OPINION NO. 81-091

Syllabus:

Pursuant to Crim. R. 46(D), where the clerk of a municipal or county court is unavailable and a person charged with a misdemeanor offense of which the municipal or county court has jurisdiction is brought to a facility of which the sheriff has charge, the sheriff may accept bail and release the accused in accordance with the provisions of the rule. (1960 Op. Att'y Gen. No. 1641, p. 560, overruled.)

To: John A. Pfefferle, Erie County Pros. Atty., Sandusky, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your opinion request in which you ask whether a sheriff is authorized to collect bonds and fees for municipal and county courts. From information provided by your office it is my understanding that you have limited

your question to whether a sheriff may accept bail bonds for persons charged with offenses over which a municipal or county court has jurisdiction.

Pursuant to R.C. 311.08(A), the sheriff is required to "execute every summons, order, or other process. . ., make return thereof, and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law." It is clear, therefore, that a sheriff may perform any act which is specifically authorized by statute or necessarily implied from an express grant of authority. See 1979 Op. Att'y Gen. No. 79-083 (a public officer has such powers as are expressly granted or may be fairly implied from such express powers).

The general statutory provisions concerning bail are contained in R.C. Chapter 2937.[1] R.C. 2937.23 provides for the fixing of bail in criminal cases as follows:

> In cases of felony, the amount of bail shall be fixed by judge or magistrate; in cases of misdemeanor or ordinance offense it may be fixed by judge, magistrate, or clerk of the court and may be in accordance with schedule previously fixed by judge or magistrate or, in cases when the judge, magistrate, or clerk of the court is not readily available, bail may be fixed by the sheriff, deputy sheriff, marshal, deputy marshal, police officer, or jailer having custody of the person charged, shall be in accordance with a schedule previously fixed by the judge or magistrate, and shall be taken only in the county courthouse, or in the municipal or township building, or in the county or municipal jail. In all cases it shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial of the case. (Emphasis added.)

This statute clearly requires that, in felony cases, bail shall be fixed by either a judge or magistrate; there is no provision for bail to be fixed or accepted by a sheriff in such cases. The statute appears, however, to set forth circumstances under which persons other than a judge or magistrate may fix bail. Thus, where the sheriff is the officer with custody of a person charged with a misdemeanor or ordinance offense, and where the judge, magistrate, or clerk of the court is not readily available, the sheriff may fix bail in accordance with a schedule set by the judge or magistrate; such bail "shall be taken only in the county courthouse, or in the municipal or township building, or in the county or municipal jail" (emphasis added). R.C. 2937.23.

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[1] R.C. 2937.22 defines bail as "security for the appearance of an accused 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." The statute also sets forth three forms bail may take:

> (A) The deposit of cash by the accused or by some other person for him;
> (B) The deposit by the accused or by some other person for him in form of bonds of the United States, this state, or any political subdivision thereof in a face amount equal to the sum set by the court or magistrate. In case of bonds not negotiable by delivery such bonds shall be properly endorsed for transfer.
> (C) 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 a recognizance.

Crim. R. 46, discussed more fully below, appears, however, to use the term "bail" in a broader manner.

R.C. 2937.23 does not specify by whom bail shall be taken, but in those instances where the sheriff is authorized to fix bail (i.e., in the case of misdemeanor or ordinance offenses where the judge, magistrate, or clerk of court is not readily available), the authority of the sheriff to accept the bail must be necessarily implied. If such authority were not implied and the sheriff could not accept bail, the provision allowing the sheriff to fix bail in the absence of the judge, magistrate, or clerk would be of no effect, since bail could not be taken in such an instance in any event. R.C. 1.47 ("[i]n enacting a statute, it is presumed that: . . . (B) The entire statute is intended to be effective").

Crim R. 46 provides, in greater detail, the procedure to be followed when fixing bail pursuant to R.C. 2937.23.[2] Crim. R. 46(A) states, in part, that "[a]ll persons are entitled to bail, except in capital cases where the proof is evident or the presumption great." Crim. R. 46(B), providing for pretrial release where summons has issued and the defendant has appeared, states that, "the judge shall release the defendant on his personal recognizance, or upon the execution of an unsecured appearance bond" (emphasis added). Under such circumstances, it is clear that the judge is required to release the accused; there is no provision for the sheriff to accept bail.

