February 25, 2016

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481

SYLLABUS: 2016-007

1. Under R.C. 2937.22(B), a conviction, plea of guilty, forfeiture of bail, finding of not guilty, or dismissal of the charges prompts the clerk of court either to transmit the bail surcharge to the Treasurer of State or return the bail surcharge to the defendant, as those events signify the final judgment in a criminal case.

2. In the case of intervention in lieu of conviction (ILC) under R.C. 2951.041, a defendant's guilty plea is not a final judgment in the criminal case. If the defendant fails to complete the requirements of the ILC program, the court enters a finding of guilt and sentences the defendant, which prompts the clerk of court to transmit the bail surcharge as provided in R.C. 2937.22(B) to the Treasurer of State. If the defendant successfully completes the requirements of the ILC program, the court dismisses the charges against the defendant, which prompts the clerk of court to return the bail surcharge to the defendant.

3. Pursuant to a pre-trial diversion program under R.C. 2935.36, if a defendant fails to complete the requirements of the pre-trial diversion program, and the defendant's criminal case proceeds to trial, the final judgment of the trial court prompts the clerk of court either to transmit the bail surcharge as provided in R.C. 2937.22(B) to the Treasurer of State if the defendant is convicted, or return the bail surcharge to the defendant if the defendant is found not guilty. If the defendant successfully completes the pre-trial diversion program requirements, the court dismisses the charges against the defendant, which prompts the clerk of court to return the bail surcharge to the defendant.

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OPINION NO. 2016-007

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481

Dear Prosecutor Watkins:

You have requested an opinion about the responsibility of a clerk of court under R.C. 2937.22(B) to transmit a bail surcharge to the Treasurer of State if a defendant enters an intervention in lieu of conviction program pursuant to R.C. 2951.041 or a pre-trial diversion program pursuant to R.C. 2935.36. R.C. 2937.22(B) provides:

> Whenever a person is charged with any offense other than a traffic offense that is not a moving violation and posts bail, the person shall pay a surcharge of twenty-five dollars. The clerk of the court shall retain the twenty-five dollars until the person is convicted, pleads guilty, forfeits bail, is found not guilty, or has the charges dismissed. If the person is convicted, pleads guilty, or forfeits bail, the clerk shall transmit the twenty-five dollars on or before the twentieth day of the month following the month in which the person was convicted, pleaded guilty, or forfeited bail to the treasurer of state, and the treasurer of state shall deposit it into the indigent defense support fund created under [R.C. 120.08]. If the person is found not guilty or the charges are dismissed, the clerk shall return the twenty-five dollars to the person.

Your inquiry presents the following specific questions:

1. Is a clerk of court required to transmit the twenty-five dollar surcharge to the Treasurer of State on or before the twentieth day of the month following the month in which the defendant was convicted, pleaded guilty, or forfeited bail when a defendant enters an intervention in lieu of conviction (ILC) program or a pre-trial diversion program?

2. If the answer to question 1 is in the affirmative, is a clerk of court required to refund the bail surcharge to a defendant who pleads guilty and thereafter completes an ILC program or pre-trial diversion program, and the criminal charges are dismissed?

3. If the answer to question 2 is in the affirmative, what funds must a clerk of court use to refund this surcharge if the bail surcharge has already been transmitted to the Treasurer of State?

Your questions recognize that in a case that involves an intervention in lieu of conviction program or a pre-trial diversion program, it is possible that a defendant may plead guilty and later the case is dismissed. If a plea of guilty and a dismissal occur within the same case, conflicting results may occur. Upon a plea of guilty, R.C. 2937.22(B) requires transmittal of the bail surcharge to the Treasurer of State, but upon a later dismissal, R.C. 2937.22(B) requires that the bail surcharge be returned to the defendant.

To answer your inquiry, we will first briefly review the purposes of bail and the statutory authority to impose the bail surcharge.

