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March 15, 2021

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Pursuant to Texas Government Code Section 402.042, I hereby request a Texas Attorney General's Opinion concerning the following question:

Whether the District Attorney for Nueces County and his Assistant District Attorneys have the duty and/or the authority to represent the State before a municipal court when the judge of that court is performing her duties as a magistrate hearing a Motion to Vacate and Suspend Emergency Protective Order entered pursuant to Tex. Code Crim. Proc. art. 17.292?

Respectfully submitted,

/s/ *Mark A. Gonzalez*

Mark A. Gonzalez

BRIEF IN SUPPORT OF REQUEST

I. District Attorney's Authority to Represent the State.

Tex. Code Crim. Proc. art. 2.01

Duties of district attorneys

Each district attorney shall represent the State in all criminal cases in the district courts of his district When *any criminal proceeding is had before an examining court in his district* or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties. (emphasis added)

Tex. Gov't Code § 43.148

105th Judicial District

(a) The voters of Nueces County elect a district attorney for the 105th Judicial District who has the same powers and duties as other district attorneys and serves all the district, county, and justice courts of Nueces County.

(b) The district attorney shall attend each term and session of the district, county, and justice courts of Nueces County and shall represent the state in criminal cases pending in those courts. The district attorney has control of any case heard on petition of writ of habeas corpus before any district or inferior court in the district.

The general and specific statutes granting authority to the Nueces County District Attorney to represent the State generally pertain to “criminal cases” in the “district, county, and justice courts of Nueces County.” In addition, the District Attorney also represents the State in “any criminal proceeding” had before an “examining court in his district.”

II. Municipal Court Prosecutions.

Tex. Code Crim. Proc. art. 45.201

Municipal Prosecutions

(a) All prosecutions in a municipal court shall be conducted by the city attorney of the municipality or by a deputy city attorney.

(b) The county attorney of the county in which the municipality is situated may, if the county attorney so desires, also represent the state in such prosecutions. In such cases, the county attorney is not entitled to receive any fees or other compensation for those services.

Article 45.201, however, appears to limit the authority to prosecute criminal cases in municipal court to the city attorney and county attorney.

III. Magistrates.

Tex. Code Crim. Proc. art. 2.09

Who Are Magistrates

Each of the following officers is a magistrate within the meaning of this Code: ... the judges of the municipal courts of incorporated cities or towns.

Nevertheless, municipal judges, among others, separately perform duties as a “magistrate” that do not directly correspond to the prosecution of a criminal case, and which include informing an arrested person of his rights and setting bail. *See* Tex. Code Crim. Proc. art. 14.06 (Must take offender before magistrate); Tex. Code Crim. Proc. art. 15.17 (Duties of arresting officer and magistrate).

IV. The Examining Court

Tex. Code Crim. Proc. art. 2.11

Examining court

When the magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an examining court.

Tex. Code Crim. Proc. art. 17.24

General rules applicable

All general rules in the Chapter are applicable to bail defendant before an examining court.

Concerning exactly when a magistrate is sitting as an “examining court,” - *i.e.*, when he is sitting “for the purpose of inquiring into a criminal accusation against any person” under Article 2.11 - there appears to be some disagreement. In 2004, the Fort Worth Court of Appeals construed the term narrowly to encompass only those times when the magistrate is conducting an “examining trial,” and excluding when the magistrate was performing his duties in the issuance of a search warrant. *Bitner v. State*, 135 S.W.3d 906, 908 (Tex. App.—Fort Worth 2004, pet. ref’d).

However, under a prior version of the same article, the Supreme Court of Texas concluded that “in issuing a warrant for the arrest of a person accused of a felony, in contemplation of an inquiry into the matter of commitment or bail, whether such inquiry is to be conducted before him or some other magistrate named in the warrant, a magistrate functions as ‘an examining court.’” *Cook v. Sheppard*, 121 Tex. 117, 118, 45 S.W.2d 554, 555 (1932). Moreover, clearly

under Article 17.24 matters of bail may also be conducted by the magistrate in his capacity as an examining court.

Under Article 2.01, in any criminal proceeding in which the magistrate sits as an examining court, the District Attorney has authority to represent the State.

V. Emergency Protective Order.

Tex. Code Crim. Proc. art. 17.292

Magistrate's order for emergency protection

(a) At a defendant's appearance before a magistrate after arrest for an offense involving family violence or an offense under Section 20A.02, 20A.03, 22.011, 22.012, 22.021, or 42.072, Penal Code, the magistrate may issue an order for emergency protection on the magistrate's own motion or on the request of:

- (1) the victim of the offense;
- (2) the guardian of the victim;
- (3) a peace officer; or
- (4) *the attorney representing the state.* (emphasis added)

.....

(j) After notice to each affected party and a hearing, the issuing court may modify all or part of an order issued under this article if the court finds that:

- (1) the order as originally issued is unworkable;
- (2) the modification will not place the victim of the offense at greater risk than did the original order; and
- (3) the modification will not in any way endanger a person protected under the order.

.....

(n) On motion, notice, and hearing, or on agreement of the parties, an order for emergency protection issued under this article may be transferred to the court assuming jurisdiction over the criminal act giving rise to the issuance of the emergency order for protection. On transfer, the criminal court may modify all or part of an order issued under this subsection in the same manner and under the same standards as the issuing court under Subsection (j).

Although Article 17.292 is contained within Chapter 17, regarding bail following arrest, and the District Attorney probably has a right to request an emergency protective order to the extent that he is notified of and participates in that criminal proceeding before an examining court, issuance of the protective order and continuing proceedings concerning that protective order itself do not appear to fit within the bail determination and the scope of the “inquir[y] into a criminal accusation” within which the magistrate performs his or her duties as an examining court, or within the “criminal proceeding” at which the District Attorney is directed to represent the State.

VI. Conclusion.

Accordingly, the Nueces County District Attorney does not believe that he has the obligation or authority to represent the State in continuing litigation over an Emergency Protective Order issued by a municipal judge sitting as a magistrate.