Crim. R. 46(C), which discusses pretrial release in felony cases, allows for the release of certain defendants on personal recognizance or upon execution of an unsecured appearance bond "in an amount specified by the judge, unless the judge determines that such release will not assure the appearance of the person as required." The rule further specifies that where a judge determines that the above mentioned forms of bail will not assure the accused's appearance, "he shall, either in lieu of or in addition to the preferred methods of release stated above, impose any" of several conditions. It is clear, therefore, that the rule makes no provision for the sheriff to fix or take bail in felony cases.

Crim. R. 46(D), setting forth the procedure for pretrial release in misdemeanor cases, reads as follows:

> A person arrested for a misdemeanor and not released pursuant to Rule 4(F) [by mere issuance of a summons to appear], shall be released by the clerk of court, or if the clerk is not available the officer in charge of the facility to which the person is brought, on his personal recognizance, or upon the execution of an unsecured appearance bond in the amount specified in the bail schedule established by the court. If the clerk or officer in charge of the facility determines pursuant to subdivision (F) that such release will not reasonably assure appearance as required, the person shall be eligible for release by doing any of the following, at his option:
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> (1) Executing an appearance bond in the amount specified in the court's bail schedule, with a deposit of either $25.00 or a sum of money equal to ten percent of the amount of the bond, whichever is greater. Ninety percent of the deposit shall be returned upon the performance of the conditions of the appearance bond;

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[2]The Ohio Supreme Court promulgated the Criminal Rules pursuant to Ohio Const. art. IV, §5(B), which provides, in part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Crim. R. 46 became effective on July 1, 1973. Crim. R. 59. The rule, therefore, supersedes any statute enacted prior to such date to the extent of any conflict with the statute. See State v. Tate, 59 Ohio St. 2d 50, 53-54, 391 N.E.2d 738, 740 (1979) ("[u]nder the authority of Section 5(B), Article IV of the Ohio Constitution, the Criminal Rules supersede the analogous statutes to the extent of any conflict" (footnote omitted)).

> (2) Posting a bond in the amount specified in the court's bail schedule, which bond is guaranteed to the person as a policyholder of a casualty insurer, or as a member of a bona fide motorists' or travelers' organization;
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> (3) Executing a bail bond with sufficient solvent sureties, or executing a bond secured by real estate in the county, or depositing cash or the securities allowed by law in lieu thereof in the amount specified in the court's bail schedule.
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> A person need not be released on his own recognizance or upon the execution of an unsecured appearance bond if he has a history of failure to appear when required in judicial proceedings, or if his physical, mental, or emotional condition appears to be such that he may pose a danger to himself or others if released immediately. When a person is not released because of his physical, mental, or emotional condition, and it appears that his release into the temporary custody of a responsible relative, friend, or other person will obviate the danger to himself or others, he shall be released into such temporary custody on his making bail under subsection (D)(1), (2), or (3).
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> If a person is not released on his own recognizance, or upon the execution of an unsecured appearance bond, or pursuant to subsection (D)(1), (2), or (3) he shall be given a hearing without unnecessary delay before a judge who shall determine the conditions of his release pursuant to subdivision (C).
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> Each court shall establish a bail schedule covering all misdemeanors including traffic offenses, either specifically, or by type, or by potential penalty, or by some other reasonable method of classification. Each court shall, by rule, establish a method whereby a person may make bail under subsection (D)(1) or (3) by the use of a credit card. Such rule shall permit only credit cards of recognized and established issuers. No credit card transaction shall be permitted when a service charge is made against the court or clerk. (Emphasis added.)

Pursuant to this division of the rule, where a person arrested for a misdemeanor is not released pursuant to Crim. R. 4(F), the clerk of court or, if he is unavailable, the officer in charge of the facility to which the accused is brought, shall release the accused upon one of several conditions set forth in the rule. If such release is not granted, the person arrested must be given a hearing before a judge, who shall determine the conditions of his release.

