising out of the offense for which he was convicted and sentenced rests squarely with the custodian of the penal or reformatory institution. *State v. Smith*; *State ex rel. Corder v. Wilson*; *State ex rel. Gooden v. Martin; see* rule 5120-2-04. In light of the foregoing, it is clear that the custodian of a penal or reformatory institution has a mandatory duty to reduce the minimum and maximum sentence or definite sentence of an individual by the total number of days of confinement that the sentencing court determines the individual is entitled by law to have credited to his sentence.[2]

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[2] Pursuant to 17 Ohio Admin. Code 5120-2-04(D), the APA is also required to reduce a prisoner's minimum and maximum sentence or definite sentence by "the number of days the prisoner was confined as a result of the offense, between the date of [sentencing] and the date committed to the

## III. The APA Reduces an Individual's Sentence in Accordance with the Determination of the Sentencing Court

R.C. 2967.191 requires the APA to reduce the minimum and maximum sentence or definite sentence of an individual who is in actual confinement in a state penal or reformatory institution by the total number of days that the individual was confined for any reason arising out of the offense for which he was convicted and sentenced. *Accord* rule 5120-2-04. It follows, therefore, that the conflict between R.C. 2929.23(B)(2) and R.C. 2967.191 exists with respect to the reduction of the minimum and maximum sentence or definite sentence of an individual who is incarcerated in a state penal or reformatory institution.

As stated above, a sentencing court is required to calculate and forward to the custodian of the penal or reformatory institution a statement of the number of days of confinement which an individual is entitled by law to have credited to his sentence of imprisonment. Pursuant to R.C. 2929.23(B)(2), an individual who violates any of the restrictions or requirements imposed upon him as part of his sentence of electronically monitored house arrest is not entitled by law to receive credit for any time thus served toward any sentence of imprisonment that had been imposed upon him. Obviously, the mandate of R.C. 2929.23(B)(2) is directed at the sentencing court, which is required to make the determination as to the amount of credit to which an individual is entitled by law. *See* rule 5120-2-04(B). In addition, the custodian of a penal or reformatory institution is not authorized to ignore the sentencing court's determination of the number of days of credit for confinement to which an individual is entitled by law and thus may not substitute his own determination of the number of days of credit for confinement to which an individual is entitled by law. Rule 5120-2-04(E), (H).

In analyzing both R.C. 2929.23(B)(2) and 2967.191 in a manner which gives effect to both, it appears that the language of R.C. 2929.23(B)(2) is directed at the sentencing court, which is required to calculate and forward to the custodian of the penal or reformatory institution a statement of the number of days of confinement which an individual is entitled by law to have credited to his sentence of imprisonment, while R.C. 2967.191 requires the custodian to reduce the sentence of imprisonment of an individual by the total number of days determined by the sentencing court. *See* rule 5120-2-04. Accordingly, a sentencing court is required to calculate and forward to the APA a statement of the number of days of confinement which an individual who violates any of the restrictions or requirements imposed upon him as part of his sentence of electronically monitored house arrest is entitled by law to have credited to his sentence of imprisonment, while the APA is required to reduce the minimum and maximum sentence or definite sentence of an individual by the total number of days of confinement that the sentencing court determines the individual is entitled by law to have credited to his sentence.

## IV. The APA May Not Calculate the Credit to which an Individual Is Entitled

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department, as reflected in the sheriff's record."

Your remaining questions ask about the action the APA should take if it receives information that (1) is from someone other than the sentencing court, (2) conflicts with the sentencing court's determination, or (3) indicates that credit is to be denied but that no hearing was conducted. Rule 5120-2-04(H) provides:

> The record officer shall not reduce a sentence for jail time credit except in accordance with this rule. *A party questioning either the number of days contained in the journal entry or the record of the sheriff shall be instructed to address his concerns to the court or sheriff.* Unless the court issues an entry modifying the amount of jail time credit or the sheriff sends the institution corrected information about time confined awaiting transport, no change will be made. (Emphasis added.)

