OPINION NO. 87-062

Syllabus:

1. When appropriate, a county sheriff may charge the jail fees described in R.C. 311.17(B)(3)(a) more than once in a particular case pending against a prisoner (1959 Op. Att'y Gen. No. 820, p. 523, syllabus, paragraph one, overruled).

2. A county sheriff may not charge the jail fees described in R.C. 311.17(B)(3)(a) for receiving and discharging a prisoner each time a prisoner departs from or returns to the jail to participate in a work-release program established pursuant to R.C. 5147.28.

3. A county sheriff may charge the jail fees described in R.C. 311.17(B)(3)(a) for a person whose arrival at and departure from the county jail are recorded in the jail register or "book" according to the procedures outlined in R.C. 341.02 and accompanying regulations.

To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 20, 1987

I have before me your request for my opinion concerning the application of R.C. 311.17(B)(3)(a) to two sets of facts. R.C. 311.17 allows the county sheriff to charge certain fees for specified services, and reads in part:

> For the services specified in this section, the sheriff shall charge the following fees, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor:
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> ....
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> (B) In addition to the fee for service and return, the sheriff may charge:
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> ...
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> (3) Jail fees, as follows:
>
> (a) For receiving a prisoner, four dollars, and for discharging or surrendering a prisoner, four dollars.... (Emphasis added.)

In your first question, you ask whether a sheriff may charge fees pursuant to R.C. 311.17(B)(3)(a) for "discharging" and "receiving" a prisoner each time he releases and accepts a prisoner participating in a work-release program. In your second question, you ask whether R.C. 311.17(B)(3)(a) allows a county sheriff to charge jail fees for an individual who is taken to the county jail pursuant to an arrest for a traffic offense and who is released after being booked and signing a "personal recognizance bond," perhaps never having been incarcerated in the holding facility.

A county sheriff is an elected official, see R.C. 311.01, charged with the "exercise [of] the powers conferred and [performance of] the duties enjoined upon him by statute and by the common law." R.C. 311.08. The general powers and duties of a sheriff are set forth in R.C. 311.07. R.C. 341.01 governs the sheriff's authority over the county jail, and provides that "[t]he sheriff shall have charge of the county jail and all persons confined therein. He shall keep such persons safely,

attend to the jail, and govern and regulate the jail according to the minimum standards for jails in Ohio promulgated by the department of rehabilitation and correction."

In your letter of request you specifically direct my attention to 1959 Op. Att'y Gen. No. 820, p. 523, in which one of my predecessors interpreted the provisions of R.C. 311.17(B)(3)(a). The precise question addressed in 1959 Op. No. 820 was whether the sheriff could charge a jail fee for each case if a prisoner had more than one case pending against him. My predecessor concluded that "[u]nder the provisions of Division (B)(3)(a) of Section 311.17, Revised Code, a sheriff may charge jail fees for receiving a prisoner, and also for discharging or surrendering a prisoner, once in each case against the prisoner." 1959 Op. No. 820 (syllabus, paragraph one). My predecessor reasoned that the fees charged for providing service upon receiving and discharging a prisoner could be multiplied by the number of cases pending against a single prisoner, but could be charged no more than once in each case. At the time 1959 Op. No. 820 was issued, however, R.C. 311.17(B)(3)(a) prescribed fees which were "to be charged but once in each case." 1959 Ohio Laws 542, 544 (Am. H.B. 9, eff. July 17, 1959). The legislature amended R.C. 311.17 in 1973 Ohio Laws 831, 832 (Am. S.B. 208, eff. Dec. 17, 1973), deleting the phrase "to be charged but once in each case" from R.C. 311.17(B)(3)(a). The Ohio Supreme Court has noted that a "change in wording creates a presumption that the General Assembly intended by the amendment to change the meaning." State ex rel. Clampitt v. Brown, 165 Ohio St. 139, 140, 133 N.E.2d 369, 370 (1956). Therefore, I conclude that when the legislature deleted from R.C. 311.17(B)(3)(a) the words "to be charged but once in each case," the intention was that the fees for receiving and discharging or surrendering prisoners could, under appropriate circumstances, be charged more than once in a particular case. Based upon the 1973 amendment of R.C. 311.17(B)(3)(a), I hereby overrule paragraph one of the syllabus of 1959 Op. No. 820.