Division (E) of Crim. R. 46 provides for the release of persons who have been convicted of either a felony or misdemeanor. Unlike division (D) of the rule, division (E) does not authorize anyone other than the judge to fix bail or release a person who has already been convicted.

Concerning the specific authority of the sheriff to accept bail bonds, Crim. R. 46 appears to conflict, in part, with R.C. 2937.23.[3] R.C. 2937.23 allows the sheriff to fix bail for a person who has been charged with a misdemeanor or ordinance offense where the sheriff has custody of the person and where the judge, magistrate or clerk of court is unavailable, and provides that such bail may be taken only in the courthouse, in the municipal or township building, or in the county

[3]As stated in note 2, supra, the Criminal Rules governing practice and procedure supersede any laws to the extent of any conflict with such rules.

or municipal jail. Crim. R. 46, however, provides that where a person arrested for a misdemeanor[4] is not released upon issuance of a summons to appear, if the clerk of court is not readily available, the person "shall be released" by "the officer in charge of the facility to which the person is brought. . . ." Crim. R. 46(D).[5] Pursuant to R.C. 2937.23, the judge, magistrate and clerk of court must be "not readily available" before the sheriff may fix the accused's bail. Crim. R. 46(D), however, states that where the clerk of the court is unavailable, the sheriff may proceed to fix bail; there is no mention in the rule of the judge or magistrate's availability. I conclude, therefore, that because the rule supersedes the statute to the extent of any conflict therewith, where a person charged with a misdemeanor offense is brought to a facility of which the sheriff has charge, the sheriff may fix and accept bail and release the accused if the clerk of court is unavailable, regardless of the availability of the judge or magistrate.

Further support for the proposition that a sheriff may accept bail in certain instances is found in R.C. 311.15 and 311.17. R.C. 311.15 sets forth the procedure to be followed when a sheriff leaves office, stating in part that, "[s]uch sheriff shall also deliver to his successor all prisoners in the county jail or otherwise in his custody, with all bail bonds taken by him and remaining in his possession" (emphasis added). R.C. 311.17 prescribes the fees that a sheriff may charge for his services. R.C. 311.17(B)(2) allows the sheriff to charge one dollar for taking bail bond. There is no specific provision in R.C. Chapter 311 which authorizes the sheriff to accept bail bonds. I believe, therefore, that the references in R.C. Chapter 311 to bail bonds taken by the sheriff must be read in pari materia with the bail provisions set forth in R.C. Chapter 2937 and the corresponding Crim. R. 46. See Roberts v. Briscoe, 44 Ohio St. 596, 600, 10 N.E. 61, 63 (1887) ("sections of a revised code upon one subject. . .are to be construed as a single statute; and treated as a single statute, it is to be so construed that all its provisions may be harmonized if possible").

In your request you specifically mention the apparent conflict between the duty of the clerk of the court to collect and receive bail and the authority of other officials to accept bail. R.C. 1901.31, which sets forth the powers and duties of the clerks and deputy clerks of municipal courts, states that, "[t]he clerk of a municipal court shall receive and collect all costs, fees, fines, bail, and other moneys payable to the office or to any officer of the court and issue receipts therefor, and shall each month disburse the same to the proper persons or officers and take receipts therefor. . ." R.C. 1901.31(F) (emphasis added). The statute also requires the clerk to pay all moneys received by him into the appropriate municipal or county treasury, and to maintain a permanent record of all receipts and disbursements in civil and criminal cases. R.C. 1907.101(C) establishes duties

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[4]Crim. R. 46(D) deletes the portion of R.C. 2937.23 relating to persons charged with an "ordinance offense." Presumably, bail for a person accused of a felony offense must be set by a judge. Crim. R. 46. See also R.C. 2937.23. Bail for a person charged with a misdemeanor offense, in violation of either a statute or an ordinance, must be set in accordance with the provisions of Crim. R. 46(D).

