



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 5, 1997

The Honorable Jack Skeen, Jr.  
Smith County Criminal District Attorney  
Smith County Courthouse  
Tyler, Texas 75702

Letter Opinion No. 97-103

Re: Authority of personal bond office to report  
findings to magistrate (ID# 39465)

Dear Mr. Skeen:

You ask about the authority of a personal bond office to report to a magistrate information regarding whether a criminal defendant should be released on personal bond pending trial. We begin with a review of the relevant law.

Virtually every judge in the State of Texas may act as a "magistrate" for purposes of the Code of Criminal Procedure.<sup>1</sup> The code requires a person arrested for a criminal offense to be taken "without unnecessary delay" to a magistrate in the county where the person was arrested. *See Code Crim. Proc. art. 14.06; id. art. 15.17.* A magistrate may, if allowed by law, release a person from custody on bail pending trial. *Id. art. 15.17; see also Tex. Const. art. 1, § 11* (granting prisoners right to bail, except for capital offenses); *id. § 11a* (allowing courts to deny bail in certain cases).

The magistrate before whom a defendant appears after arrest may or may not be the magistrate who accepted a complaint<sup>2</sup> against the defendant or the judge of the court who will preside over further proceedings in the defendant's case. A judge acting as a magistrate may have jurisdiction to accept a complaint and release a defendant on bond even though the judge may not have jurisdiction to try the defendant's case on the merits following the filing of an indictment (in

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<sup>1</sup>Each of the following officers is a magistrate within the meaning of the Code of Criminal Procedure: The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the magistrates appointed by the judges of the district courts of Bexar County, Dallas County, Tarrant County, or Travis County that give preference to criminal cases, the criminal law hearing officers for Harris County appointed under subchapter L, chapter 54, Government Code, the magistrates appointed by the judges of the district courts of Lubbock County or Webb County, the magistrates appointed by the judges of the criminal district courts of Dallas County or Tarrant County, the masters appointed by the judges of the district courts and the county courts at law that give preference to criminal cases in Jefferson County, the county judges, the judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the justices of the peace, the mayors and recorders and the judges of the municipal courts of incorporated cities or towns. Code Crim. Proc. art. 2.07.

<sup>2</sup>In this opinion, we use the word "complaint" as it is defined in articles 15.04 and 15.05 of the Code of Criminal Procedure: a sworn statement charging the commission of an offense. *See Code Crim. Proc. arts. 15.04, .05.* For a discussion of other uses of the term "complaint" in the code, see Dix and Dawson, Texas Practice vol. 40, *Criminal Practice and Procedure* sec. 19.01.

a felony case) or an information (in a misdemeanor case). For example, a municipal court judge acting as a magistrate may set bail in a felony case, but a municipal court has no jurisdiction over felony prosecutions. *See* Code Crim. Proc. art. 7.03 (authorizing magistrate to admit person to bail); *id.* art. 4.14 (setting out jurisdiction of municipal courts); *see also* *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649, 670 (S.D. Tex. 1975) (“A judge of a Municipal Court sitting as a magistrate has jurisdiction to accept complaints on cases which he cannot try on the merits . . . .”); Attorney General Opinion C-718 (1966) at 4 (same). Also, a defendant may be arrested and released on bail in a county other than the county from which a complaint and arrest warrant issued against the defendant. *See* Code Crim. Proc. art. 17.031.

We understand that in some Texas counties, a complaint is filed directly in the court that will have continuing jurisdiction over the defendant. Thus the magistrate who sets bail and the court that will try the case on the merits are one and the same. In other counties, a defendant brought before a magistrate for a bail determination may have his or her case transferred to another court for further proceedings.

Article 17.03 of the Texas Code of Criminal Procedure authorizes the release of a criminal defendant on a personal bond as a form of bail, as follows in pertinent part:

(a) Except as provided by Subsection (b) of this article, a magistrate may, in the magistrate’s discretion, release the defendant on his personal bond without sureties or other security.

