

## TARRANT COUNTY

OFFICE OF THE  
CRIMINAL DISTRICT ATTORNEY  
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FORT WORTH, TX 76196-0201

December 19, 2003

FILE # ML-43396-03  
I.D. # 43396

Honorable Greg Abbott  
Texas Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

**RQ-0153-GA**

VIA U.S. (REGULAR) MAIL

Re: Opinion Request from the Tarrant County  
District Attorney's Office Concerning  
*TEXAS GOVERNMENT CODE ANN. § 41.258*

Dear General Abbott:

The 78<sup>th</sup> Texas Legislature, in its regular 2003 session, created a new statutory scheme in which certain fees are collected whenever surety bonds are taken. *See generally* Act of May 30, 2003, 78<sup>th</sup> Leg., R.S., H.B. 1940. An officer collecting these fees is commanded to deposit them in the county treasury in accordance with Article 103.004 of the Code of Criminal Procedure. TEX. GOV'T CODE ANN. § 41.258 (c) (Vernon Supp. 2004). Then, on a quarterly basis, the county treasurer is commanded to send the funds collected pursuant to this new law to the State Comptroller. TEX. GOV'T CODE ANN. § 41.258 (e) (Vernon Supp. 2004). The county is authorized to retain 10 percent of the funds as well as accrued interest on all funds held so long as it keeps the proper records and remits the funds to the Comptroller properly. TEX. GOV'T CODE ANN. § 41.258 (g) (Vernon Supp. 2004). The Comptroller must deposit two thirds of the funds he or she receives in the felony prosecutor supplement fund, and one-third of the funds received in the "fair defense account". TEX. GOV'T CODE ANN. § 41.258 (i) (Vernon Supp. 2004).

Our questions arise from the provision located in subsection (f) of TEXAS GOV'T CODE ANN. § 41.258. That provision reads as follows:

*A surety paying a cost under Subsection (b) may apply for and is entitled to a refund of the cost not later than the 181<sup>st</sup> day after the date the state declines to prosecute an individual or the grand jury declines to indict an individual.*

This provision raises a number of unanswered questions. We have had inquiries from sureties as to our interpretation of this provision, and we are uncertain how to set up procedures to comply with this law. We also wish to correctly advise our County Auditor as to the proper handling of funds collected pursuant to these statutes.

We have divided the issues into six questions. We will address each question separately, including our views of the applicable legal issues.

**Question 1:** How does one determine “the date the state declines to prosecute an individual?”

**Comments:** At first blush, one might think of looking to the date a court enters a dismissal order. However, courts enter dismissal orders upon a defendant’s successful completion of deferred adjudication probation, and even upon completion of adjudicated probations connected to suspended sentences. *See* TEX. CODE CRIM. PROC. ANN. ART. 42.12 , Sec. 5(c) and Sec. 20(a) (Vernon Supp. 2004). Probations, whether adjudicated or unadjudicated, simply do not comport with the common usage of the phrase “declines to prosecute.” *See* TEX. GOV’T CODE ANN. § 311.011 (a) (Vernon 1998).

Furthermore, not all bail bonds result in judicially filed cases, nor are all dismissals due to a prosecutor’s “declining to prosecute.” Cases may be dismissed when a defendant dies, or when a defendant absconds and cannot be located over an extended period of time. In such cases, a prosecutorial motion to dismiss does not represent the prosecutor *declining* to prosecute; the prosecutor is simply reacting to circumstances that make prosecution legally impossible. *See* TEX. CODE CRIM. PROC. ANN. ART. 33.03 (Vernon 1989) (personal presence of defendant required at commencement of trial for any felony or misdemeanor when any portion of punishment includes imprisonment in jail)

The phrase “declines to prosecute” should be interpreted in light of its context, including surrounding provisions of law. *See* TEX. GOV’T CODE ANN. § 311.011 (a) (Vernon 1998) (context) and § 311.023 (4) (Vernon 1998) (laws on same or similar subjects). This phrase is juxtaposed and conjoined with a grand jury “declin[ing] to indict”. A grand jury indictment represents the **commencement** of a criminal proceeding. *Burnett v. State*, 514 S.W.2d 939, 941 (Tex. Crim. App. 1974) Therefore, this context indicates that the legislature was concerned with refunding bond fee money for criminal prosecutions that never get started. The relevant implication is that the State declining to prosecute should be given a narrow construction—cases in which the prosecutor declines to initially file charges.