I must next determine what fees may be charged pursuant to R.C. 311.17(B)(3)(a) when a prisoner departs from and returns to the county jail daily to participate in a work-release program. R.C. 5147.28 authorizes the establishment of work-release programs by providing:

> (A) The court of common pleas and each municipal and county court in a county in which all of such courts agree on uniform standards may provide by rule for a work-release program to permit any prisoner in a county or city jail or workhouse, other than a prisoner sentenced under a non-suspendable sentence, to be employed with his consent outside of the jail or workhouse. In any county in which the common pleas court, after reasonable efforts to obtain such an agreement, determines that such is not possible, such court, after reasonable notice to all interested courts and officials, shall place into effect rules of such court making provisions for a work-release program available to all courts within the county.
>
> (B) Any court which establishes a work-release program under division (A) of this section shall adopt rules prescribing the conditions under which a prisoner is to leave the jail or workhouse during the hours of his employment and go to and from work.
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> (C) Upon approval of the sentencing judge located

> in any jurisdiction having a work-release program, any person sentenced to a county or city jail or workhouse shall be permitted to participate in a work-release program.
>
> (D) The court shall not assign a prisoner to work in an establishment where a legally constituted strike is in process.
>
> (E) Any prisoner participating in a work-release program shall be paid remuneration, subject to garnishment, and have hours and other conditions of work that are substantially equal to those prevailing for similar work in the locality. (Emphasis added.)

Thus, a prisoner in a county or city jail may be employed outside the jail, with his consent. The conditions under which a prisoner may leave the jail and go to and from work are prescribed by the court that establishes the work-release program.

R.C. 311.17(B)(3)(a) allows a sheriff to charge fees each time he "receives," "discharges," or "surrenders" a prisoner. Thus, it must be determined whether a prisoner who participates in a work-release program is "discharged" or "surrendered" when he departs from the jail and is "received" when he returns to the jail. The terms used in R.C. 311.17(B)(3)(a) are not defined in the Revised Code and have not been the subject of judicial construction. R.C. 1.42 provides that "[w]ords and phrases [in a statute] shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

Black's Law Dictionary 1140 (5th ed. 1979) defines the word "receive," in part, as "[t]o take into possession and control; accept custody of." The definition of "discharge," as used in the context of criminal law, is "[t]he act by which a person in confinement, held on an accusation of some crime or misdemeanor, is set at liberty." Black's Law Dictionary at 417.[1] In order to find that the terms "discharging" and "receiving," as used in R.C. 311.17(B)(3)(a), encompass the situation you present, it would be necessary to determine that a prisoner who departs each day to participate in a work-release program is at liberty and not in custody while outside the jail and that custody is accepted each day when he returns to the jail. It is essential, therefore, to determine the status of a prisoner who has left the jail to participate in a work-release program.

A prisoner participating in a work-release program who fails to return to the jail at the scheduled time may be

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[1] Black's Law Dictionary 1295 (5th ed. 1979), defines "surrender of criminals" as "[t]he act by which the public authorities deliver a person accused of a crime, and who is found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime has been committed." I do not believe that either of the situations which you pose concerns the surrender of criminals from one authority without jurisdiction to an authority with proper jurisdiction; I will therefore confine my discussion to the interpretation of the word "discharge."

charged with the crime of escape pursuant to R.C. 2921.34, which provides in pertint part:

> (A) No person, knowing he is under detention or being reckless in that regard, shall purposely break or attempt to break such detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement. (Emphasis added.)

Thus, R.C. 2921.34 prohibits purposely failing to return to detention. R.C. 2921.01(E) defines "detention" as used in R.C. 2921.01 to 2921.45: "'Detention' means arrest, or confinement in any facility for custody of persons charged with or convicted of crime or alleged or found to be delinquent or unruly, or detention for extradition or deportation. Detention does not include supervision of probation or parole, nor constraint incidental to release on bail." (Emphasis added.) The Defiance County Court of Appeals has defined "detention" as it is used in R.C. 2921.34 as "an abstract term which signifies, not a place or means of confinement, but a status. It constitutes the state of being held in some form of legal custody." State v. Shook, 45 Ohio App. 2d 32, 34, 340 N.E.2d 423, 425 (Defiance County 1975).