Purposes of Bail

Bail is "security for the appearance of a defendant to appear and answer to a specific criminal or quasi-criminal charge in any court or before any magistrate at a specific time or at any time to which a case may be continued, and not depart without leave[.]" R.C. 2937.22(A); *see also* Ohio Const. art. I, § 9. Generally, the purpose of bail is to secure the attendance of the defendant at subsequent court proceedings. Ohio R. Crim. P. 46(B) permits the court to impose conditions of bail, and Ohio R. Crim. P. 46(C)(1)-(5) provides a non-exhaustive list of factors for the court to consider in determining the types, amounts, and conditions of bail.[1] As provided in R.C. 2937.22(A)(1)-(3), bail may take the following forms:

(1) The deposit of cash by the accused or by some other person for the accused;
(2) The deposit by the accused or by some other person for the accused in the form of bonds … in a face amount equal to the sum set by the court or magistrate;
(3) The written undertaking by one or more persons to forfeit the sum of money set by the court or magistrate, if the accused is in default for appearance, which shall be known as recognizance.

See also Ohio R. Crim. P. 46(A); s*ee generally* 1970 Op. Att'y Gen. No. 70-036. Hence, bail is not available in cases where the defendant has been charged with a certain level of offense or certain

[1] The relevant factors include, but are not limited to, the nature and circumstances of the crime and whether the defendant used or had access to a weapon; the weight of the evidence against the defendant; confirmation of the defendant's identity; the defendant's ties to the community, the defendant's criminal history, and likelihood of the defendant to appear at future hearings; and whether the defendant is on probation, community control sanction, parole, bail, or other court protection order. Ohio R. Crim. P. 46(C)(1)-(5).

conditions are associated with the charge. Further, if bail is available, a defendant has no obligation to post bail once a sum has been set by the court or magistrate. The defendant may remain in detention until his case is heard, and ultimately disposed of. R.C. 2937.32 thus declares that, "[i]f an offense is not bailable, if the court denies bail to the accused, or if the accused does not offer sufficient bail, the court shall order the accused to be detained." When bail is available to a defendant, posting bail is a voluntary act.

Authority of a Clerk of Court to Collect Bail Surcharge and Either Remit to the Treasurer of State or Return to the Defendant

Your inquiry begins with the premise that a person has been charged with one or more criminal offenses, posted bail, and paid the surcharge required by R.C. 2937.22(B). This statute states:

> Whenever a person is charged with any offense other than a traffic offense that is not a moving violation[2] and posts bail, the person shall pay a surcharge[3] of twenty-five dollars. The clerk of the court shall retain the twenty-five dollars until the person is convicted, pleads guilty, forfeits bail, is found not guilty, or has the charges dismissed. If the person is convicted, pleads guilty, or forfeits bail, the clerk shall transmit the twenty-five dollars on or before the twentieth day of the month following the month in which the person was convicted, pleaded guilty, or forfeited bail to the treasurer of state, and the treasurer of state shall deposit it into the indigent defense support fund created under [R.C. 120.08]. If the person is found not guilty or the charges are dismissed, the clerk shall return the twenty-five dollars to the person. (Footnotes added.)

The second sentence of R.C. 2937.22(B) states that "[t]he clerk of the court shall retain the twenty-five dollars *until* the person is convicted, pleads guilty, forfeits bail, is found not guilty, or has the charges dismissed." (Emphasis added.) "Until" is "used as a function word to indicate continuance (as of an action or condition) to a specified time." *Merriam-Webster's Collegiate Dictionary* 1373 (11th ed. 2005). For purposes of R.C. 2937.22(B), "until" signifies

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[2] R.C. 2937.22(D) states that "moving violation" has the same meaning as in R.C. 2743.70. *See also* 1994 Op. Att'y Gen. 94-050 (syllabus) ("[a]s used in R.C. 2743.70 … 'moving violation' means any violation of any statute or ordinance (other than R.C. 4513.263, an ordinance that is substantially equivalent to that section, or a statute or ordinance that regulates pedestrians or the parking of vehicles) that regulates the operation of vehicles, streetcars, or trackless trolleys on highways or streets or that regulates size or load limitations or fitness requirements of vehicles").