This conclusion is buttressed by the statute’s failure to provide any specialized forum or procedure to resolve disputes concerning whether the State had “declined to prosecute” or whether the grand jury had “declined to indict.” If the legislature had anticipated frequent inquiry into the moving forces behind various dismissals, it would have surely provided a special

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forum and procedure to do so. Since it did not, we should presume that “decline to prosecute” delineates a fairly bright line, and its juxtaposition to non-indictment indicates that the line is located at the start of prosecution.

**Question 2:** How does one determine the date when a grand jury “declines to indict”?

**Comments:** This phrase is one of the statutory triggering events which can “entitle” a surety to a refund of a previously tendered fee upon a proper and timely request. Practical application of this standard is problematic because grand jury proceedings are secret, and grand juries do not issue any instrument when a matter is concluded and voted upon without an indictment being issued. See TEX. CODE CRIM. PROC. ANN. ART. 20.02 (a) (Vernon Supp. 2004) (secrecy of grand jury proceedings) and Chapters 20 and 21 of that Code generally (grand jury provisions generally).

However, it is the practice in Tarrant County, and presumably many other counties, to terminate a previously filed case whenever a grand jury considers a matter, takes a vote, and fails to indict. In such situations, the District Attorney’s office sends a letter which informs the court clerk and other relevant parties about the grand jury’s “no-bill.” Nevertheless, the same grand jury or a different grand jury still possesses the legal authority to make a different decision on the same matter at a later time. This does happen occasionally—typically in response to substantial new evidence or changed circumstances.

Does any “no-bill” published by the prosecution entitle a surety to a refund under the statute, despite the remote possibility of further grand jury action at a later time? It seems difficult to arrive at any answer other than “yes”.

**Question 3:** When is interest owed to the surety on the amount refunded?

**Comments:** Under Texas law, interest is considered to be an “incident of ownership” of the principal itself. See *Sellers v. Harris County*, 483 S.W.2d 242, 243-244 (Tex. 1972). In cases involving court registry trust fund accounts, statutes purporting to create a blanket assignment of interest on the accounts to the government have been found unconstitutional, since an owner’s right to retain interest earned on one’s property is protected by the due course of law provision of the Texas Constitution and the Fourteenth Amendment to the federal constitution. *Id.* at 244.

However, the bail bond fees in question ARE NOT trust funds. They are paid to the government as a “cost” at the time a bail bond is made. TEX. GOV’T CODE ANN. § 41.258 (b) (Vernon Supp. 2004). At that time, title to the money passes to the government, and the interest thereon properly belongs to the government as well. A bail bond surety does not become “entitled” to a refund, and hence reacquire title to the fee funds, UNTIL two conditions are fulfilled:

(1) The State declines to prosecute the principal named in the bond OR the grand jury declines to indict the principal; AND

(2) The surety applies for a refund of the fee not later than the 181<sup>st</sup> day after the applicable date above.

TEX. GOV'T CODE ANN. § 41.258 (f) (Vernon Supp. 2004). Interest earned on the amount refunded should therefore be paid commencing on the date of surety "entitlement": the date that he makes a proper and timely request under § 41.258 (f), provided that the underlying conditions of non-prosecution or non-indictment have been satisfied.

**Question 4:** To whom should a surety "apply" for a refund: the officer collecting the fee, the county treasurer, or the State Comptroller?