(b) Only the court before whom the case is pending may release on personal bond a defendant who:

(1) is charged with an offense under the following sections of the Penal Code:

(A) Section 19.03(Capital Murder);

(B) Section 20.04 (Aggravated Kidnaping);

(C) Section 22.021 (Aggravated Sexual Assault);

(D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, or Court Participant);

(E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);

(F) Section 29.03 (Aggravated Robbery);

(G) Section 30.02 (Burglary); or

(H) Section 71.02 (Engaging in Organized Criminal Activity);

(2) is charged with a felony murder under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, . . . ; or

(3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c)<sup>3</sup> of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.

Code Crim Proc. art. 17.03 (footnote added and omitted). Article 17.03 authorizes any magistrate to release a defendant on a personal bond, except in certain cases when "only the court before whom the case is pending" may do so.

Prior to the enactment of Senate Bill 376 in 1989, article 17.03 contained no restrictions on personal bond release for serious offenses or drug-related cases. As originally introduced, the bill would have barred completely personal bond release in these cases. The provision met with objection, and it was amended in committee to its present form to achieve what appears to us to be a compromise. See Hearings on S.B. 367 Before the Senate Comm. on Criminal Justice, 71st Leg. (Apr. 4, 1989) (transcript available from Senate Staff Services Office). In our view, the legislature intended the 1989 amendment to allow certain defendants to be released on personal bond only by the court that will try the defendant's case on the merits. Explaining the bill on the floor of the senate, Senator Brown said: "In certain enumerated cases, only the judge in whose court the offense is filed can release the person on personal recognizance." Debate on Senate Bill 376 on the Floor of the Senate, 71st Leg., R.S. (May 16, 1989). The House Research Organization described the bill as allowing "only the court hearing a case" to release a defendant on personal bond in certain cases. House Research Organization, Bill Analysis, at 42 (May 26, 1989). We conclude that "the court before whom the case is pending" for purposes of article 17.03 means that court that will hear the defendant's case on the merits.

With this background, we turn to your question. A county or judicial district, with the approval of the commissioners court, may create a personal bond office under the authority of article 17.42 of the Code of Criminal Procedure. Article 17.42 authorizes a personal bond office "to gather and review information about an accused that may have a bearing on whether he will comply with the conditions of a personal bond and report its finding to the court before which the case is

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<sup>3</sup>Under subsection (c) of article 17.03, on reasonable belief by an investigating or arresting law enforcement agency or a magistrate of the presence of a controlled substance in the defendant's body, or on the finding of drug or alcohol abuse related to the offense, a court or a magistrate must make drug testing and treatment a condition of release on personal bond. Code Crim. Proc. art. 17.03(c).

pending.” Code Crim. Proc. art 17.42, § 1. You ask whether a personal bond office may report findings on a defendant to any magistrate authorized to set bail for a defendant when section 17.42 does not appear to allow it. We conclude that a personal bond office may report its findings only to the court before which the defendant’s case is pending. For purposes of article 17.42, a case is pending in the court in which the complaint against the defendant was filed or in any court to which the case is transferred for further proceedings. Thus the phrase “the court before which the case is pending” in article 17.42 has a different meaning than the phrase “the court before whom the case is pending” in article 17.03.

You argue that the reporting authority in article 17.42 extends to all officials authorized to set personal bonds pursuant to article 17.03; that is, the court before which a case is pending and any magistrate. In your view, the failure of the legislature to amend section 17.42 to authorize personal bond offices to report to any magistrate was an oversight when section 17.42 was codified in 1989. We have found no evidence to support this view. When article 17.42’s predecessor—V.T.C.S. article 2372p-2—was enacted in 1973, any magistrate was authorized to release a defendant on personal bond. Yet V.T.C.S. article 2372p-2 was drafted to limit personal bond office reports to “the court before which the case is pending.” This language was retained when the statute was codified in 1989. We conclude that a personal bond office may report its findings on a defendant only to the court before which the defendant’s case is pending.