[3] The term, "surcharge," is not defined within R.C. Chapter 2937. In the absence of a statutory definition, words are generally construed in accordance with their common, ordinary meaning. *See* R.C. 1.42. A "surcharge" is "[a]n additional tax or cost onto an existing tax, cost, or charge." *Black's Law Dictionary* 1441 (6th ed. 1990).

that the clerk shall retain the bail surcharge and thereafter transmit or return the bail surcharge upon the occurrence of one of the following: when the person is convicted, pleads guilty, forfeits bail, is found not guilty, *or* has the charges dismissed. The word "or" is a coordinating conjunction that connects words or phrases of equal rank. *See* R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). The use of "or" to connect the five events means that the specified events are equal in rank. Each event has the same significance for the purpose of prompting the clerk of court either to transmit the bail surcharge to the Treasurer of State or return the bail surcharge to the defendant.

Pursuant to R.C. 2937.22(B), a clerk of court is required to transmit the bail surcharge to the Treasurer of State upon a defendant's conviction, guilty plea, or bail forfeiture. We will consider what it means to be convicted, plead guilty, or forfeit bail for this purpose. A conviction, as recognized by the Ohio Supreme Court, may occur in one of the following ways: (1) a defendant may plead guilty either at the arraignment or after withdrawing an initial plea of not guilty or not guilty by reason of insanity, (2) a defendant may enter a plea of no contest and be convicted upon a finding of guilt by the court, (3) a defendant may be found guilty based upon a jury verdict, or (4) a defendant may be found guilty by the court after a bench trial. Each of these events leads to the imposition of a sentence. *See State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶12, *modified, State v. Lester*, 130 Ohio St. 3d 303, 2011-Ohio-5204, 958 N.E.2d 142, at ¶¶12-14; *see also* Ohio R. Crim. P. 32(C).

By pleading guilty, a defendant waives his right to a trial and all the incidents thereto, admits the material facts in the indictment, dispensing with the necessity of proving them, and authorizes the court by such plea to proceed to judgment. *Norton v. Green*, 173 Ohio St. 531, 533, 184 N.E.2d 401 (1962) (citing *Carper v. State*, 27 Ohio St. 572, 574 (1875) and *Craig v. State*, 49 Ohio St. 415, 418, 30 N.E. 1120 (1892)). "On a plea of guilty the court has nothing to do but to either arrest the judgment[4] or pronounce it against the defendant[.]" *Picket v. State*, 22 Ohio St. 405, 409 (1872). The Ohio Supreme Court in S*tate v. Bowen*, 52 Ohio St. 2d 27, 28, 368 N.E.2d 843 (1977) (quoting *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582 (1927)) acknowledged that:

> [a] plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are

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[4] An "arrest of judgment" is "[t]he act of staying a judgment, or refusing to render judgment in an action at law and in criminal cases, after verdict, for some matter intrinsic appearing on the face of the record, which would render the judgment, if given, erroneous or reversible." *Black's Law Dictionary* 110 (6th ed. 1990).

> careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

When a defendant enters a guilty plea and the court accepts the defendant's guilty plea,[5] the court is authorized to proceed to judgment and impose sentence upon the defendant. *See* Ohio R. Crim. P. 11(B)(3) ("[w]hen a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32"); R.C. 2937.07 (additional requirements that defendant provide explanation of circumstances when pleading guilty in certain misdemeanor cases). "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164 (1937) (citing *Miller v. Aderhold*, 288 U.S. 206, 210, 53 S.Ct. 325 (1933)). Thus, a guilty plea tendered by the defendant, accepted by the court, and followed by the imposition of a sentence by the court constitutes a final judgment in the criminal case.

