



JOHN R. ROACH
CRIMINAL DISTRICT ATTORNEY
COLLIN COUNTY COURTHOUSE
210 S. McDONALD, SUITE 324
McKINNEY, TEXAS 75069
972-548-4323
METRO 424-1460
FAX NO'S. 972-548-4388/972-548-4565
www.collincountyda.com

RECEIVED

DEC 12 2006

OPINION COMMITTEE

FILE # ML-45076-06
I.D. # 045076

December 7, 2006

Honorable Greg Abbott
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

RQ-0556-GA

RE: Disposition of Gambling Proceeds, TEX. CODE CRIM. PROC. art. 18.18(a)

Dear Attorney General Abbott:

I am requesting an Attorney General's written opinion pursuant to Government Code §402.043.

The Collin County District Attorney's Office has collected several thousand dollars pursuant to Code of Criminal Procedure article 18.18 (gambling forfeiture statute). Article 18.18, among other things, provides the procedure for seizing and forfeiting gambling devices, equipment, paraphernalia and proceeds. *See* TEX. CODE CRIM. PROC. art. 18.18. Our office would like to distribute these proceeds in accordance with our local agreements regarding disposition of forfeited contraband. I am aware, however, that while chapter 59 specifically permits our office and local law enforcement to make formal agreements regarding the disposition of forfeited contraband, article 18.18 does not contain similar provisions. *See* TEX. CODE CRIM. PROC. art. 59.06.

Article 18.18 states that if gambling proceeds are seized, the court shall order them forfeited to the state and shall transmit them to one of four entities:

- (1) to the grand jury of the county in which they were seized;
- (2) to the State;

- (3) to any political subdivision of the State, or
- (4) to any state institution or agency.

TEX. CODE CRIM. PROC. art. 18.18(a). Unlike the more specific provisions in chapter 59 of the Texas Code of Criminal Procedure, which governs the seizure and forfeiture of contraband, section 18.18 does not specifically detail how forfeited gambling proceeds are to be administered, divided, held, and spent. I have three questions pertaining to the disposition of gambling proceeds.

Question 1: What is meant by the terms “the State”, a “political subdivision of the state”, and “state institution or agency”?

My first question pertains to the definitions of the four listed categories. What is meant by the terms “the State”, a “political subdivision of the state”, and “any state institution or agency”? More specifically, does a Criminal District Attorney’s Office and/or a local law enforcement agency fall into any of these categories? And if both a Criminal District Attorney’s Office and a law enforcement agency do fall into one of the listed categories, can both entities enter into a local agreement about how the entities will ask the trial court to distribute gambling proceeds?

Question 2: How are gambling proceeds distributed to and administered by the grand jury?

Next, article 18.18 permits the trial court to distribute proceeds to a grand jury of the county in which they were seized for use in investigating alleged violations of the Penal Code. *See id.* The Code of Criminal Procedure, however, does not specifically address how the court is to transmit the proceeds, who may administer the proceeds, and how the grand jury will use the proceeds to investigate alleged criminal violations. If the court chooses to distribute the proceeds to the grand jury, who will hold the money for the grand jury? Additionally, may the attorney representing the state decide how the proceeds are to be used during a grand jury investigation?

Question 3: Must gambling proceeds be spent investigating Penal Code violations?

Finally, while article 18.18 specifies that proceeds distributed to the grand jury should be spent investigating alleged violations of the Penal Code, does this mandate also attach to other entities receiving gambling proceeds i.e., the state, a political subdivision of the state and a state institution or agency? If the proceeds are awarded to an entity other than the grand jury, how may the funds be spent or used by the entity receiving the proceeds?

BRIEF

Question 1: What is meant by the terms “the State”, a “political subdivision of the state”, and “state institution or agency”?

Article 18.18 requires the trial court to distribute forfeited gambling proceeds to one of four entities: the grand jury of the county in which the funds were seized for use in investigating alleged violations of the Penal Code, or to the State, to any political subdivision of the state, or to any state institution or agency. *See id.* The statute, however, does not clearly define these terms and does not state whether a district attorney’s office and/or a local law enforcement agency fall within one of the four listed categories.

While not defined under the gambling statute, counties and municipalities are included within the definition of a “political subdivision” in other areas of Texas law. *See* TEX. LOC. GOV’T CODE § 172.003(3); TEX. LAB. CODE § 504.001(3); TEX. WATER CODE § 20.002(7); TEX. AGRIC. CODE § 150.011(1). Further, the Attorney General’s Office has suggested that a trial court has authority to dispose of gambling proceeds by awarding those proceeds to a county. *See* Tex. Att’y Gen. Op. No. V-469 (1947).¹ This suggests that a district judge could deliver the proceeds to a county or municipality.

While it appears gambling proceeds can be delivered to a county or a municipality, it is not clear whether a district judge has the power to further distribute the proceeds to an agency or division of a county or municipality, i.e. a district attorney’s office or police agency. Chapter 59 explicitly permits forfeited contraband to be distributed to law enforcement agencies, such as a district attorney’s office, and kept in a separate fund, which can be spent for law enforcement purposes. *See* TEX. CODE CRIM. PROC. art. 59.06(c) & (d). These specific provisions, however, are not included within article 18.18. If a district judge wants to give the proceeds to a district attorney’s office or law enforcement agency, do either or both of these entities fall under one of the four categories listed in article 18.18?

With regard to district attorneys, the Texas Constitution specifically grants to county and district attorneys the right to represent the State in all cases in the district and inferior courts in their respective counties. TEX. CONST. art. V, § 21. A district attorney represents the State in all criminal matters in the district court of his or her district. *See* TEX. CODE CRIM. PROC. art 2.01. The district attorney also represents the State in forfeiture proceedings under article 59. *See* TEX. CODE CRIM. PROC art.

