



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 13, 2021

The Honorable Mark A. Gonzalez
Nueces County District Attorney
901 Leopard, Room 206
Corpus Christi, TX 78401-3681

Opinion No. KP-0385

Re: Authority of a district attorney to represent the State in litigation over an emergency protective order under Code of Criminal Procedure article 17.292 issued by a municipal judge sitting as a magistrate (RQ-0400-KP)

Dear Mr. Gonzalez:

You ask whether you, as Nueces County District Attorney, “have the duty [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” issued under article 17.292 of the Code of Criminal Procedure.¹ Article 17.292 authorizes a magistrate to issue an emergency protective order after a defendant’s arrest for offenses involving family violence or offenses under the Penal Code regarding trafficking, sexual assault, or stalking. TEX. CODE CRIM. PROC. art. 17.292(a). The article also provides for modification of such an order “[a]fter notice to each affected party and a hearing.” *Id.* art. 17.292(j).

Authority of the Nueces County District Attorney in Municipal Court

Your request letter suggests your concern is prompted because of a modification proceeding in municipal court. *See* Request Letter at 1; Brief at 5. As you recognize, “[a]ll prosecutions in a municipal court shall be conducted by the city attorney of the municipality or by a deputy city attorney” or a county attorney desiring to do so.² TEX. CODE CRIM. PROC. art.

¹*See* Letter & Brief from Honorable Mark A. Gonzalez, Nueces Cnty. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Mar. 15, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0400KP.pdf> (“Request Letter” & “Brief,” respectively). You also ask about the authority of your assistant district attorneys. *See id.* at 1. Because assistant prosecuting attorneys derive their authority from that of the district attorney, we do not consider their authority separately. *See* TEX. GOV’T CODE § 41.103(b).

²Section 43.148 of the Government Code provides for a district attorney for the 105th Judicial District in Nueces County. TEX. GOV’T CODE § 43.148. Under section 43.148, the Nueces County District Attorney “has the same powers and duties as other district attorneys and serves all the district, county, and justice courts of Nueces
(continued...) ”

45.201(a). However, article 17.292 grants authority to a magistrate, not to the judge of any particular court. *Id.* art. 17.292(a). The Code of Criminal Procedure designates numerous officials and judges as magistrate, including municipal court judges. *See id.* art. 2.09. When acting as a magistrate of an examining court, the municipal court judge’s “functions as a magistrate are the same as those of the judges of the county, district, Supreme, or Court of Appeals, when they sit as magistrates to hold an examining trial.” *Brown v. State*, 118 S.W. 139, 144 (Tex. Crim. App. 1909) (“When a justice sits for the purpose of inquiring into a criminal accusation against any person, he sits, not as a justice of the peace, but as a magistrate, and the court which he then holds is not a justice’s, but an ‘examining,’ court.”); *see also Ex parte Clear*, 573 S.W.2d 224, 228 (Tex. Crim. App. 1978) (recognizing that justices of the peace acting as magistrates have “jurisdiction concurrent with that of a district judge who also seeks to exercise magisterial powers”). Thus, any requirements or limitations on municipal court proceedings have no bearing on a municipal court judge who acts as magistrate under article 17.292.

Proceedings Under Code of Criminal Procedure Article 17.292

Article 17.292’s provision for an emergency protective order states that “[a]t a defendant’s appearance before a magistrate after arrest for an offense involving family violence or [other specified offenses] the magistrate may issue an order for emergency protection on the magistrate’s own motion or on the request of” the victim, the victim’s guardian, a peace officer, or “the attorney representing the state.” TEX. CODE CRIM. PROC. art. 17.292(a)(1)–(4); *see also id.* art. 17.292(b) (requiring the magistrate to issue an order for emergency protection when the person is arrested for a family violence offense that also involves serious bodily injury to the victim or the use or exhibition of a deadly weapon); *see also* TEX. GOV’T CODE § 311.016(1) (“‘May’ creates discretionary authority or grants permission or a power.”).

Subsection (j) of article 17.292 authorizes the court issuing the emergency protective order to modify all or part of an order upon certain findings and after notice to each “affected party.” TEX. CODE CRIM. PROC. art. 17.292(j). While such notice is likely to be given to a district attorney who requested the order for emergency protection, no language in subsection (j) imposes a duty on a district attorney to be involved in proceedings to modify an emergency protective order before a magistrate. *See generally id.* art. 17.292. Accordingly, the plain language of article 17.292 permits but does not require a district attorney who requested the order to appear in a proceeding to modify the order.

