



3. Determination of the rights, statuses and legal relations between the parties in this cause involves construction by this Court of the provisions of 57 O.S. Sec. 38, which establishes the per diem rate to be paid to counties in this State by Respondent when State inmates are housed within county jail facilities; Petitioner alleges that Sec. 38, while not unconstitutional on its face, may be unconstitutional as applied in situations where county jail facilities are expending funds in excess of the per diem rate paid by the Respondent; due to such, Petitioner is serving a copy of this Motion to the Attorney General of the State of Oklahoma pursuant to 12 O.S. Sec. 1653(C) to allow an opportunity to be heard to the Attorney General.

## II. STATEMENT OF ACTUAL CONTROVERSY FOR WHICH DETERMINATION IS SOUGHT FROM THIS COURT

1. 57 O.S. Sec. 37(D) provides that, once a judgment and sentence is transmitted to Respondent Department of Corrections (relative to an inmate for whom the Department is responsible due to conviction of a felony offense), the Department is “responsible for the cost of housing the inmate in the county jail from the date the sentence was ordered by the court until the date of transfer of the inmate from the county jail”.
2. Relative to the State inmates housed in county jail facilities pursuant to Sec. 37(D), 57 O.S. Sec. 38 provides in relevant part as follows:

“... Effective January 1, 2007, the Department of Corrections shall reimburse any county, which is required to retain an inmate pursuant to paragraph 2 of Section 37 of this title, **in an amount not to exceed Twenty-seven Dollars (\$27.00) per day for each inmate during such period of retention.** The proceeds of this reimbursement shall be used to defray expenses of equipping and maintaining the jail and payment of personnel ...” (emphasis provided).

3. The Oklahoma Supreme Court has held Section 1 of Article XXI of the Oklahoma Constitution is violated when the Legislature, either directly or indirectly, requires or permits county ad valorem revenue to be used to support a state institution. **State ex rel. Dep't of Human Serv. V. Malibie**, 630 P.2d 310, 315 (Okl. 1981). Additionally, Section 9 of Article X of the Oklahoma Constitution provides in relevant part as follows:

**“No ad valorem tax shall be levied for State purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes”** (emphasis provided).

4. In interpreting 57 O.S. Sec. 38 in light of the cited provisions of the Oklahoma Constitution and the interpretations thereof by the Oklahoma Supreme Court, the Attorney General has rendered an opinion in 2011 OK AG 8 (07/01/2011) that the housing of state inmates in county jails under 57 O.S. Sec. 37(D) serves a clear State purpose and that, if the actual cost to a particular county from housing state inmates is not fully defrayed by the statutory payment provided by 57 O.S. Sec. 38, the result is that counties are forced to use county resources to make up the difference between the actual cost of housing and the Sec. 38 payment. Said opinion stated that, in such situation, Sec. 38 would be unconstitutional as applied as it would force counties to expend county funds for clear State purposes.
5. The Attorney General's opinion went on to state that, due to the above and to avoid the use of county funds for State purposes in such situations, the Oklahoma Constitution would require the Department of Corrections pay to counties the actual amount expended by counties to house state inmates under

57 O.S. Sec. 37(D) if such amount exceeded the per diem payment required by 57 O.S. Sec. 38.

6. Plaintiff Board of County Commissioners of the County of Bryan ask this Court to determine the rights, status, or other legal relations between it and Defendant Oklahoma Department of Corrections pursuant to 12 O.S. Sec. 1651 et seq. with regard to the payments required to be paid by the Defendant for state inmates housed in the Bryan County Jail under 57 O.S. Sec. 37(D) as to those situations where the monies expended by the Plaintiff for such housing are in excess of the per diem payments provided for by 57 O.S. Sec. 38.

Respectfully submitted,



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The Attorney General has issued an opinion, 2011 AG 8, based on a hypothetical situation which would exist if a county has offender expenses in excess of the per diem reimbursement provided by the legislature and the county uses ad valorem taxes to house offenders awaiting reception in the prison system.

The final construction of a statute rests with the courts and an opinion of the Attorney General is not controlling, although it is given great respect. *State ex rel. Clifton v. Reeser*, 1975 OK 126, 543 P.2d 1379. Consequently, the Petitioner filed this action for declaratory judgment.

The Petitioner has not asserted that it is in a position of using ad valorem taxes to support offenders awaiting transport, nor that such a situation has ever existed. To do so, Petitioner would be required to establish factually its actual per diem rate by revealing the amounts paid in debt service, meals, personnel costs, utilities and any additional expenses related to incarceration of inmates in their facility. The county would also be required to reveal other sources of revenue such as profits obtained from offenders for use of telephones and canteen and from the lease of cells to the state, federal or municipal governments. In order to determine if a county is violating Article X, Section 9, all sources of revenue and expenses related to housing offenders must be revealed by the county. Otherwise, a county could claim they were being compelled to utilize ad valorem taxes and assert an artificially high per diem rate. Further, a per diem rate would need to be established for each county individually, since the threshold of ad valorem tax utilization would be different for each county.

