OPINION NO. 94-029

Syllabus:

1. Where an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, R. Crim. P. 4(E)(1) mandates that the individual who is the subject of the warrant be taken forthwith by the arresting officer before a court of record in the county of arrest, and that the individual not be removed from the county of arrest until he has been given an opportunity to consult with an attorney, or another person of his choice, and to post bail.

2. If an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, the individual who is arrested may not waive the jurisdiction of the arresting county's court as provided by R. Crim. P. 4(E)(1) and immediately consent, in writing, to be delivered into the custody of the law enforcement officials of the county that issued the arrest warrant.

To: John E. Meyers, Sandusky County Prosecuting Attorney, Fremont, Ohio
By: Lee Fisher, Attorney General, May 20, 1994

You have requested an opinion pertaining to the transfer of an individual from an arresting county to the county that issued an arrest warrant. Specifically, you have asked if an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, may the individual who is arrested waive the bail hearing provided in R. Crim. P. 4(E)(1) and immediately consent, in writing, to be delivered into the custody of law enforcement officials of the county that has issued the arrest warrant.

R. Crim. P. 4(E)(1)

R. Crim. P. 4(E)(1) sets forth the procedure to be followed upon arrest pursuant to a warrant as follows:

> Where under a warrant a person is arrested either in the county from which the warrant issued or in an adjoining county, the arresting officer shall, except as provided in division (F),[1] bring the arrested person without unnecessary delay before the court that issued the warrant. *Where the arrest occurs in any other county, the arrested person shall,* except as provided in division (F), *be brought without unnecessary delay before a court of record therein, having jurisdiction over such an offense, and he shall not be removed from that county*

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[1] R. Crim. P. 4(F) provides, in part:

> In misdemeanor cases where a person has been arrested with or without a warrant, the arresting officer, the officer in charge of the detention facility to which the person is brought or the superior of either officer, without unnecessary delay, may release the arrested person by issuing a summons when issuance of a summons appears reasonably calculated to assure the person's appearance.

> *until he has been given an opportunity to consult with an attorney, or another person of his choice, and to post bail to be determined by the judge or magistrate of that court.* If he is not released, he shall then be removed from the county and brought before the court issuing the warrant, without unnecessary delay. If he is released, the release shall be on condition that he appear in the issuing court at a time and date certain for an initial appearance under Crim. R. 5. (Footnote and emphasis added.)

Thus, where an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, the arresting officer must take the individual who is the subject of the warrant forthwith before a court of record in the county of arrest having jurisdiction over the offense or offenses set forth in the warrant. R. Crim. P. 4(E)(1); *see* R.C. 2935.13; 1979 Op. Att'y Gen. No. 79-106 at 2-330; *see also* 1993 Op. Att'y Gen. No. 93-003 at 2-23 ("[d]epending upon the entity issuing the warrant and the circumstances arising after the arrest, a city police officer, who makes an arrest pursuant to a warrant, is required to deliver the individual named in the warrant before the court issuing the warrant, a court of record which has jurisdiction over the offense set forth in the warrant, a federal magistrate, a state or local judicial officer, or an authorized agent of a demanding state"); 1991 Op. Att'y Gen. No. 91-047 at 2-247 ("an individual arrested with or without a warrant for a misdemeanor must be taken 'before a court' and afforded the opportunity to make bail"). *See generally State ex rel. Niles v. Bernard,* 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978) (absent a clear and unequivocal showing of a contrary intention, the use of the word "shall" within a provision of law is to be interpreted as imposing a mandatory duty with respect to the activity or conduct therein described). Further, an individual arrested without a warrant in such a distant county may not be removed from the county of arrest until he has been given an opportunity to post bail and to communicate with an attorney, or another person of his choice for the purpose of obtaining counsel or arranging bail. R. Crim. P. 4(E)(1); *see* R.C. 2935.13; R.C. 2935.14; R.C. 2935.20. *See generally* R. Crim. P. 46(A) ("[a]ll persons are entitled to bail, except in capital cases where the proof is evident or the presumption great").

Waiver of a Right

It is generally accepted that an individual may waive his statutory and constitutional rights. *See, e.g., Peretz v. United States,* 111 S. Ct. 2661, 2669 (1991); *Newton v. Rumery,* 480 U.S. 386 (1987); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). However, an individual may not waive a statutory right if the allowance of a waiver would contravene and thwart statutory policy. As stated by the United States Supreme Court,

> a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. *Midstate Horticultural Co. v. Pennsylvania R. Co.,* 320 U.S. 356, 361; *Phillips v. Grand Trunk R. Co.,* 236 U.S. 662, 667. [*Cf.*] *Young v. Higbee Co.,* 324 U.S. 204, 212. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (footnote omitted); *see also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 51-52 (1974) (holding that employee's rights under Title VII are not susceptible of prospective waiver); *Parker v. DeKalb Chrysler Plymouth,* 673 F.2d 1178, 1181 (11th Cir. 1982) (an individual may not waive a Truth in Lending Act

claim, insofar as "the public interest in deterring inconsistent and undecipherable lending practices would be greatly hampered"); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1505 (D. N.J. 1985) ("the court's conclusion that [these] rights are statutorily substantive ones explodes any argument of waiver"). Accordingly, if the waiver of R. Crim. P. 4(E)(1) contravenes the policy the rule was designed to effectuate, then an individual may not waive the jurisdiction of a proper court of record in that county where he is arrested as provided in that rule.