County” and “shall represent the state in criminal cases pending in those courts.” *Id.* § 43.148(a), (b); *see also id.* §§ 41.001–.352 (providing generally for prosecuting attorneys), 43.002–.004 (Subchapter A, general provisions for district attorneys). Section 43.148 does not include authority for the Nueces County District Attorney to represent the State in criminal cases in municipal court. *See id.* § 43.148.

A District Attorney's Duty Under Code of Criminal Procedure Article 2.01

Nevertheless, you are concerned that article 2.01 of the Code of Criminal Procedure might require you to represent the State at an emergency protection order proceeding under article 17.292. *See* Request Letter at 1. Article 2.01 provides in relevant part that

[e]ach 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 . . . , 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.

TEX. CODE CRIM. PROC. art. 2.01. Article 2.01 thus would impose a duty on a district attorney only if the proceeding to modify the emergency protective order is a criminal proceeding before an examining court in the district. *See id.* art. 2.01; *see also* TEX. GOV'T CODE § 311.016(2) (“‘Shall’ imposes a duty.”).

1. Criminal proceeding

Texas courts have determined that an emergency protective order in article 17.292 is civil in nature and not criminally punitive. *See Ex parte Necessary*, 333 S.W.3d 782, 790 (Tex. App.—Houston [1st. Dist.] 2010, no pet.); *see also Harris v. State*, 164 S.W.3d 775, 781–82 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Its “primary purpose . . . is to prevent domestic violence and protect domestic violence victims.” *Lopez v. Occhiogrosso*, No. 14-17-00324-CV, 2019 WL 347336, at *7 (Tex. App.—Houston [14th Dist.] Jan. 29, 2019, no pet.) (mem. op.). Accordingly, a court would likely conclude that a proceeding to modify an emergency protective order issued under article 17.292 is not a “criminal proceeding” for purposes of article 2.01.

2. An examining court

The Code of Criminal Procedure does not define “examining court” but describes its operation. Under article 2.11, a magistrate acts as an examining court “[w]hen the magistrate sits for the purpose of inquiring into a criminal accusation against any person.” TEX. CODE CRIM. PROC. art. 2.11. By contrast, subsection (j) of article 17.292 authorizes the magistrate as the issuing court to modify all or part of an emergency protection order but only if the issuing court finds that “(1) the order as originally issued is unworkable; (2) the modification will not place the victim . . . at greater risk . . . ; and (3) the modification will not in any way endanger a person protected under the order.” *Id.* art. 17.292(j)(1)–(3). None of these findings inquire into the underlying criminal accusation of the person. *See generally In re State ex rel. Munk*, 494 S.W.3d 370, 374–75 (Tex. App.—Eastland 2015, orig. proceeding) (“The traditional and statutory purposes of an examining trial are (1) to determine whether there exists sufficient evidence of guilt to hold a suspect accused of criminal conduct; (2) to determine whether bail should be allowed and if so, the amount of bail; and (3) to perpetuate the testimony of witnesses, including any voluntary statement the suspect may wish to make.”). While a magistrate, acting as the issuing court, may modify an emergency protection order, the proceeding at which the court so acts does

not constitute an examining court.³ Accordingly, a court would likely conclude that a proceeding to modify an issued emergency protective order is not a criminal proceeding before an examining court under article 2.01, and is rather a civil proceeding.

³You refer us to two judicial opinions that disagree about “exactly when a magistrate is sitting as an ‘examining court.’” Brief at 3 (citing *Cook v. Sheppard*, 45 S.W.2d 554, 554 (Tex. 1932) and *Bitner v. State*, 135 S.W.3d 906 (Tex. App.—Fort Worth 2004, pet. ref’d)). The two cases you cite involve the earliest reach of the scope of an examining court and the activities included therein. They are inapposite to a situation in which the defendant has already been arrested and an emergency protection order has already been issued. Thus, these two opinions about the earliest scope of an examining court do not speak to your question.

S U M M A R Y

Code of Criminal Procedure article 17.292 permits but does not require the district attorney to represent the State before a municipal court judge who is acting as a magistrate and hearing a motion to vacate and suspend an emergency protective order issued under article 17.292.

Very truly yours,

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

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