The Petitioner and the Attorney General's opinion rely heavily on *State ex rel. Department of Human Services v. Malibie*, 1981 OK 18, 630 P.2d 310, but the facts in *Malibie* are quite distinguishable from the instant situation. In *Malibie*, the court considered a statutory requirement which required all counties to appropriate at least one fifth of one mill on the assessed valuation of the respective counties to the crippled children's program. This statute required the counties to directly assess a tax on property in the county for state purposes. In the instant case, the Petitioner is asserting

only that some ad valorem tax revenue might hypothetically be used to fund housing for offenders sentenced from that county prior to being accepted into a state facility. There is no command from the legislature for the county to tax directly or indirectly for a state purpose. Section 37. B of Title 57 does require the county to wait until the Department of Corrections schedules the sentenced offender into state custody, but there is no requirement that the county utilize ad valorem taxes either or directly or indirectly to do so. In fact, there is no requirement that the sentenced offender remain in the county jail after sentencing. In the past, offenders were sent home on appeal bonds while awaiting reception into the state system. Current technology, such as, global positioning satellites make this option more viable and safer than it was in years past and it can be funded by the offender himself.

There is also the legal question of when the offender is becomes a ward of the state and thus when the "state purpose" actually begins. The legislature has provided in Section 38, for "reimbursement to defray the expenses of equipping and maintaining the jail and payment of personnel," but there is no stated intent to reimburse the county for the actual cost of incarcerating the offender. Title 57, Section 37 states that:

*"D. Once the judgment and sentence is transmitted to the Department of Corrections, the Department will be responsible for the cost of housing the inmate in the county jail from the date the sentence was ordered by the court until the date of transfer of the inmate from the county jail. The cost of housing shall be the per diem rate specified in Section 38 of this title. (emphasis added).*

Both the opinion of the Attorney General and the Petitioner have assumed that the "state purpose" begins when the reimbursement begins, but the statutes do not say so. A critical analysis regarding whether there is a state purpose in this instance been omitted. Because the constitutionality of a statute is involved, the question is worth considering. Does the interest or purpose of the county end with the transmittal of the judgment and sentence?

The answer to this inquiry can be gained from looking at the statutory language to determine what happens between the county and the state rather than assuming the responsibility falls to the state

when the gavel falls in a criminal action. In fact, the interaction is much more complex. In examining the relationship between the county and state, it is important to keep in mind the cardinal principal of statutory construction is that a statute is constitutional and should be sustained against challenge where it is possible to do so. *In re application of Oklahoma Dept. of Transportation*, 2002 OK 7464, P.3d 546, 553, reviewing the issue with an intent to sustain the constitutionality of the statute if possible and inquiring into the nature of a "state purpose" renders a result contrary to the Attorney General's Opinion.

The offender has committed a crime in the county and has been tried in the county. The criminal justice resources of the county have been expended on the offender. It is obvious the county has an interest in keeping the offender out of the community if he has been deemed sufficiently dangerous to do prison time. Yet, even though the county is receiving reimbursement, they remain responsible for feeding and housing the offender. In addition the county is still responsible for obtaining and transporting the offender for medical care, dental care and mental health care though the state reimburses for those expenses also. (See Title 57, Section 37). By the authority of Title 57, Section 95 the sheriff is responsible for delivery of the offender to the state prison reception center. When the offender is delivered to the state prison system, the sheriff receives a receipt for the offender and there the county's responsibilities end. Until delivered, the sheriff, although receiving reimbursements, remains responsible for the person of the offender.

The legislature has deemed it fair to assist the county "defray the expenses of equipping and maintaining the jail and payment of personnel," and to pay for medical, dental and mental health care because physical custody has not changed hands. Nonetheless, it can scarcely be said the interest and the responsibility of the county expires when the judgment and sentence is transmitted to the state. If the offender awaiting reception escapes from county jail, it is the responsibility of the county to capture the offender. Also, the county remains civilly liable for wrongs committed against the offender by

county officials. Clearly, a county purpose continues until the offender is delivered to the state. The state's reimbursement to defray the expenses does not mean that the county purpose has been transferred to the state. In fact, the state does not have the most important incident of incarceration, i.e., custody of the person until the offender is delivered to the state.

The Petitioner has also stated that "no revenue source outside of those appropriated to the State can be utilized to support Oklahoma's penal institutions." This assertion is based upon Petitioner's mistaken construction of Article XXI, Section 1 of the Oklahoma Constitution and interpretation of *Malabie, supra*. The Constitutional provision does not state that only state revenue may be used to support such institutions. A thorough perusal of *Malabie* reveals no such restriction. If only revenues from the legislature were permitted to fund these institutions, it would be unconstitutional for the state's institutions of higher education to supplement their budgets with tuition payments from students. In addition, the state's Human Services Department and Mental Health Department could not supplement their budgets with grants and matching funds from the federal government or private charitable entities.