Bail forfeiture also is a potential disposition[6] in misdemeanor cases wherein a defendant forfeits or pays the bail posted in lieu of proceeding with a trial of the criminal charges. Bail forfeiture concludes the criminal matter. "Bail forfeiture" is "the forfeiture of bail by a defendant who is arrested for the commission of a misdemeanor, other than a defendant in a traffic case as defined in Traffic Rule 2, if the forfeiture is pursuant to an agreement with the court and prosecutor in the case." R.C. 2953.31(C). Applying the language of R.C. 2953.31(C), a bail forfeiture is a plea agreement between the defendant and the prosecutor (and approved by the court) that provides a final judgment.[7]

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[5] The court is not required to accept a plea of guilty. *See* Ohio R. Crim. Proc. 11(G) ("[i]f the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant").

[6] In a criminal proceeding, a disposition is "the sentencing or other final settlement of a criminal case." *Black's Law Dictionary* 471 (6th ed. 1990).

[7] We recognize that certain bail forfeitures do not conclude or resolve a criminal case. R.C. 2937.35 defines bail forfeiture when a defendant fails to appear for court proceedings, and states:

> Upon the failure of the accused or witness to appear in accordance with its terms the bail may in open court be adjudged forfeit, in whole or in part by the court or magistrate before whom he is to appear. But such court or magistrate may, in its discretion, continue the cause to a later date certain, giving notice of such date to him and the bail depositor or sureties, and adjudge the bail forfeit upon failure to appear at such later date.

For purposes of R.C. 2937.22(B), we conclude that a conviction, plea of guilty, or bail forfeiture signifies a final judgment and concludes the criminal matter.

Pursuant to R.C. 2937.22(B), a clerk of court is required to return the bail surcharge to the defendant when he is found not guilty or when the charges against him are dismissed. A finding[8] of not guilty is an adjudication on the merits that determines a person is not responsible for the crime charged against him when the prosecution has not proven the elements of the crime. In a criminal matter, "[o]nce the finding is 'not guilty,' … then the case is over; and no continuing jurisdiction over the defendant is reserved[.]" *Vill. of Woodmere v. Smith*, 11 Ohio App. 3d 195, 196, 463 N.E.2d 1291 (Cuyahoga County 1983). Ohio R. Crim. P. 32 (C) provides as follows:

> If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

Once the court issues judgment with a finding of not guilty or case dismissal, the criminal matter is concluded. In addition to the events of a defendant's conviction, plea of guilty, or bail forfeiture, the events of a finding of not guilty or dismissal of the criminal charges likewise are a final judgment in a criminal case.

It is a well-established rule of statutory construction that, "in accordance with the maxim *noscitur a sociis*, the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows they are to be understood in the same sense." *Myers v. Seaberger*, 45 Ohio St. 232, 236, 12 N.E. 796 (1887). This rule means that each of the terms in R.C. 2937.22(B) - conviction, plea of guilty, bail forfeiture, a finding of not guilty after a trial or charge dismissal - when defined by its associates, is a result or occurrence that concludes a criminal case. Therefore, these five events mark the final judgment in the criminal case.

Additionally, reading the terms conviction, plea of guilty, forfeit bail, finding of not guilty or case dismissal as signifying a final judgment in the criminal case harmonizes the last two sentences of R.C. 2937.22(B) and gives full force and effect to the statute as a whole. *See* R.C. 1.47(B) ("[i]n enacting a statute, it is presumed that: … [t]he entire statute is intended to be

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This type of bail forfeiture is an interlocutory or interim order, and the defendant may still appear at a later date and proceed to trial. Bail forfeiture in this context does not conclude the criminal charges brought against the defendant.

[8] A finding commonly applies to the result reached by a judge or jury. *Black's Law Dictionary* 632 (6th ed. 1990).

effective"); R.C. 1.47(C) ("[i]n enacting a statute, it is presumed that: … [a] result feasible of execution is intended"). Upon the occurrence of one of the five events listed in R.C. 2937.22(B), the clerk of court shall act. Thus, the statute declares:

> If the person is convicted, pleads guilty, or forfeits bail, the clerk *shall* transmit the twenty-five dollars on or before the twentieth day of the month following the month in which the person was convicted, pleaded guilty, or forfeited bail to the treasurer of state, and the treasurer of state shall deposit it into the indigent defense support fund created under [R.C. 120.08]. If the person is found not guilty or the charges are dismissed, the clerk *shall* return the twenty-five dollars to the person.

