Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

August 19, 1998

The Honorable Barry S. Green
District Attorney, 271st Judicial District
Wise County Courthouse, Suite 200
Decatur, Texas 76234

Letter Opinion No. 98-066

Re: Proper forum for filing affidavit to surrender bond principal (RQ-962)

Dear Mr. Green:

Article 17.19 of the Code of Criminal Procedure allows a surety (normally a bail bondsman) who wishes to surrender his principal (a person released from custody on a bail bond) to do so by filing an affidavit of such intention "before the court or magistrate before which the prosecution is pending." Code Crim. Proc. art. 17.19. If the court or magistrate finds that there is cause for the surety to surrender the principal, the court or magistrate must issue a warrant for the principal's arrest. *Id.* You ask: Before which court or magistrate is a prosecution "pending" for the purpose of filing an affidavit to surrender a bond principal?

The troublesome phrase "the court or magistrate before which the prosecution is pending" and its similarly worded kin occur throughout the Code of Criminal Procedure, but nowhere is the phrase defined. *See, e.g.*, Code Crim. Proc. arts. 17.02, .03, .19, .21, .34, .42. The different procedural contexts in which the phrase is used, combined with the complicated nature of statutorily prescribed criminal processes, the occasional lack of clear statutory procedures, and the varying local criminal docket procedures used throughout the state make it difficult to fashion a uniform meaning for the phrase.[1] Instead, courts and this office have defined when a case is "pending" based upon the context of the statute in which the term is employed. *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 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); Letter Opinion No. 97-103 (1997) (for purpose of personal bond office report, case is pending in court in which complaint was filed).

Article 17.08 of the Code of Criminal Procedure requires a bail bond to state, among other things, "the time and place, when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear." Code Crim. Proc. art. 17.08. The bond must also bind the

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[1]One treatise states: "The informality of the manner in which preindictment proceedings are often handled in felony cases creates some confusion regarding the authority of various magistrates to deal with pretrial release issues." GEORGE E. DIX & ROBERT O. DAWSON, 40 TEXAS PRACTICE, *Criminal Practice and Procedure* § 16.13 (1995).

accused "to appear before any court or magistrate before whom the cause may thereafter be pending at any time when, and place where, his presence may be required under this Code or by any court or magistrate." *Id.* In our view, article 17.08 contemplates that the magistrate setting bail will designate the particular court or magistrate that will hear further proceedings in the case. It can thus be argued that the court or magistrate designated in the bond is the place where the case is "pending" for the purposes of filing by a surety of an affidavit to surrender a bond principal. We understand that in practice, however, particularly in counties that have multiple criminal courts, the bail bond might not designate a specific court or magistrate. Such bonds have been held to be valid under article 17.08 where the principal and surety had available enough information from the bond or from another official source to fairly inform them when and where the principal was to appear once the proper court or magistrate has been determined. *See Blaine v. State*, 494 S.W.2d 916, 918 (Tex. Crim. App. 1973); *Rodriguez v. State*, 673 S.W.2d 635, 636-39 (Tex. App.--San Antonio 1984, no writ). Even where a specific court or magistrate is designated in the bail bond, at the time a surety wishes to file an affidavit the case might not yet have been filed with the court or magistrate, or the court or magistrate might otherwise be without jurisdiction to act in the case despite its designation in the bond. In *Blaine v. State*, 494 S.W.2d at 918, the court noted that because article 17.08 does not require the bond to specify the name of the court or magistrate, "[i]t may thus be seen that the statute provides that the bond shall bind the defendant to appear before any court or magistrate before whom the cause may thereafter be pending." Thus the bail bond requirements of section 17.08 return us to our original dilemma.

While courts and this office have said that for pretrial purposes a case is pending in the court in which the "complaint" was filed against the defendant, *see Ex parte Clear*, 573 S.W.2d 224 (Tex. Crim. App. 1978); Letter Opinion No. 97-103 (1997), the term "complaint" itself is not uniformly defined in the Code of Criminal Procedure.[2] For example:

- In municipal courts, the "complaint" is the instrument formally charging the defendant with a misdemeanor offense and thereby commencing prosecution. *See* Code Crim. Proc. art. 45.01. No specific requirements for the complaint are set out in the code, but courts have held that the complaint must inform the accused of the facts surrounding the offense charged so that the accused may prepare a defense. *Kindley v. State*, 879 S.W.2d 261, 262-63 (Tex. App.--Houston [14th Dist.] 1994, no writ).

- Justice of the peace court misdemeanor actions commence with the filing of a similar "complaint," which must be in writing, sworn to, and state the name or description of the accused; the offense with which the accused is charged; that the offense was committed in the county in which the complaint is made; and show that the offense is not barred by limitation. Code Crim. Proc. arts. 45.16, .17. This complaint may serve as the basis for both an arrest warrant and the prosecution. *Id.* art. 45.18.