R.C. 2921.34 was also explained in the Committee Comment to 1971-72 Ohio Laws, Part II, 1866, 1953-54 (Am. Sub. H.B. 511, eff. Jan. 1, 1974), which enacted R.C. 2921.34 in its present form. The Committee stated, in pertinent part:

> This section consolidates several sections in former law, and restates the offense of escape so as to include an escape from arrest as well as escape from a lock-up, jail, workhouse, juvenile detention home, or penal or reformatory institution. It also includes failing to return to detention following temporary leave such as that incidental to work release or weekend sentencing.

Reprinted at R.C. 2921.34 (Page 1987) (emphasis added). Thus, it was clearly intended that failure to return to detention following work-release be included in the offense of escape. See also State v. Lepley, 24 Ohio App. 3d 237, 495 N.E.2d 40 (Medina County 1985)(prisoner participating in a work-release program was convicted of violating R.C. 2921.34 for failure to return to jail at the scheduled time). Additionally, I note that R.C. 5147.29(C)(5), which governs the disbursement of the earnings of prisoners participating in work-release programs, provides that "[t]he balance [of the earnings shall be disbursed] to the prisoner upon discharge from the sentence." (Emphasis added.) The clear implication of this provision is that a prisoner participating in a work-release program is not discharged each day, but is discharged only upon completion of the sentence. Cf. R.C. 5139.01(A)(8) ("[a]s used in R.C. Chapter 5139...'[d]ischarge' means that the department of youth services' legal custody of a child is terminated").

The status of a prisoner participating in a work-release program who failed to return as scheduled was analyzed in State v. Kiggins, 86 S.D. 612, 200 N.W.2d 243 (1972). The court ruled that the prisoner's failure to return was an escape, reasoning:

> Defendant was lawfully confined in the Minnehaha County jail. The privilege of work-release merely extended the limits of his confinement. Until his discharge by due process of law he remained under the legal restraint of his sentence and in constructive custody of the jail. His wilful abscondment from restraint and custody constituted an escape.

865 S.D. at 615, 20 N.W.2d at 244 (citations omitted). Under this analysis, custody is not considered to be relinquished when a prisoner is released to participate in a work-release program even though the prisoner is not physically confined within the jail.

Thus, I conclude that a prisoner who is outside the jail participating in a work-release program is in a form of legal custody. I do not consider, therefore, that a prisoner who is released from jail each day to participate in a work-release program is at liberty; the release does not constitute a "discharge" as that term is used in R.C. 311.17(B)(3)(a). Furthermore, because a prisoner is in a form of legal custody while outside the jail, accepting the prisoner into the jail at the end of the day does not constitute "receiving" as that term is used in R.C. 311.17(B)(3)(a). Such a prisoner is not accepted into custody each day but rather remains in custody while outside the jail.

Accordingly, I conclude that the daily departure and return of a prisoner who is participating in a work-release program does not constitute "discharging" or "receiving" as those terms are used in R.C. 311.17(B)(3)(a) and thus, a county sheriff is not authorized to charge the fees prescribed therein when a prisoner departs from and returns to the jail to participate in a work-release program.[2]

In your second question you ask whether the sheriff may charge the fees authorized by R.C. 311.17(B)(3)(a) when a person is released on his own recognizance shortly after being brought to the jail and booked after being arrested for a misdemeanor violation.[3]

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[2] In your letter you note that payment of jail fees would not be unreasonable in this situation because "extra manpower is needed and additional procedures are followed" each time a prisoner is "released" for the work-release program. However, R.C. 311.17 has traditionally been construed narrowly; at times this construction has resulted in the charging of fees where no extra manpower or labor is used. See e.g., 1982 Op. Att'y Gen. No. 82-009 (allowing a sheriff to charge multiple fees for serving multiple writs on one or more individuals in one location).

[3] In your question, you refer to a "traffic arrestee/detainee" who signs a "personal recognizance bond." References to "personal recognizance bonds" do appear in some cases. See e.g. Littleton v. Ginter, No. WD-85-72 (Ct. App. Wood County August 8, 1985)(unreported). I find no reference, however, to a "personal recognizance bond" in the Ohio Revised Code or accompanying rules of criminal procedure. An arrestee may be released on "personal recognizance," or his own recognizance," pursuant to R. Crim. P. 46(D) or R.C. 2937.29 if the court believes that the accused will "appear

An individual released on personal recognizance is released pursuant to R.C. 2937.29 and R. Crim. P. 46(D), which prescribe pretrial release in misdemeanor cases. As noted, R.C. 311.17(B)(3)(a) allows the sheriff to charge jail fees for "receiving" and "discharging" a "prisoner." Thus, in order to decide whether the sheriff may charge jail fees in the situation you present, it is necessary to determine whether an individual who has been brought to the jail and booked pursuant to an arrest for a misdemeanor violation is a "prisoner," and whether a person who is detained at the jail and subsequently released on his personal recognizance is "received" and then "discharged" as those terms are used in R.C. 311.17(B)(3)(a).

