



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

August 8, 2023

The Honorable Julie Renken
Washington County District Attorney
100 East Main, Box 303
Brenham, Texas 77833

Opinion No. AC-0002

Re: Authority of a magistrate to deny bail following a designation under Code of Criminal Procedure article 17.027(a)(1) (RQ-0484-KP)

Dear Ms. Renken:

You ask about Code of Criminal Procedure article 17.027(a)(1), which concerns the release on bail of a defendant charged with a felony committed while on bail for a prior felony.¹ *See* TEX. CODE CRIM. PROC. art. 17.027(a)(1). In that situation,² article 17.027(a)(1) limits which court may release the defendant on bail, assuming the previous offense and the subsequent offense were “committed in the same county”³ *Id.* The statute provides that

[n]otwithstanding any other law:

(1) if a defendant is charged with committing an offense punishable as a felony while released on bail in a pending case for another offense punishable as a felony and the subsequent offense was committed in the same county as the previous offense, the defendant may be *released on bail only by*:

¹*See* Letter from Honorable Julie Renken, Washington Cnty. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Nov. 9, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0484KP.pdf> (“Request Letter”).

²Under circumstances that do not invoke article 17.027, a bail decision can generally be made by any magistrate in the arresting county or, in certain cases, by any magistrate in the state. *See* TEX. CODE CRIM. PROC. art. 15.17(a).

³You do not ask about article 17.027(a)(2), which applies when the previous offense and the subsequent offense occur in different counties. *See id.* art. 17.027(a)(2) (providing that if the subsequent offense is committed in a different county than the previous offense, “electronic notice of the charge must be promptly given to the court specified by [article 17.027(a)(1)] for purposes of reevaluating the bail decision, determining whether any bail conditions were violated, or taking any other applicable action”). We limit our analysis accordingly.

(A) the court before whom the case for the previous offense is pending; or

(B) another court designated in writing by the court described by Paragraph (A)[.]

Id. (emphasis added). You ask whether a court designated under article 17.027(a)(1)(B) “may also deny bail” Request Letter at 1. Your question stems from the fact that the Texas Constitution, in its Bill of Rights, limits who may deny bail under these circumstances, providing that

[a]ny person . . . accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted . . . after a hearing, and upon evidence substantially showing the guilt of the accused . . . of the offense committed while on bail . . . *may be denied bail pending trial, by a district judge in this State*[.]

TEX. CONST. art. I, § 11a(a) (emphasis added); *see also* Request Letter at 1.⁴

To illustrate your question, you note that if the court before which the previous offense is pending is a district court, a district judge is authorized either to grant bail under article 17.027(a)(1)(A) or deny bail under article I, section 11a of the Texas Constitution. Request Letter at 1. But because a court before which the previous offense is pending may designate another court to set bail pursuant to article 17.027(a)(1)(B), you explain that the district court in the example scenario could designate “a justice of the peace serving as a magistrate under Art. 2.09, Code of Criminal Procedure.” *Id.*; *see also* TEX. CODE CRIM. PROC. art. 2.09 (authorizing a variety of officers, including justices of the peace and district judges, to act as a magistrate). In that instance, you question whether the designated court could deny bail or whether the Texas Constitution limits the denial of bail “to the district court,” despite the article 17.027(a)(1)(B) designation. Request Letter at 1.

By its plain terms, article 17.027(a)(1) limits only who may release a defendant on bail— in other words, who may *grant* bail—when a defendant is charged with committing a felony while on bail for a previous felony in the same county. TEX. CODE CRIM. PROC. art. 17.027(a)(1). Thus, in your scenario, an article 17.027(a)(1)(B) designation would only authorize the designated court to grant bail. Authority to deny bail must be found elsewhere.

In response to your example scenario, we turn to Code of Criminal Procedure articles 15.17(a) and 17.028. Among a magistrate’s duties with respect to an arrested person, article 15.17(a) provides that a magistrate “shall, after determining whether the person is currently on bail for a separate criminal offense and whether the bail decision is subject to Article 17.027, admit the

⁴A joint resolution proposed during the regular session of the Eighty-eighth Legislature would have amended Texas Constitution article I, section 11a by deleting the language referring to the commission of a non-capital felony while on bail for a prior felony and moving it to a new section. *See* Tex. H.R.J. Res. 94, 88th Leg., R.S. (2023). While the legislation did not pass, it would have mandated the denial of bail under these circumstances “unless a judge *or magistrate*” made certain determinations by clear and convincing evidence. *Id.* (emphasis added).