An Individual May Not Waive the Jurisdiction of the Arresting County's Court as Provided by R. Crim. P. 4(E)(1)

A review of the language of R. Crim. P. 4(E)(1) clearly shows that the Ohio Supreme Court did not intend that an individual arrested in a distant county be permitted to waive the jurisdiction of a proper court of record in that county before he is removed from that county and transported back to the county that issued the arrest warrant.[2] The plain purpose of R. Crim. P. 4(E)(1) is to provide an orderly jurisdictional scheme to assure that an individual arrested in a distant county is taken without unnecessary delay before an appropriate court of record, which in turn helps to safeguard an individual's right to the assistance of counsel and an opportunity to post bail. To accomplish this purpose, R. Crim. P. 4(E)(1) requires that an individual arrested pursuant to a warrant in any county other than the county from which the warrant issued or an adjoining county be taken by the arresting law enforcement officer before a court of record in the county of arrest without unnecessary delay.[3]

If an individual so arrested were permitted to waive the jurisdiction of the court as mandated by R. Crim. 4(E)(1), then the orderly jurisdictional scheme provided in that rule could be entirely circumvented. An individual who waives his right to a R. Crim. P. 4(E)(1) bail hearing in a court of record as provided in the rule would thus defeat the proper jurisdiction of that court and also could be subject to an unreasonable delay before he is removed to a court of record in the county that issued the arrest warrant. In light of the above, it seems quite clear that allowing a waiver of the bail hearing mandated by R. Crim. P. 4(E)(1) would contravene and thwart the policy that the Ohio Supreme Court designed R. Crim. P. 4(E)(1) to effectuate: providing an orderly jurisdictional scheme that addresses the practical problems raised when an individual is arrested in a county distant from the county that issued the original arrest warrant. *Cf. State v. Rojas*, 64 Ohio St. 3d 131, 136, 592 N.E.2d 1377, 1382 (1992) (defendant who chooses to appeal in capital case to Ohio Supreme Court may not subsequently withdraw the appeal), *cert. denied*, 113 S. Ct. 1007 (1993).

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[2] The Ohio Rules of Criminal Procedure are promulgated by the Ohio Supreme Court pursuant to Ohio Const. art. IV, §5(B).

[3] It should be noted also that though the Ohio Supreme Court has expressly authorized waiver of certain protections in the Rules of Criminal Procedure, *see, e.g.*, R. Crim. P. 4.1 (in minor misdemeanor cases an individual may waive his right to a trial); R. Crim. P. 5(B) (an individual accused of a felony may waive his right to a preliminary hearing); R. Crim. P. 10(A) (an individual may waive the reading of the indictment, information, or complaint); R. Crim. P. 23(A) (an individual "may knowingly, intelligently and voluntarily waive in writing his right to trial by jury"), no such authority was given for waiver of the specific jurisdictional provisions set out in R. Crim. P. 4(E)(1).

Because waiver of R. Crim. P. 4(E)(1) contravenes the policy the rule was designed to effectuate, an individual may not waive the jurisdiction of a proper court of record where he is arrested in a distant county as required by that rule. Accordingly, if an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, the individual who is arrested may not waive the jurisdiction of the arresting county's court as provided by R. Crim. P. 4(E)(1) and immediately consent, in writing, to be delivered into the custody of the law enforcement officials of the county that issued the arrest warrant.

Conclusions

On the basis of the discussion above, it is my opinion, and you are hereby advised, that:

1. Where an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, R. Crim. P. 4(E)(1) mandates that the individual who is the subject of the warrant be taken forthwith by the arresting officer before a court of record in the county of arrest, and that the individual not be removed from the county of arrest until he has been given an opportunity to consult with an attorney, or another person of his choice, and to post bail.

2. If an arrest pursuant to a warrant is made in any county other than the county from which the warrant issued or an adjoining county, the individual who is arrested may not waive the jurisdiction of the arresting county's court as provided by R. Crim. P. 4(E)(1) and immediately consent, in writing, to be delivered into the custody of the law enforcement officials of the county that issued the arrest warrant.