Article XXI, Section 1 does not, as Petitioner asserts, provide that the **entire** cost of the state's educational institutions, penal institutions and institutions for certain disadvantaged citizens be funded solely by the legislature. Indeed, this constitutional provision contemplates that the legislature will find ways to support these institutions "in such a manner as may be prescribed by law."

Even if detaining offenders after sentencing is deemed solely a state function, it is quite unlikely the expense would be more than the reimbursement rate. Due to the difficulty in determining the actual per diem rate for each county, the Legislature would be justified in fixing a standard rate of reimbursement. In this regard, it is helpful to examine the statutory provisions related to the financing and uses of county jails in general.

Section 731 of Title 19 provides for a separate fund for construction or repairing of county jails:

“The board of county commissioners is authorized to provide for the construction or repairing of courthouses, jails or other necessary buildings, and make contracts on behalf of the county for building or repairing the same, and for the purpose of providing a fund for the payment of the cost of the same such board of county commissioners is hereby authorized and empowered to provide for the levy of a tax and to continue such provision from year to year for a period not exceeding five years: Provided, that such levy for such purpose, together with the levies for all other purposes shall not exceed the amount authorized by law: Provided, Further, that the money, raised by such levy, shall constitute a separate and distinct fund from all others in the hands of the county treasurer until the obligation assumed by the board of county commissioners under authority of this section shall have been discharged.”

Additionally, Title 57, Section 51 sets forth the responsibilities of the sheriff and county commissioners related to offenders awaiting trial or held for punishment:

“It shall be the duty of the sheriff of each county to provide bed clothing, washing, board and medical care when required, and all necessities for the comfort and welfare of prisoners as specified by the standards promulgated pursuant to Section 192 of Title 74 of the Oklahoma statutes and he shall be allowed such compensation for services required by the provisions of Sections 41 through 64 of this title, as may be prescribed by the county commissioners.”

Thus, the county commissioners are responsible for payment to the sheriff for services and goods furnished to inmates.

The legislature provided in Title 19, Section 70, that the county may have access to a sinking fund for building, repairing or remodeling the jail, and Title 19, Section 746.1 provides for an inmate medical expense liability fund, which can be accessed by the county to pay for inmate medical expenses. Further, Title 57, Section 60 provides that the county commissioners shall pay the sheriff for housing offenders who have committed crimes.

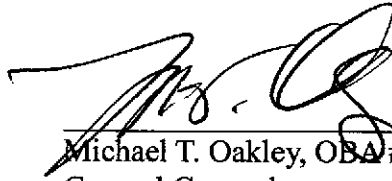
In addition to these methods of financing a jail, the sheriff may charge a markup on canteen items sold to offenders and for telephones used by offenders. Judges may even charge offenders for the costs of their own incarceration. All of these sources of revenue and methods for financing jails show the counties are not being compelled to utilize ad valorem taxes to pay for offenders awaiting reception to the state prison system. In fact, the vast majority of counties welcome the financial reimbursement from the state. The different financing mechanisms do reveal the difficulty in ascertaining and

verifying whether ad valorem taxes are being utilized by a particular county for the purpose of housing inmates who are awaiting reception into the state prison system.

If the current reimbursement rate is insufficient, the counties should make their case to the legislature rather than the courts. It is the purview of the legislature to establish the rate of reimbursement rather than the reimbursement rate being subject to the assertions of each of the seventy-seven counties. If the counties established the reimbursement rate, there would be no incentive to operate in an efficient and cost-effective manner. The legislature holds the purse strings for financing the Department of Corrections and has devised a way of reimbursement which allows the agency to estimate the needs of the state when the counties turn over the expenses of the criminal justice system to the state. Allowing the counties to determine how much they are willing to pay would tie the hands of the legislature in attempting to establish a budget for the Department of Corrections.

The Attorney General concluded that the Legislature exercised proper authority in establishing a rate of twenty-seven dollars (\$27.00) unless said amount is insufficient to defray the cost of housing offenders awaiting reception into the prison system and the county uses ad valorem taxes for such offender. Because the Petitioner has not asserted that it is in such a position, it is impossible to argue that the issue does or does not exist. The Respondent asserts that the cost of housing offenders sentenced from a county does is not a fully ripened state function until the offender is turned over to the state prison system and the Legislature has devised a reasonable system to reimburse counties which will both assist the counties and minimize the chances that ad valorem taxes would be utilized for said purpose, even if it was a state purpose.

Respectfully Submitted,



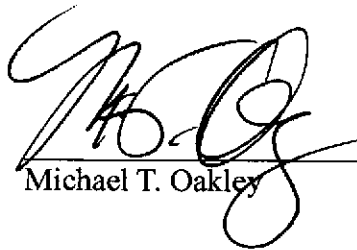
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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2012, a true and correct copy of the foregoing document was mailed, postage prepaid, to:

Greg Jenkins, Assistant District Attorney  
Bryan County Courthouse  
201 E. Court  
Atoka, OK 74525



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Michael T. Oakley