R.C. 2937.22(B) (emphasis added). The use of the word "shall" makes the statutory provision in which it is contained mandatory, unless a contrary intent is clearly and unequivocally expressed by the statute's language. 1993 Op. Att'y Gen. No. 93-009, at 2-46. In the instance where these five events do not signify a conclusion to a criminal case, the clerk of court may be confronted with opposing duties or requirements. For example, if the clerk of court transmits that bail surcharge upon the occurrence of a bail forfeiture for a failure to appear, and the case is later dismissed after a trial, the clerk of court is required to return the bail surcharge to the defendant. However, R.C. 2937.22(B) does not provide a mechanism to return the surcharge once it is transmitted to the Treasurer of State. The entire statute is made feasible of execution if each of the five events delineated within R.C. 2937.22(B) - conviction, guilty plea, bail forfeiture, a finding of not guilty, or dismissal - signifies a final judgment in the criminal case. Each event is a final judgment, which prompts the clerk of court either to transmit the bail surcharge to the Treasurer of State or return the bail surcharge to the defendant. If the terms in R.C. 2937.22(B) specify a final judgment in the criminal case, no further events could occur to warrant additional, conflicting action by the clerk of court once the bail surcharge is transmitted or returned. Thus, we conclude that under R.C. 2937.22(B), a conviction, plea of guilty, forfeiture of bail, finding of not guilty, or dismissal of the charges prompts the clerk of court either to transmit the bail surcharge to the Treasurer of State or return the bail surcharge to the defendant, as those events signify the final judgment in a criminal case.

Intervention in Lieu of Conviction Programs under R.C. 2951.041 and Pre-Trial Diversion Programs under R.C. 2935.36

Your first question asks whether a clerk of court is required to transmit the twenty-five dollar bail surcharge to the Treasurer of State on or before the twentieth day of the month following the month in which the person was convicted, pleaded guilty, or forfeited bail when a defendant enters an ILC program or a pre-trial diversion program.[9]

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[9] The Ohio Supreme Court recognizes special docket programs pertaining to intervention in lieu of conviction (ILC) programs and pre-trial diversion programs, including mental health courts, drug courts, and human trafficking courts. Specialized docket programs are established through local

A. Intervention In Lieu of Conviction Programs

Let us first consider an intervention in lieu of conviction program (ILC). In the case of an ILC program, you pose this question because a defendant is required to enter a guilty plea to be admitted to an ILC program. *See* R.C. 2951.041(C). Yet, upon the successful completion of the ILC program, the charges against the defendant are dismissed. *See* R.C. 2951.041(E). Accordingly, for purposes of R.C. 2937.22(B), the issue is whether a person's guilty plea for ILC program eligibility constitutes the final judgment in a criminal case or whether a final judgment occurs following the court's dismissal of the charges upon the defendant's successful completion of the ILC program.

R.C. 2951.041 authorizes ILC. "ILC is a statutory creation that allows a trial court to stay a criminal proceeding and order an offender to a period of rehabilitation if the court has reason to believe that drug or alcohol usage was a factor leading to the offense." *State v. Massien*, 125 Ohio St. 3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, at ¶9. In order for a defendant charged with a criminal offense[10] to be eligible for ILC, the court must have reason to believe that the defendant's drug or alcohol use, mental illness, intellectual disability, or status as a victim of human trafficking[11] was a factor leading to the offender's criminal behavior. R.C. 2951.041(A)(1). To qualify for ILC, a defendant is required to formally request ILC prior to a guilty plea and is further required to waive his right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the defendant, and arraignment, unless the hearing, indictment, or arraignment has already occurred. *Id.* The court may reject the defendant's request without a hearing. *Id.* However, if the court elects to

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court rules and are certified by the Ohio Supreme Court. *See* Ohio Sup. R. 36.20. The Ohio Supreme Court's specialized docket standards set uniform minimum requirements, yet "still allow local specialized dockets to innovate and tailor their specialized docket to respond to local needs and resources." Ohio Sup. R. App. I. These specialized dockets supplement rather than replace diversionary programs to treat offenders. Some courts have dedicated special dockets to administer the pre-trial diversion program or ILC program rather than the original court in which the defendant is prosecuted. *See also* R.C. 2951.041(G)(3) (defining "intervention in lieu of conviction" to mean "any court-supervised activity that complies with [R.C.2951.041]").

