



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**WAGGONER CARR
ATTORNEY GENERAL**

June 29, 1966

Honorable Carol S. Vance
District Attorney
Harris County
Houston, Texas

Opinion No. C-717

Re: Waiver and termination of
right to an examining
trial.

Dear Mr. Vance:

In an opinion request to this office you pose the following questions:

"1. After warning of Defendant in compliance with Article 15.17, C.C.P., does Defendant's failure to request an examining trial prior to his indictment waive his right thereto?

"2. Does Defendant's indictment, after examining trial has been set and before same has been held, terminate his right to examining trial?"

Article 15.17, Vernon's Code of Criminal Procedure, provides, in part, as follows:

". . . The magistrate shall inform the person arrested . . . of his right to have an examining trial."

Article 16.01, Vernon's Code of Criminal Procedure, which provides for examining trials, reads as follows:

"When the accused has been brought before a magistrate for an examining trial that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint counsel to represent an accused in such examining trial only, to be compensated as otherwise provided in this Code. The accused in any felony case shall have the right to an examining trial before

indictment in the county having jurisdiction of the offense, whether he be in custody or on bail, at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if aailable case."

The above quoted Article clearly provides that a defendant in a felony case shall have the right to an examining trial before being indicted. However, Article 1.14, Vernon's Code of Criminal Procedure, provides, in part, as follows:

"The defendant in a criminal prosecution for any offense may waive any rights secured him by law except the right of trial by jury in a capital felony case in which the State has made known in open court in writing at least 15 days prior to trial that it will seek the death penalty. . . ."

In view of Article 1.14, it is the opinion of this office that a defendant may affirmatively waive his right to an examining trial. Moreover, after a defendant has been informed of his right to have an examining trial in compliance with Article 15.17, his failure to request an examining trial, prior to his indictment would constitute a waiver of his right thereto; or to state the proposition another way, the failure of the defendant to request an examining trial prior to his indictment, terminates the right to such a hearing.

Article 16.01 would appear to make it mandatory that the examining trial be held before a valid indictment could be returned against the defendant. Prior to the enactment of the new Code of Criminal Procedure, there was no requirement that an accused person in a felony case should have the right to an examining trial before indictment could be returned. Singleton v. State, 346 S.W.2d 328 (Tex.Crim. 1961, cert.den. 82 S.Ct. 118). It is the opinion of this office that even in view of the new Code of Criminal Procedure, this rule is still applicable and the return of an indictment can still cut off an examining trial already set. This result is in conformity with the Federal rules. Rule 5(b), Federal Rules of Civil Procedure, provides, in part, as follows:

"(b) Statement by the Commissioner.
The Commissioner shall inform the de-

defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination.
. . . "

It will be noted that Rule 5(b) of the Federal Rules is very similar to Article 16.01. Under Federal Rule 5(b), indictment by the grand jury without a preliminary trial is not a violation of due process. United States v. Smith, 343 F.2d 847, 850 (6th Cir. 1965, cert.den. 86 S.Ct. 55). This right is waived by an accused when he pleads to an indictment subsequently returned against him. United States ex rel. Lawson v. Skeen, 145 F.Supp. 776 (N.D. W.Va. 1956). Even the fact that a waiver of preliminary hearing resulted from a misunderstanding appears to have been cured by the accused's subsequent indictment by the grand jury. Vincent v. United States, 337 F.2d 891, (8th Cir. 1964, cert.den. 85 S.Ct. 1363).

In the Vincent case, the Court stated at page 896:

"The purpose of a preliminary hearing is to determine whether or not there is probable cause to believe that the defendant has committed an offense. . . . The grand jury by the return of the indictment resolved this question and thereby eliminated the necessity for a preliminary hearing before the U. S. Commissioner. (Cases Cited)."

In view of the similarity of the Federal rule with that of the new Code with regard to rights to examining trials, we see no reason to depart from the reasoning of the Federal cases set out above. We are of the opinion, therefore, that if a defendant is indicted after an examining trial has been set and before same has been held, his right to said examining trial is terminated.

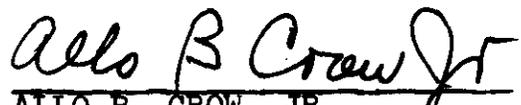
We wish to point out that Article 16.01 provides for an examining trial even though the defendant may already be on bail. Additionally, the accused, under the new Code of Criminal Procedure, has full discovery rights as to depositions under Article 39.02, Vernon's Code of Criminal Procedure, without recourse to a preliminary hearing, and therefore, the accused is not deprived of the right to discovery by not being afforded an examining trial.

S U M M A R Y

A defendant's failure to request an examining trial prior to his indictment, after being informed of such right in accordance with Article 15.17, V.C.C.P., constitutes a waiver of his right there-to. A defendant's indictment, after examining trial has been set and before same has been held, terminates his right to said examining trial.

Yours very truly,

WAGGONER CARR
Attorney General of Texas


ALLO B. CROW, JR.
Assistant Attorney General

ABC:JR/dt

APPROVED

OPINION COMMITTEE:

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APPROVED FOR THE ATTORNEY GENERAL
By T. B. Wright