person arrested to bail if allowed by law.” *Id.* art. 15.17(a); *see also id.* art. 17.027 (applying, as already noted, when the offense for which the person is currently on bail and the subsequent offense are both “punishable as a felony”). Article 17.028 further specifies that within a certain period and after the consideration of certain factors, “a magistrate shall order . . . that the defendant be: (1) granted personal bond with or without conditions; (2) granted surety or cash bond with or without conditions; or (3) denied bail in accordance with the Texas Constitution and other law.” *Id.* art. 17.028(a). Thus, denial of bail is an option generally available to a magistrate making a bail decision. But its exercise must comport “with the Texas Constitution and other law.”⁵ *Id.*

The Texas Constitution provides a general right to bail for non-capital offenses. *See* TEX. CONST. art. I, § 11 (“All prisoners shall be bailable . . . unless for capital offenses, when the proof is evident[.]”); *see also* TEX. CODE CRIM. PROC. art. 1.07 (“Any person shall be eligible for bail unless denial of bail is expressly permitted by the Texas Constitution or by other law.”). But as the Texas Court of Criminal Appeals has recognized, article I, section 11a of the Texas Constitution operates as an exception to the general right to bail. *See Taylor v. State*, 667 S.W.2d 149, 151–52 (Tex. Crim. App. 1984); *see also Ex parte Moore*, 594 S.W.2d 449, 450 (Tex. Crim. App. [Panel Op.] 1980) (characterizing article I, section 11a as “a modification of the constitutional right to bail provided by” article I, section 11). Article I, section 11a, expressly provides in relevant part that a defendant accused of a felony committed while on bail for a prior felony for which he has been indicted “may be denied bail pending trial, *by a district judge*” TEX. CONST. art. I, § 11a(a) (emphasis added).

In construing this provision, the Texas Court of Criminal Appeals has held that “[t]here can be no doubt that the language of said Article I, [section] 11a, grants to a district court and to the district court alone the jurisdiction to deny bail under the conditions prescribed therein.” *Ex parte Moore*, 594 S.W.2d at 451 (explaining that “[w]hen the Constitution grants certain powers, and the means by which these powers can be exercised are prescribed, such means are exclusive of all others” (quoting *White v. State*, 440 S.W.2d 660, 665 (Tex. Crim. App. 1969))); *see also Holloway v. State*, 781 S.W.2d 605, 606 (Tex. Crim. App. 1989) (Clinton, J., concurring) (stating that article I, section 11a “grants *a district judge* jurisdiction, power, and authority to deny bail” under the circumstances described therein (emphasis added)).⁶ Thus, under binding precedent, when a defendant is accused of a felony committed while on bail for a prior felony in the same county only a district judge, and not any other magistrate, such as a justice of the peace, may deny bail.⁷ Construing article I, section 11a to limit who is authorized to deny bail corresponds with the

⁵For example, article I, section 11b of the Texas Constitution allows a magistrate to deny bail to a person accused of a felony or a family violence offense after making certain determinations at a hearing if the person has previously been released on bail and the bail is subsequently revoked or forfeited for a violation of a condition of release. TEX. CONST. art. I, § 11b.

⁶Judge Clinton’s concurrence in *Holloway* noted that the Court’s reference to “district court” in *Ex parte Moore* should be regarded as an oversight, as article I, section 11a places the authority to deny bail “solely in ‘a district judge.’” *Holloway*, 781 S.W.2d at 607 n.3 (Clinton, J., concurring) (emphasis added).

⁷Our conclusion does not affect a magistrate’s authority to deny bail pursuant to other constitutional provisions that expressly give a magistrate this authority. *See, e.g.*, TEX. CONST. art. I, §§ 11b (authorizing “a judge or magistrate” to deny bail for violating a condition of release in certain situations), 11c (authorizing “a judge or magistrate” to deny bail for violating a protective order involving family violence).

manner in which courts “interpret Section 11a as favoring a defendant’s access to bail[.]” *Pharris v. State*, 165 S.W.3d 681, 690 (Tex. Crim. App. 2005).

In summary, a court designated in writing pursuant to article 17.027(a)(1) of the Code of Criminal Procedure to set bail for a defendant charged with committing a felony while on bail for a prior offense committed in the same county is not authorized to deny bail unless the designated court is a district court, as only a district judge may deny bail under these circumstances pursuant to article I, section 11a of the Texas Constitution.

S U M M A R Y

Code of Criminal Procedure article 17.027(a)(1) concerns the release on bail of a defendant charged with a felony committed while on bail for a prior felony in the same county. A court designated in writing pursuant to article 17.027(a)(1) to set bail under these circumstances is not authorized to deny bail unless the designated court is a district court, as only a district judge may deny bail to a person accused of a felony committed while on bail for a prior felony pursuant to Texas Constitution article I, section 11a.

Very truly yours,

A handwritten signature in black ink that reads "Angela Colmenero". The signature is written in a cursive, flowing style.

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