Thus, under rule 5120-2-04(H), the presumption is that the sentencing court is correct in its determination of the number of days of confinement which an individual is entitled by law to have credited to his sentence of imprisonment. Further, if the determination of the sentencing court appears erroneous, or if a prisoner brings information to the attention of the APA that causes the APA to question the accuracy of the determination, the APA shall address its concerns to the sentencing court.

As discussed above, the APA is required to reduce the minimum and maximum sentence or definite sentence of an individual by the total number of days of confinement that the sentencing court determines the individual is entitled by law to have credited to his sentence. The APA has no authority to ignore the sentencing court's determination of the number of days of credit for confinement to which an individual is entitled and to substitute its own determination of the number of days to be credited in complying with the mandate of R.C. 2967.191. Rule 5120-2-04(E), (H); *State ex rel. Corder v. Wilson*. Accordingly, notwithstanding that the APA has received information that (1) is from someone other than the sentencing court, (2) conflicts with the sentencing court's determination, or (3) indicates that credit is to be denied but that no hearing was conducted, the APA is nevertheless required to reduce the minimum and maximum sentence or definite sentence of an individual in accordance with the determination of the sentencing court. *See State ex rel. Corder v. Wilson* (since the APA has a duty under R.C. 2967.191 to give an individual credit for the presentence-confinement time as determined and certified by the sentencing court, the APA may not rely upon a communication from the county sheriff indicating the number of days the individual was confined in a particular institution). However, pursuant to rule 5120-2-04(H), if the determination of the sentencing court appears to be erroneous or if a prisoner brings information to the attention of the APA that causes the APA to question the accuracy of the determination, the APA shall address its concerns to the sentencing court.

## V.Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1.A sentencing court is required to calculate and forward to the Adult Parole Authority a statement of the number of days of confinement which an individual who

violates any of the restrictions or requirements imposed upon him as part of his sentence of electronically monitored house arrest is entitled by law to have credited to his sentence of imprisonment.

2.The Adult Parole Authority is required to reduce the minimum and maximum sentence or definite sentence of an individual by the total number of days of confinement that the sentencing court determines the individual is entitled by law to have credited to his sentence.

3.Notwithstanding that the Adult Parole Authority has received information that (1) is from someone other than the sentencing court, (2) conflicts with the sentencing court's determination, or (3) indicates that credit is to be denied but that no hearing was conducted, the Adult Parole Authority is nevertheless required to reduce the minimum and maximum sentence or definite sentence of an individual in accordance with the determination of the sentencing court. However, pursuant to 17 Ohio Admin. Code 5120-2-04(H), if the determination of the sentencing court appears to be erroneous or if a prisoner brings information to the attention of the Adult Parole Authority that causes the Adult Parole Authority to question the

accuracy of the determination, the Adult Parole Authority shall address its concerns to the sentencing court.

Respectfully,

LEE FISHER
Attorney General

November 16, 1993

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SYLLABUS: 93-035

1. A sentencing court is required to calculate and forward to the Adult Parole Authority a statement of the number of days of confinement which an individual who violates any of the restrictions or requirements imposed upon him as part of his sentence of electronically monitored house arrest is entitled by law to have credited to his sentence of imprisonment.

2. The Adult Parole Authority is required to reduce the minimum and maximum sentence or definite sentence of an individual by the total number of days of confinement that the sentencing court determines the individual is entitled by law to have credited to his sentence.

3. Notwithstanding that the Adult Parole Authority has received information that (1) is from someone other than the sentencing court, (2) conflicts with the sentencing court's determination, or (3) indicates that credit is to be denied but that no hearing was conducted, the Adult Parole Authority is nevertheless required to reduce the minimum and maximum sentence or definite sentence of an individual in accordance with the determination of the sentencing court. However, pursuant to 17 Ohio Admin. Code 5120-2-04(H), if the determination of the sentencing court appears to be erroneous or if a prisoner brings information to the attention of the Adult Parole Authority that causes the Adult Parole Authority to question the accuracy of the determination, the Adult Parole Authority shall address its concerns to the sentencing court.