[10] The criminal offenses that are eligible for intervention in lieu of conviction under R.C. 2951.041 include, but are not limited to, theft, aggravated theft, unauthorized use of a vehicle, passing bad checks, misuse of credit cards, forgery, forging identification cards, and nonsupport of dependents. *See* R.C. 2951.041(A)(1) (delineating the Revised Code sections that correspond to each of the foregoing offenses).

[11] The enactment of Am. Sub. H.B. 86 added mental illness or intellectual disability as a factor contributing to the defendant's criminal behavior in determining eligibility for intervention in lieu of conviction. *See* Am. Sub. H.B. 86, 129th Gen. A. (2011) (eff. Sept. 30, 2011). The enactment of Am. Sub. H.B. 130 added victimization by a human trafficker as a factor contributing to the defendant's

consider the defendant's request for ILC, the court shall hold a hearing to determine the defendant's eligibility and make the necessary findings as provided in R.C. 2951.041(B)(1)-(10). "If an offender satisfies all of the statutory eligibility requirements for intervention, the trial court has discretion to determine whether a particular offender is a good candidate for intervention." *State v. Wiley*, Franklin App. No. 03AP–362, 2003-Ohio-6835, 2003 WL 22966833, at ¶3. If a court grants the defendant's request for ILC, the defendant is required to enter a guilty plea:

> If the court finds … that the offender is eligible for intervention in lieu of conviction and grants the offender's request [for intervention in lieu of conviction], the court shall accept the offender's plea of guilty and waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment or arraignment has already occurred.

R.C. 2951.041(C). Thus, admittance to an ILC program is conditioned upon the defendant's waiver of certain rights and the court's acceptance of the defendant's plea of guilty to the criminal charges brought against him.

A defendant whose request for ILC is granted is placed under general control and supervision of the county probation department, the Adult Parole Authority, or another appropriate local probation or court services agency as if the offender was subject to a community control sanction imposed under R.C. 2929.15, 2929.18, or 2929.25. R.C. 2951.041(D). The final disposition of an ILC case turns upon whether or not the offender successfully completes the ILC plan as required in R.C. 2951.041(D). *See* R.C. 2951.041(E)-(F). "If the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender … and all other terms and conditions ordered by the court, the court shall dismiss the pleadings against the offender." R.C. 2951.041(E). "Successful completion of the intervention plan … shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law[.]" *Id.*; *see also State v. Niesen-Pennycuff*, 132 Ohio St. 3d 416, 2012-Ohio-2730, 973 N.E.2d 221, at ¶9 ("an offender who has successfully completed ILC has *no conviction*") (emphasis in original). Alternatively, "[i]f the court determines that the defendant has failed to comply with any of those terms and conditions [of his intervention plan], it shall enter a finding of guilt and shall impose an appropriate sanction under [R.C. Chapter 2929]." R.C. 2951.041(F).

Intervention in lieu of conviction is *sui generis*, meaning "of its own kind or class; … peculiar." *See Black's Law Dictionary* 1434 (6th ed. 1990). Intervention in lieu of conviction is a means through which a defendant may receive appropriate treatment to address the factors that were the bases for the defendant's criminal actions and avoid a conviction. Although a defendant pleads guilty as a pre-condition for acceptance into an ILC program pursuant to R.C. 2951.041 and the

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criminal behavior in determining eligibility for intervention in lieu of conviction. *See* Am. Sub. H.B. 130, 130th Gen. A. (2014) (eff. June 20, 2014).