[5]R.C. 311.07 states that, "[u]nder the direction and control of the board of county commissioners, such sheriff shall have charge of the court house." Pursuant to R.C. 341.01, "[t]he sheriff shall have charge of the county jail and all persons confined therein."

similar to those of a municipal court clerk, as discussed above, for the clerk of the county court.[6]

R.C. 1901.31(F) and 1907.101(C), concerning the duties of clerks of court in regard to bail, must, however, be harmonized, if possible, with the bail provisions set forth in R.C. Chapter 2937, see Roberts v. Briscoe, supra, and to the extent that the statutory provisions conflict with the Criminal Rules, the Rules supersede the statutes. It appears, therefore, that while county and municipal court clerks are required by statute to collect and receive bail, such duty does not necessarily preclude the sheriff from accepting bail from an accused. Crim. R. 46 clearly sets forth circumstances under which the sheriff may accept bail. Thus, where the clerk does not receive bail directly from the accused, R.C. 1901.31 and 1907.101(C) appear to require the municipal or county court clerk to collect or receive the bail from the officer who accepted the bail and then forward the bail to the proper person or officer. See R.C. 311.15 (sheriff shall deliver to the successor "all bail bonds taken by him and remaining in his possession"); R.C. 1901.31(F), 1907.101(C). Furthermore, R.C. 2935.15, which discusses generally the amount and disposition of bail in misdemeanor cases, requires that, "[a]ll recognizances taken, or cash received shall be promptly transmitted to the court issuing the warrant, and further proceedings thereon shall be the same as if taken by the issuing court." This provision, when read in conjunction with R.C. 1901.31(F) and 1907.101(C), requires the sheriff to forward any recognizances or cash received as bail to the clerk of the municipal or county court issuing the warrant.[7]

In your opinion request, you specifically ask about the application of 1960 Op. Att'y Gen. No. 1641, p. 560 to your situation.[8] 1960 Op. No. 1641 concluded that the sheriff was without authority to accept "cash appearance bonds" in misdemeanor cases coming within the jurisdiction of the county court. The opinion relied, in part, on the following language of R.C. 2937.22: "All bail shall be received by the clerk of the court, deputy clerk of court, or by the magistrate, or by a special referee. . .and, except in case of recognizances, receipt shall be given therefor by him." This version of R.C. 2937.22 was enacted in 1959 Ohio Laws 97 (Am. Sub. S.B. 73, eff. Jan. 1, 1960), prior to the enactment of the Criminal Rules. Because, as discussed above, Crim. R. 46 provides for the acceptance of bail by the sheriff in certain instances, the rule supersedes any possible prohibition contained in R.C. 2937.22 against a sheriff accepting bail. I, therefore, overrule 1960 Op. No. 1641 to the extent that it is inconsistent with this opinion.

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[6]R.C. 2937.22 states, in pertinent part:

> All bail shall be received by the clerk of the court, deputy clerk of court, or by the magistrate, or by a special referee appointed by the supreme court pursuant to section 2937.46 of the Revised Code, and, except in cases of recognizances, receipt shall be given therefor by him. (Emphasis added.)

Pursuant to this section, all bail shall be received by the clerk of the court, a deputy clerk of court, the magistrate or a special referee. This statute is, however, superseded by Crim. R. 46 to the extent that it is inconsistent therewith. See note 2, supra.

[7]Pursuant to R.C. 2937.22, bail may be in the form of cash, a bond of the United States, the State of Ohio, or a political subdivision of the state, or a recognizance. R.C. 2935.15 does not appear to discuss the disposition of bail taken in the form of a governmental bond.

[8]Your request also mentions 1961 Op. Att'y Gen. No. 2384, p. 369, which deals with the sheriff's authority to collect fines and costs from persons jailed for failure to pay fines and costs for a misdemeanor offense. Because you have limited your question to the authority of a sheriff to accept bail bonds, it is unnecessary to discuss 1961 Op. No. 2384.

It is, therefore, my opinion, and you are advised, that pursuant to Crim. R. 46(D), where the clerk of a municipal or county court is unavailable and a person charged with a misdemeanor offense of which the municipal or county court has jurisdiction is brought to a facility of which the sheriff has charge, the sheriff may accept bail and release the accused in accordance with the provisions of the rule. (1960 Op. Att'y Gen. No. 1641, p. 560, overruled.)