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[2]"Discussion of 'complaints' is complicated by the Code's unfortunate failure to carefully distinguish between the various ways in which this and related terms are used." DIX & DAWSON, 41 TEXAS PRACTICE § 19.01 (1995).

- Under article 15.04 of the code, a sworn affidavit made before a magistrate or district or county attorney is a "complaint" if it charges the commission of an offense. *Id.* art. 15.04. An article 15.04 complaint is normally used to show probable cause for the issuance of an arrest warrant. An article 15.04 complaint must state the name or description of the accused; show that the accused has committed some crime or that the affiant has good reason to believe so; state the time and place of the offense; and be signed by the affiant. *Id.* art. 15.05.

- For prosecution of a misdemeanor in a county or district court, a sworn "complaint" stating that an offense has been committed must be made before a district or county attorney and filed as the basis of an "information" required for prosecution. *Id.* arts. 2.04, .05, 21.20, .22. 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.

- Although a felony prosecution requires an indictment, and not a complaint or information, *see id.* art. 21.01, some sort of document charging the offense and called a "felony complaint," whether a statutorily prescribed pre-arrest complaint or another type of sworn statement, is likely to have been filed prior to the indictment. *See id.* art. 2.05.

- Under article 51.03, a "complaint" can be made to any magistrate that a person within the magistrate's jurisdiction is a fugitive from justice from another state, at which time the magistrate must issue a warrant for the fugitive's arrest. *Id.* art. 51.03. The complaint must state the name of the accused; the state from which the accused has fled; the offense committed; that the accused fled to Texas from the state where the offense was committed; and that the alleged act committed is a crime in the state from which the accused fled. *Id.* art. 51.04.

- Finally, you tell us that when a person is arrested without a warrant, and thus without a pre-arrest complaint having been filed, depending upon local procedure the arresting officer might file an affidavit to show probable cause why the person should be detained. The officer might also file another type of short form setting out the basis of the arrest. Either of these documents might be called a "complaint," although no specific provision is made for them in the Code of Criminal Procedure.[3]

While the various complaints described in the Code of Criminal Procedure or filed customarily serve different purposes and have different requisites depending on their purpose, they all share a basic characteristic: they set forth the basis of the criminal charges against the accused. Pursuant to

[3]We note that federal rules of criminal procedure require a "complaint" to be filed following an arrest without a warrant. FED. R. CRIM. P. 5. No similar Texas rule exists.

whatever statute it is filed, and in whatever form, it has been said: "The Code of Criminal Procedure contemplates that a complaint is to be taken and filed in all cases."[4]

The difficulty of determining before which magistrate or in which court a case is pending, particularly based upon where the "complaint" was filed, is illustrated by examination of a typical pretrial criminal proceeding. A person suspected of committing a crime may be arrested following the filing of an article 15.04 complaint or other probable cause complaint and the issuance by a magistrate of an arrest warrant.[5] *See* Code Crim. Proc. ch. 15. Or, a person may be arrested without a warrant by a peace officer under certain circumstances, for example when a crime has been committed in the officer's view, when the officer has reason to believe that a crime has been committed, or when a person is in danger of bodily harm. *See id.* arts. 14.01, .02, .03, .04. Following the person's arrest with or without a warrant, the person must be taken "without unnecessary delay" to a magistrate in the county where the person was arrested. *Id.* arts. 14.06, 15.16, .17. If the person was arrested without a warrant, some sort of "complaint," either a formal charging instrument or another document setting forth the charges, might be filed before or at this point in order to show the magistrate probable cause why the defendant should be detained. The magistrate must, among other things, inform the person of his or her right to an attorney, the right to remain silent, and the like--*Miranda* warnings as they are commonly known. The magistrate may also, if allowed by law, release a person from custody on bail pending trial. *Id.* art. 15.17.

The magistrate before whom the person appears for *Miranda* and bail proceedings may or may not be the magistrate who accepted the pre-arrest complaint against the person and who issued the arrest warrant, if any, since the defendant may be brought before any magistrate in the county of arrest, *id.* arts. 15.16, .17, and since an arrest warrant may be executed anywhere in the state, including a county other than the county of the magistrate who issued the arrest warrant, *see id.* arts. 15.19, .20. Moreover, this magistrate may or may not be the judge of the court who will preside over further proceedings in the defendant's case, because a judge acting as a magistrate may have jurisdiction to accept a complaint (however defined) and release a defendant on bond even though the judge may not have jurisdiction to try the defendant's case on the merits. *See Ex parte Knight*, 904 S.W.2d 722, 726 (Tex. App.--Houston [1st Dist.] 1995, pet. ref'd). However, we understand

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[4]GEORGE E. DIX & ROBERT O. DAWSON, 40 TEXAS PRACTICE, *Criminal Practice and Procedure* § 19.01 (1995) at 66.