"Prisoner" is defined as, among other things, "[o]ne who is deprived of his liberty." Black's Law Dictionary at 1075. R. Crim. P. 46 states that a person arrested for a misdemeanor may be released pursuant to issuance of a summons (R. Crim. P. 4(F)). If he is not released pursuant to Rule 4(F), he may be released by the clerk of court or, if the clerk is not available, by the officer in charge of the facility to which the person is brought. The person may be released on his personal recognizance, upon execution of an unsecured appearance bond, or by making bail pursuant to R. Crim. P. 46(D)(1), (2), or (3). If the person is not released by any of these methods, the rule provides that he must be given a

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as required." In addition, he could be released after "execution of an unsecured appearance bond" pursuant to R. Crim. P. 46(D). Furthermore, R.C. 2937.22, which sets forth different forms of bail, provides in division (C) that bail may take the form of "[t]he 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 a recognizance." (Emphasis added.) "Personal recognizance" is not defined in the Ohio Revised Code, although it is defined in Black's Law Dictionary at 1030 as:

> Pre-trial release based on the person's own promise that he will show up for trial (no bond required). A species of bail in which the defendant acknowledges personally without sureties his obligation to appear in court at the next hearing or trial date of his case. It is used in place of a bail bond when the judge or magistrate is satisfied that the defendant will appear without the need of a surety bond or other form of security. Also referred to as "release on own recognizance" or "ROR."

Although this definition indicates that no deposit of money or promise of money is required for release on personal recognizance, Ohio courts have differed in their interpretations of the term. On the one hand, the Hamilton County Court of Appeals has indicated that "personal recognizance" means release without bail or any security other than the defendant's word. State v. Pembaur, No. C-800856 (Ct. App. Hamilton County February 10, 1982) (unreported). In that case, the defendant claimed that R.C. 2937.29 would violate the equal protection clause of the fourteenth amendment because it provides no criminal penalties for not appearing for trial when release was

hearing without unnecessary delay before a judge, who shall determine the conditions of his release. Thus, until the person is released pursuant to one of these specified methods, he is deprived of his liberty. I conclude, therefore, that a person who has been arrested for a misdemeanor is a prisoner, for purposes of R.C. 311.17(B)(3)(a), from the time he is brought to the facility until the time he is released.

Black's Law Dictionary at 1140 defines "receive" as to "take into possession and control; accept custody of." "Custody" is defined as, among other things, "[t]he care and control of a thing or person," and "the detainer of a man's person by virtue of lawful process or authority." Id. at 347. In addition, it is noted that "[t]he term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession." Id. Custody is established when a person is placed under arrest. Cf. State v. Reed, 65 Ohio St. 2d 117, 418 N.E.2d 1359 (1981) (syllabus) ("[a] person is under 'detention,' as that term is used in R.C. 2921.34, when he is arrested and the arresting officer has established control over his person"). Clearly, a person who has been brought to the jail under arrest and booked and who is not free to leave until released on a bond or on his own recognizance has been placed in the custody of the sheriff, who has "charge of the county jail and all persons confined therein" pursuant to R.C. 341.01. Prisoners are "booked" according to the procedures

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predicated on some sort of bail, bond, or cash deposit, but does provide a criminal penalty for those released on personal recognizance. The court held that R.C. 2937.29 does not violate the equal protection clause because there is a difference between release on personal recognizance and release on some form of bond:

> The trust which is imposed when a court releases [one] upon one's own recognizance, that is, accepting the word of a defendant that he or she will appear as required, is enough to differentiate reasonably between release under R.C. 2937.29 and other release undertakings. The difference is grounded on a rational basis.

Id. at p. 9.