We must consider, then, when a case is “pending” before a court for purposes of receiving a personal bond office report. The Code of Criminal Procedure does not define the term, but it instructs us to give phrases and terms used in the code their ordinary meaning when not specifically defined. Code Crim. Proc. art. 3.01. The ordinary definition of “pending”—“[b]egun, but not yet completed”—only begs another question. BLACK’S LAW DICTIONARY 1021 (6th ed. 1979). Courts determine when a case is pending before a court within the context of the particular statute at issue. *See, e.g., Thomas v. State*, 796 S.W.2d 196, 198 (Tex. Crim. App. 1990) (deferred adjudication is “pending” case); *Cuellar v. State*, 521 S.W.2d 277, 279 (Tex. Crim. App. 1975) (for purpose of obtaining legislative continuance, case is “pending” from its inception until the rendition of final judgment); *Campbell v. State*, 644 S.W.2d 154, 161 (Tex. App.—Austin 1982, pet. ref’d) (for purpose of unanimous verdict statute, case is “pending” from moment jury is selected and sworn).

A case may be said to be pending in a court only after the formal charging instrument is filed: a complaint in a municipal court,<sup>4</sup> an information in a misdemeanor case, or an indictment in a felony case. Applied to article 17.42, this would mean that a personal bond office could not assist magistrates in determining whether a defendant should be released on personal bond until formal charges have been filed. We do not believe the legislature intended such a result.

Instead, we believe that for purposes of article 17.42, a case is pending in the court in which a complaint, a sworn statement charging the commission of an offense, has been filed against a

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<sup>4</sup>In municipal court and justice court actions, a “complaint” is the instrument formally charging the defendant with the offense. Code Crim. Proc. art. 45.01.

defendant. This is the point when criminal cases are generally considered to have commenced. In *Smalley v. State*, 127 S.W. 225, 226 (Tex. Crim. App. 1910), the defendant was convicted of bribing a person to ignore a subpoena in a pending criminal case. The defendant appealed his conviction on the grounds that no case was “pending” when the bribe was paid because, following the complaint, no information had been filed in county court.<sup>5</sup> The Court of Criminal Appeals said: “[W]e do hold that the making of the complaint and the filing of the complaint in the county court is the commencement of a criminal action, . . . and therefore, when the complaint is filed, it may be said that the case is pending in the county court.” *Id.* And in *Ex parte Clear*, 573 S.W.2d 224 (Tex. Crim. App. 1978), the Court of Criminal Appeals held that the filing of a complaint commences an action for the purpose of determining which court has jurisdiction over an action when two courts have concurrent jurisdiction. *Id.* at 228-29; *see also* Code Crim. Proc. art. 4.16 (providing that “[w]hen two or more courts have concurrent jurisdiction of any criminal offense, the court in which an indictment or a complaint shall first be filed shall retain jurisdiction”). The court held that only the court in which the complaint has been filed has jurisdiction to set bail for the defendant. *Id.* at 229; *accord*, *Ex parte Mitchell*, 601 S.W.2d 376, 377 (Tex. Crim. App. 1980) (holding in felony theft case where complaint was filed in justice court that “[o]nly the justice court had jurisdiction of that complaint until it was dismissed by that court or superseded by the action of the grand jury,” and thus district court’s order setting bail was void).

In sum, we conclude that a personal bond office created pursuant to Code of Criminal Procedure article 17.42 may report its findings on a defendant only to the court before which the defendant’s case is pending. For purposes of article 17.42, a case is pending before the court in which the complaint was filed or to which the case is transferred for further proceedings.

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<sup>5</sup>A court is without jurisdiction to hear a misdemeanor prosecution if an information has not been filed with the court. Code. Crim. Proc. art. 2.05. An information is “a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted.” *Id.* art. 21.20.

**S U M M A R Y**

A personal bond office created pursuant to Code of Criminal Procedure article 17.42 may report its findings on a defendant to the court before which the defendant's case is pending. For purposes of article 17.42, a case is pending before the court in which the complaint was filed or to which the case is transferred for further proceedings.

Yours very truly,

A handwritten signature in black ink that reads "Barbara Griffin". The signature is written in a cursive style with a large initial "B" and a long, sweeping tail.

Barbara Griffin  
Assistant Attorney General  
Opinion Committee