court accepts the plea of guilty, the court does not immediately proceed to sentencing. Acceptance of a guilty plea for purposes of ILC does not have the same legal ramification as a guilty plea provided in a typical criminal proceeding. With an ILC, "[t]he court does not enter the conviction [when a plea of guilty is entered], but holds the plea in abeyance during the period of rehabilitation." 1976 Op. Att'y Gen. No. 76-002, at 2-8. A guilty plea for purposes of ILC is a provisional plea dependent upon the successful completion of the terms and conditions of the ILC program. *See, e.g.*, *State v. Jukic*, Cuyahoga App. No. 101663, 2015-Ohio-2695, 2015 WL 4043002, at ¶1. The guilty plea for an ILC program marks the beginning of the process whereby the defendant is treated and rehabilitated. A guilty plea within the context of an ILC program does not conclude the criminal case.

Thus, final judgment for the purpose of an intervention in lieu of conviction program either is case dismissal or a finding of guilt with an accompanying sentence as delineated in R.C. Chapter 2929. Transmittal of the bail surcharge by the clerk of court is not initiated by the defendant's entry of a guilty plea for the purpose of being eligible for an intervention in lieu of conviction program, as further action is required to obtain a final judgment. If the defendant fails to complete the requirements of the ILC program, the court enters a finding of guilt and sentences the defendant, which prompts the clerk of court to transmit the bail surcharge to the Treasurer of State. If the defendant successfully completes the requirements of the ILC program, the court dismisses the charges against the defendant, which prompts the clerk of court to return the bail surcharge to the defendant.

B. Pre-Trial Diversion Programs

We next consider pre-trial diversion programs. R.C. 2935.36(A) authorizes a prosecuting attorney to establish pre-trial diversion programs for adults accused of committing criminal offenses that the prosecuting attorney believes probably will not offend again.[12] R.C. 2935.36(A) further provides as follows:

[12] We recognize that a variety of pre-trial diversion programs exist other than a pre-trial diversion program authorized under R.C. 2935.36, and the requirements for participation in those other programs may vary. *See* 1977-1978 Ohio Laws, Part II, 2770, 2772 (Am. Sub. H.B. 473, eff. June 6, 1978) (section 2, uncodified). Section 2 (uncodified) of Am. H.B. 473 preserved pre-trial diversion programs already in existence on the effective date of the act even if the programs did not conform to the provisions of section 1 of Am. H.B. 473 authorizing prosecuting attorneys to establish pre-trial diversion programs for certain offenders. Pre-trial diversion programs may also be established by courts. *See Lane v. Phillabaum*, 182 Ohio App. 3d 145, 2008-Ohio-2502, 912 N.E.2d 113, at ¶10 (Butler County); *City of Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 241, 461 N.E.2d 924 (Cuyahoga County 1983). For the purpose of this opinion, we limit our analysis to pre-trial diversion programs authorized under R.C. 2935.36.

> The prosecuting attorney may require, as a condition of an accused's participation in the program, the accused to pay a reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing. The programs shall be operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas[.]

"By design [a diversion program] attempts to provide a viable non-criminal channel for the rehabilitation of certain putative offenders … prosecution of first time offenders arrested for certain non-violent felonies is deferred, and, upon successful completion of the terms set by the prosecutor, the charges are dismissed." 1976 Op. Att'y Gen. No. 76-002, at 2-4. With a focus upon public safety, the prosecuting attorney determines which offenders will be permitted to participate in a pre-trial diversion program.[13] Participation within a pre-trial diversion program requires a defendant to do all of the following:

> (1) Waive, in writing and contingent upon the accused's successful completion of the program, the accused's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the accused, and arraignment, unless the hearing, indictment, or arraignment has already occurred;
> (2) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court, that are applicable to the offense with which the accused is charged and to the conditions of the diversion program established by the prosecuting attorney;
> (3) Agree, in writing, to pay any reasonable fee for supervision services established by the prosecuting attorney.

R.C. 2935.36(B)(1)-(3).