**Comments:** If the actual funds collected from the surety have not yet been sent to the State, the answer seems fairly obvious: the surety should apply to whichever local entity still holds the funds previously paid. However, collecting officers are mandated to turn over bail bond fees to the county treasury within a few days of collection. TEX. GOV'T CODE ANN. § 41.258 (c) (Vernon Supp. 2004) *citing* TEX. CODE CRIM. PROC. ANN. ART. 103.004 (Vernon Supp. 2004) (mandating that funds collected by an officer be turned over to county treasury within one to thirty days, depending on circumstances, commissioners court orders, and population of county). County treasurers, for their part, are required to remit these fees to the State once per quarter. TEX. GOV'T CODE ANN. § 41.258 (e) (2) (Vernon Supp. 2004). But the triggering events for refund entitlement—non-prosecution/non-indictment along with a proper and timely request for a refund—may occur well after particular funds have been remitted to the State Comptroller. Such a request may still be timely even after the Comptroller has distributed the particular funds back to localities under the statutory scheme. *See* TEX. GOV'T CODE ANN. § 41.255 (d), (f), and (g) (Vernon Supp. 2004); TEX. GOV'T CODE ANN. § 41.258 (i) and (j) (Vernon Supp. 2004).

In enacting a statute, it is presumed that a just and reasonable result is intended, and that the legislature intends a result "feasible of execution." TEX. GOV'T CODE ANN. § 311.021 (Vernon 1998). Processing all refunds at the local level would seem to be more reasonable and feasible than centralizing all refunds at the State.

**Question 5:** If an application for a refund of costs previously sent to the State is properly made to the local county treasurer, may the treasurer remit the *net* funds collected each quarter to the state—that is, the costs collected minus any refunds paid during the quarter?

**Comments:** As stated above, statutes should be construed in a manner that produces a just and reasonable result. TEX. GOV'T CODE ANN. § 311.021 (3) (Vernon 1998). Allowing the

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county treasurer to report and remit the *net* funds received each quarter pursuant to this statutory scheme (moneys received less any refunds issued) would interpret § 41.258 (f) to mean:

*The custodian of the county treasury shall... (2) send to the comptroller not later than the last day of the month following each calendar quarter the [net] funds collected under this section during the preceding quarter.*

TEX. GOV'T CODE ANN. § 41.258 (e).

If the local treasurer is the proper officer to issue refunds of fees which have previously been tendered to the State, such a reading of the statute is necessary to avoid the manifest injustice of placing the **entire burden** of refunds on local counties who will only **benefit** from a minority portion of funds which are collected for statewide distribution, and whose surplus, if any, will eventually be deposited in the State's general fund. See TEX. GOV'T CODE §§ 41.255 and § 41.258, especially § 41.258 (j) (Vernon Supp. 2004).


**Question 6:** What kind of entitlement "proof" should a local officer or treasurer require before issuing refunds to sureties?

**Comments:** Since no legal instrument exists which *per se* declares and documents a prosecutor's failure to prosecute or a grand jury's failure to indict, the local prosecutor is probably the best source of this information. A local officer or treasurer could therefore refund upon presentation of documentation from the applicable prosecutor that he has declined prosecution as of a particular date or that a grand jury has declined to indict as of a particular date. A surety who believes he is entitled to a refund but cannot obtain such information from prosecutorial authorities could bring a declaratory judgment action to determine his rights. See *generally* TEX. CIV. PRAC. & REM. CODE ANN. § 37.001 *et. seq.* (Vernon 1997). An officer or treasurer could also issue a refund upon being presented with a court order.

With these comments, we respectfully request your opinion regarding application of this statute.

Sincerely,

TIM CURRY  
CRIMINAL DISTRICT ATTORNEY  
TARRANT COUNTY, TEXAS

  
TIM CURRY  
Criminal District Attorney

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A handwritten signature in black ink that reads "David K. Hudson". The signature is written in a cursive style with a long horizontal flourish extending to the right.

**DAVID K. HUDSON**  
**Assistant District Attorney**

TC/DKH/adp

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