The Summit County Court of Appeals, on the other hand, looked at the language of R.C. 2937.22(C) in conjunction with the language of R.C. 2937.29 and concluded that a personal recognizance would be "a written undertaking of the defendant unsecured by others on his behalf." State v. Merlo, No. 9904, p. 5 (Ct. App. Summit County April 29, 1981) (unreported)(emphasis added). That court acknowledged, however, that "[i]t is evident that the terms recognizance, bail, and bond tend to be used somewhat loosely and without specificity in many instances." Id. Accordingly, I have decided to presume that in your letter you intended to refer to release on one's own recognizance under R.C. 2937.29. I note, however, that a person's status as a "prisoner" and whether or not a sheriff "receives" and "discharges" him under R.C. 311.17(B)(3)(a) does not appear to depend on whether he was released on bail, bond, or his own recognizance; rather, it depends on whether or not he was in custody.

contained in R.C. 341.02 and 9 Ohio Admin. Code 5120:1-12-01. R.C. 341.02 provides that the sheriff shall enter the name of each prisoner, the date and cause of his confinement, and the date and manner of his discharge into "a suitable book, which shall be known as the 'jail register.'" In addition, Rule 5120:1-12-01 details an elaborate booking procedure for prisoners who have not yet been convicted of crimes, providing that the jail register shall include a listing of the "[o]fficial charge or charges." The rule further indicates that prisoners awaiting pretrial release are subject to much the same booking procedures as those who will remain in custody. See Rule 5120:1-12-01(L)(3)(Exempting prisoners awaiting pretrial release from property inventorying requirements in most cases). Prisoners who are booked are in confinement and are therefore in the sheriff's custody and control. Cf. R.C. 341.11, R.C. 341.01. Accordingly, when the sheriff "books" a prisoner, that prisoner is "received" by the sheriff for purposes of R.C. 311.17(B)(3)(a). Thus, a person who is arrested for a misdemeanor violation and who is brought to the jail is transferred to the custody and control of the sheriff when he is booked, and is a prisoner who has been received by the sheriff.

The language of R.C. 341.02(B) indicates that the release of a prisoner who has been booked under the statute is a "discharge"; provides that the jail register must include a record of "[t]he date and manner of [a prisoner's] discharge." I find nothing to indicate that the release of a prisoner on his own recognizance would not constitute a "discharge" pursuant to R.C. 311.17(B)(3)(a). In the context of criminal law, "discharge" is defined as "[t]he act by which a person in confinement, held on an accusation of some crime or misdemeanor, is set at liberty." Black's Law Dictionary at 417. "Release on own recognizance" is defined as:

> Release of a defendant on personal recognizance when, having acquired control over his person, the court permits him to be at liberty during the pendency of the criminal action or proceeding upon his written promise to appear whenever his attendance before court may be required and to render himself amenable to the orders and processes of the court.

Id. at 1160 (emphasis added). In addition, R.C. 2921.01(E) defines "detention" as used in R.C. 2921.01 to 2921.45: "'Detention' means arrest, or confinement in any facility for custody of persons charged with or convicted of crime or alleged or found to be delinquent or unruly, or detention for extradition or deportation. Detention does not include supervision of probation or parole, nor constraint incidental to release on bail." (Emphasis added.) Thus, a defendant who has been released on his own recognizance, which is a form of bail, See 1987 Op. Att'y Gen. No. 87-016, is at liberty rather than in detention during the pendency of the criminal action and is no longer a prisoner. Accordingly, a release on one's own recognizance recorded in the jail register pursuant to R.C. 341.02 would constitute a discharge under R.C. 311.17(B)(3)(a).[4]

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[4] I note that the definition of "custody" in Black's Law Dictionary at 347 includes the notation that "persons on probation or released on [their] own recognizance have been

It is, therefore, my opinion, and you are advised, that:

1. When appropriate, a county sheriff may charge the jail fees described in R.C. 311.17(B)(3)(a) more than once in a particular case pending against a prisoner (1959 Op. Att'y Gen. No. 820, p. 523, syllabus, paragraph one, overruled).

2. A county sheriff may not charge the jail fees described in R.C. 311.17(B)(3)(a) for receiving and discharging a prisoner each time a prisoner departs from or returns to the jail to participate in a work-release program established pursuant to R.C. 5147.28.

3. A county sheriff may charge the jail fees described in R.C. 311.17(B)(3)(a) for a person whose arrival at and departure from the county jail are recorded in the jail register or "book" according to the procedures outlined in R.C. 341.02 and accompanying regulations.

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held to be 'in custody' for purposes of habeas corpus proceedings." I conclude, however, that this determination is irrelevant to the definition of "discharge" in R.C. 311.17.