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APR 17 2013  
**OPINION COMMITTEE**



**DAPHNE SESSION**  
Houston County Attorney

FILE # ML-47253-13  
I.D. # 47253

**RQ-1121-GA**

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April 15, 2013

Office of the Attorney General  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion

Dear Attorney General Abbott:

In my position as County Attorney for Houston County, I am seeking an opinion from your office regarding the proper court in which a surety may file a release of surety for the surrender of a bond principal.

**BACKGROUND LAW AND FACTS**

A suspect is arrested by a law enforcement officer that believes there is probable cause an offense was committed or in the execution of a warrant. If the arrest is warrantless, the law enforcement officer submits a complaint or booking information that details the officer's probable cause for the arrest (Exhibit A – sample Complaint). Following the arrest, the suspect is taken to a magistrate.

In Houston County, the majority of arrested persons are taken before a Justice of the Peace. The Justice of the Peace informs the arrested person of their charges, rights and bond amount. A warrant number or court number is assigned by the Justice of the Peace. (Exhibit B – sample Magistrate's Warning). The warrant number or court number assigned is not used by the County Court at Law or the two District Courts after a formal complaint and information is filed, or an indictment is returned by the Grand Jury. The Justice of the Peace is not the judge of the court that will preside over the misdemeanors (Class B and Class A) or the felonies.

After the person makes bail but before a formal complaint and information is filed in County Court or County Court at Law or an indictment returned for filing in the District Courts,

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a surety may file a release of surety for the surrender of a bond principal. In cases where the surety is seeking to release surety due to the incarceration of the accused, the surety must “deliver to the sheriff of the county in which the prosecution is pending and to the office of the prosecuting attorney an affidavit stating that the accused is incarcerated in federal custody, in the custody of any state, or in any county in this state.” Tex. Code of Crim. Pro. Art. 17.16(a)(2). Upon receipt of such an affidavit, the sheriff of the county in which the prosecution is pending shall verify whether the accused is incarcerated, and if so, the sheriff “shall notify the *magistrate before which the prosecution is pending* of the verification.” *Id.* at Art. 17.16(b) (emphasis added). Once notice of verification is received, “the *magistrate before which the prosecution is pending* shall direct the clerk of the court to issue a *capias* for the arrest of the accused...” *Id.* at Art. 17.16 (c) (emphasis added). The bond is discharged and surety is absolved of liability upon the verification of the incarceration of the accused.

In all other cases, in order to relieve the surety of the surety’s undertaking before forfeiture of the bond principal, the surety may file an affidavit of such intention “*before the court or magistrate which the prosecution is pending.*” Tex. Code of Crim. Pro. Art 17.19 (emphasis added). Art. 17.19 further provides that,

In a prosecution pending before a court, if the court finds that there is cause for the surety to surrender the surety’s principal, the court shall issue a *capias* for the principal. In a prosecution pending before a magistrate, if the magistrate finds that there is cause for the surety to surrender the surety’s principal, the magistrate shall issue a warrant of arrest for the principal.

### QUESTIONS PRESENTED

1. Which court or magistrate is a prosecution pending for the purpose of filing an affidavit for release of surety to surrender a bond principal pursuant to Article 17.16, Code of Criminal Procedure, before an indictment is returned or a complaint and information are filed in a county court or county court-at-law?
2. Which court or magistrate is a prosecution pending for the purpose of filing an affidavit for release of surety to surrender a bond principal pursuant to Article 17.19, Code of Criminal Procedure, before an indictment is returned or a complaint and information are filed in a county court or county court-at-law?

### DISCUSSION

In Letter Opinion No. 98-066 (1998), the Attorney General’s Office examined the issue of before which court or magistrate is a prosecution pending for the purpose of filing an affidavit to surrender a bond principal, pursuant to Code of Criminal Procedure 17.19. In that opinion, your office first considered the possibility that the language of where the prosecution is “pending” suggests that the appropriate court is the one that will prosecute the case on the merits. However, it was noted that if the statute applied only to the court in which a formal charging

instrument has been filed, a bail bondsmen might be delayed in relinquishing a principal until the formal prosecution has begun. As noted in the opinion, a surety often wishes to relinquish a principal because he fears the person might flee from prosecution. This would have the unintended effect of delaying the re-arrest of a defendant that is likely to flee. Your office stated that "we do not think the legislature intended to delay the re-arrest of a defendant who is likely to flee."

The Letter Opinion goes on to state, "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."

In 2011, the Article 17.16 was revised by the legislature. The changes include adding the requirement for the sheriff of the county in which the prosecution is pending to verify whether the accused is incarcerated, requiring the sheriff to notify the "magistrate before which the prosecution is pending" of the verification, and the requirement that the magistrate "before which the prosecution is pending" shall direct the clerk of the court to issue a *capias* for the arrest of the accused upon receipt of the sheriff's verification. Notably, the legislature used the same language of "magistrate before which the prosecution is pending," that your office had previously stated in relation to Article 17.19 is the magistrate who received the complaint. Had the legislature intended to change which court had jurisdiction over a release of surety, it would have used different language. By using the same language as Article 17.19, the legislature properly expressed the intent that the court in which the prosecution is pending is the court who properly received a complaint. To find otherwise would not only go against the clear intent of the legislature, but could also have the effect of delaying the re-arrest of a defendant who is likely to flee, an effect the legislature surely did not intend.

Due to the 2011 change in the law, the Justices of the Peace for Houston County believe they do not have jurisdiction related to the release of a surety after they have received the complaint or booking slip, informed the arrested person of their charges and rights, and set the bond amount. However, it appears from your opinion that the County Court, County Court-at-Law, and District Courts of Houston County do not have jurisdiction until an indictment is returned or a complaint and information are filed. As such, there is no court in Houston County with which a surety can file an affidavit to surrender a bond principal until after an indictment is return or a complaint and information is filed.

It is my opinion until a case is indicted or a complaint and information are filed, the only court that has jurisdiction for the purpose of filing an affidavit for release of surety pursuant to Article 17.16 and 17.19, Code of Criminal Procedure, is the court who received the complaint. There is nothing pending in the County Court, County Court-at-Law, or District Courts until a case is filed with the appropriate court. Therefore, those courts do not have jurisdiction over a case until after the case is filed. I am not persuaded that the changes to Article 17.16 had any effect on the proper court in which to file an affidavit for release of surety.

Thank you for your time and consideration with regard to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daphne', followed by a large, stylized flourish that extends to the right.

Daphne Session

Encl.