[5]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. 2.09.

that in some Texas counties a complaint is filed directly in the court that will have continuing jurisdiction over the defendant. The magistrate who receives the complaint and the court that will try the case on the merits are one and the same. Thus in a typical pretrial criminal proceeding at least two to three courts or magistrates might act with respect to the defendant: (1) the magistrate who issues an arrest warrant upon taking a complaint; (2) the magistrate before whom an arrestee appears for bail proceedings following either an arrest on a warrant or a non-warrant arrest coupled with the filing of a complaint; and (3) the court who will hear the case on its merits. You ask: Before which of these entities is a prosecution "pending" for purposes of filing an affidavit to surrender a bond principal under article 17.19?

As your letter suggests, and as we said in Letter Opinion No. 97-103, a case might be said to be pending in a court only after the formal charging instrument is filed: a complaint in a misdemeanor case in municipal or justice court, an information in a misdemeanor case in county or district court, or an indictment in a felony case. The language of article 17.19, which talks in terms of where the "prosecution" is pending as opposed to the "case," suggests that the appropriate court is the one that will prosecute the case on the merits. However, if we read the statute to apply only to the court in which a formal charging instrument has been filed, a bail bondsman might be delayed in relinquishing a principal until the formal prosecution has begun. You tell us that a surety often wishes to relinquish a principal because he fears the person might flee from prosecution. We do not think the legislature intended to delay the re-arrest of a defendant who is likely to flee. In *Whitner v. State*, 41 S.W. 595 (Tex. Crim. App. 1897), the court considered whether the clerk of the court in which an indictment was pending could issue an arrest warrant upon affidavit by a surety wishing to surrender his principal. The arrest warrant was issued by the clerk because the court was not in term. *Id.* at 596. The statutory predecessor to current article 17.19 required, as article 17.19 does today, that the surety present his affidavit to the court or magistrate before which the prosecution is pending. *Id.* at 597. In rejecting the argument that the warrant was void because it was issued by the clerk instead of by the court, the Court of Criminal Appeals said:

> If we adhere closely to the letter of the statutes as here expressed, we might adopt the construction claimed by appellants, but we believe a more liberal construction should be adopted. The statutes in question are intended to facilitate the surrender of a principal by his bail, whenever they shall desire from any cause to surrender him; and to only allow this in a felony case after indictment, when the court should be actually sitting, would afford but very little relief to the surety.

Id. In *Hernandez v. State*, 600 S.W.2d 793, 794-98, (Tex. Crim. App. 1980) the court held that article 17.19 required the warrant to be issued by a judge or magistrate, limiting *Whitner* to circumstances where the court was not in session. We conclude that a surety is not limited to filing an affidavit for surrender of a bond principal to the court in which the formal charging instrument has been filed.

Instead, we believe that for purposes of article 17.19 a prosecution is pending before the court or magistrate who properly received a complaint, whether the complaint is a formal charging instrument, the basis for an arrest warrant, or some other "complaint" charging the commission of an offense. As we said in Letter Opinion No. 97-103:

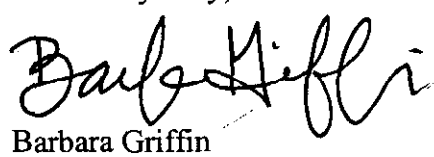
> This is the point when criminal cases are generally considered to have commenced. In *Smalley v. State*, 127 S.W. 225, 226 (Tex. Crim. App. 1910), the defendant was convicted of bribing a person to ignore a subpoena in a pending criminal case. The defendant appealed his conviction on the grounds that no case was "pending" when the bribe was paid because, following the complaint, no information had been filed in county court. 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).

Letter Opinion No. 97-103 (1997) at 5 (footnote omitted). It follows that if a pre-arrest complaint is filed with one magistrate and the defendant appears before a different magistrate for *Miranda* warnings and bail proceedings, the affidavit for surrender of bond principal should be filed with the magistrate who received the pre-arrest complaint. If a case is transferred to a court that will hear further proceedings in the case, then the affidavit for surrender of bond principal should be filed in that subsequent court. In sum, for purposes of article 17.19 of the Code of Criminal Procedure, which allows a bail bondsmen who wishes to surrender his principal to do so by filing an affidavit of such intention "before the court or magistrate before which the prosecution is pending," we conclude that the prosecution is pending before the court or magistrate who received a complaint, or the court to which proceedings are subsequently transferred.

S U M M A R Y

For purposes of article 17.19 of the Code of Criminal Procedure, which allows a bail bondsman who wishes to surrender his principal to do so by filing an affidavit of such intention "before the court or magistrate before which the prosecution is pending," the prosecution is pending before the court or magistrate who received a complaint, or the court to which proceedings are subsequently transferred.

Yours very truly,



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