Upon the defendant's satisfactory completion of the pre-trial diversion program, the court shall dismiss the criminal charges against the defendant when recommended by the prosecuting attorney. R.C. 2935.36(D). The defendant avoids a conviction upon the successful completion of the pre-trial diversion program. A defendant who does not enter the pre-trial diversion program or does

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[13] R.C. 2935.36(A)(1)-(5) specifies several categories of offenders that are not eligible to enter a pre-trial diversion program, which include repeat or dangerous offenders, persons accused of violent offenses, persons accused of driving under the influence of alcohol or drugs, persons accused of controlled substance or drug offenses, and persons who are accused of an offense while operating a commercial motor vehicle or persons who hold a commercial driver's license and are accused of any offense, if conviction of the offense would disqualify the person from operating a commercial motor vehicle. *See* R.C. 2935.36(E)(1) (defining "[r]epeat offender" as used in R.C. 2935.36); R.C. 2935.36(E)(2) (defining "[d]angerous offender" as used in R.C. 2935.36).

not successfully complete the pre-trial diversion program may be brought to trial upon the charges in the manner provided by law, and the waiver executed pursuant to R.C. 2935.36(B)(1) shall be void on the date the defendant is removed from the program. *Id.* The criminal case is not concluded until either the defendant satisfactorily completes the pre-trial diversion program and the court dismisses the charges as recommended by the prosecutor or the defendant proceeds to trial if he chooses not to enter the diversion program or violates the conditions of the program. *See* R.C. 2935.36(D).[14] If a defendant fails to complete the requirements of the pre-trial diversion program, and the defendant's criminal case proceeds to trial, the final judgment of the trial court prompts the clerk of court either to transmit the bail surcharge to the Treasurer of State if the defendant is convicted, or return the bail surcharge to the defendant if the defendant is found not guilty. If the defendant successfully completes the pre-trial diversion program requirements, the court dismisses the charges against the defendant, which prompts the clerk of court to return the bail surcharge to the defendant.

Based upon the conclusions reached in response to your first and second questions, it is unnecessary to address your third question.

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

1. Under R.C. 2937.22(B), a conviction, plea of guilty, forfeiture of bail, finding of not guilty, or dismissal of the charges prompts the clerk of court either to transmit the bail surcharge to the Treasurer of State or return the bail surcharge to the defendant, as those events signify the final judgment in a criminal case.

2. In the case of intervention in lieu of conviction (ILC) under R.C. 2951.041, a defendant's guilty plea is not a final judgment in the criminal case. If the defendant fails to complete the requirements of the ILC program, the court enters a finding of guilt and sentences the defendant, which prompts the clerk of court to transmit the bail surcharge as provided in R.C. 2937.22(B) to the Treasurer of State. If the defendant successfully completes the requirements of the ILC program, the court dismisses the charges against the defendant, which prompts the clerk of court to return the bail surcharge to the defendant.

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[14] Although a defendant in a R.C. 2935.36 pre-trial diversion program is not statutorily required to enter a plea of guilty, the written standards approved by the court may require a defendant to enter a guilty plea similar to the requirements of an ILC program under R.C. 2951.041. If a guilty plea is required for participation in a pre-trial diversion program, the clerk of court shall follow the same rationale as applicable to an intervention in lieu of conviction program and await the final judgment in the criminal case before proceeding either to transmit the bail surcharge to the Treasurer of State or return the bail surcharge to the defendant.

3. Pursuant to a pre-trial diversion program under R.C. 2935.36, if a defendant fails to complete the requirements of the pre-trial diversion program, and the defendant's criminal case proceeds to trial, the final judgment of the trial court prompts the clerk of court either to transmit the bail surcharge as provided in R.C. 2937.22(B) to the Treasurer of State if the defendant is convicted, or return the bail surcharge to the defendant if the defendant is found not guilty. If the defendant successfully completes the pre-trial diversion program requirements, the court dismisses the charges against the defendant, which prompts the clerk of court to return the bail surcharge to the defendant.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General