¹ While this opinion has been subsequently overruled, the issue regarding distribution of gambling funds to the county was not addressed in the subsequent opinion. *See* Tex Att’y Gen. Op. C-612 (1966)

59.01(1) & 59.04(b). Clearly the district attorney is a representative of the State. An argument can be made that a district attorney's office is "the State" for purposes of article 18.18:

Further, the Attorney General has inferred that a district attorney's office is also either an "agency of the state" and/or an "agency of a political subdivision." *See* Tex. Att'y Gen. Op. No. GA-0259 (2004). In order to meet the definition of a "law enforcement agency" under chapter 59, the district attorney has to be (1) an agency of the state or an agency of a political subdivision of the state, and (2) authorized to employ peace officers. TEX. CODE CRIM. PROC. art. 59.01(5). The Attorney General declared that a prosecuting attorney is authorized to employ peace officers and is thus a law enforcement agency. *See* Tex. Att'y Gen. Op. No. GA-0259 (2004). Though not specifically stated in the opinion, to meet the definition of law enforcement agency a district attorney logically must also be either an agency of the state or an agency of a political subdivision. If the District Attorney is an agency of the state (a state agency), then the district court is permitted by 18.18 to deliver proceeds to the district attorney's office. However, the statute does not specifically permit the court to distribute proceeds to an *agency* of a political subdivision—only to a political subdivision itself.

If we presume that a district attorney's office can receive gambling proceeds from the district court, what discretion does the district attorney's office have to spend the proceeds? Typically, all money belonging to the county is deposited with the county treasurer and placed in the depository of the county. *See* TEX. LOC. GOV'T CODE § 113.003. Under a chapter 59 forfeiture, however, a district attorney's office is permitted as a law enforcement agency to keep a separate asset forfeiture fund. *See* TEX. CODE CRIM. PROC. art. 59.06. And unlike a request for funds that must go through the typical budgetary process, chapter 59 requires only the "categorical submission of a budget of proposed forfeiture-fund expenditures; it does not require the governing body's approval of the budgeted expenditures, except for increases in 'salary, expense, or allowance' for certain employees." *Tex. Att'y Gen. Op. DM-246 (1993)*. But this is a permitted exception to the general rule that all funds received by a county officer be deposited in the general county fund. Even if the funds can be given to the District Attorney's Office, must the funds be transferred to the general county fund and subjected to the normal budgetary process through the commissioner's court?

Finally, if both a district attorney's office and a law enforcement agency may receive gambling proceeds under article 18.18, can both entities enter into a local agreement as to how the proceeds are to be divided? *See* TEX. CODE CRIM. PROC. art. 18.18(a). Article 18.18 provides discretion to the trial judge as to how gambling proceeds will be distributed. This is different than chapter 59, which specifically permits the attorney representing the State and local law enforcement to decide among themselves how the proceeds should be distributed in a local agreement. *See* TEX.

CODE CRIM. PROC. art. 59.06. While a local agreement regarding gambling proceeds would not be binding on the court under an article 18.18 forfeiture, there seems to be no legal impediment with two entities proposing a distribution option to the court. The trial court would still have the discretion to follow the local agreement or distribute the proceeds in other ways permitted by article 18.18.

Question 2: How are gambling proceeds distributed to and administered by the grand jury?

Article 18.18 permits the trial court to distribute gambling proceeds to the grand jury for use in investigating alleged violations of the Penal Code. *See* TEX. CODE CRIM. PROC. art. 18.18(a). Article 18.18 is the only provision throughout the Code of Criminal Procedure that permits funds to be directly transmitted to the grand jury. Yet the Code of Criminal Procedure does not provide procedures for how these funds should be transmitted to the grand jury. Nor does it provide guidance as to who administers the funds and makes the decision as to how the funds are to be used and spent by the grand jury.

Before the gambling forfeiture statute was codified as article 18.18 in 1973, the legislature provided some guidance as to how gambling proceeds should be administered by the grand jury:

At the end of the term of each Grand Jury and before the discharge of the same, the Grand Jury shall report to the District Judge impaneling the same the amount of money received under the provisions of this Section and an accounting of all funds expended, and the balance of such funds, if any, shall be turned over to the Clerk of said District Court, to be held by said Clerk until the next Grand Jury is impaneled, at which time such money will be turned over and delivered to such succeeding Grand Jury.

Act of May 3, 1941, 47th Leg., R.S., ch. 192, 1941 Tex. Gen. Laws 354, *amended by* Act of May 1973, 63rd Leg., R.S. ch. 399, 1973 Tex. Gen. Laws 986. But when the gambling forfeiture statute was codified in 1973, this provision was removed. By deleting the passage, it is reasonable to conclude that the legislature no longer intended gambling proceeds to be administered by the procedure listed in the amended statute.

Since article 18.18 specifically states that the trial judge may transmit the proceeds to the grand jury, it is reasonable to conclude that a member of the grand jury could be the administrator of the proceeds. Yet a problem occurs when the grand jury term ends. At the end of a term, the current grand jury must transmit the proceeds to the incoming grand jury. The prior grand jury term will cease before the new grand jury term commences. Currently, there is no system in place to return unused proceeds and place them with the new members of the grand jury. Since a grand juror cannot

continue as the administrator after her grand jury term ends, logistically a person or entity outside the grand jury is needed to administer the proceeds on a continuing basis.

Yet unlike most county departments where finances and operations are open to public scrutiny, grand jury proceedings are cloaked in secrecy. *See* TEX. CODE CRIM. PROC. art. 20.011 & 20.02. If the proceeds were held and obtained through the normal county budgetary process, the grand jury would have to go outside itself to request funds for an investigation. The secrecy involved in the grand jury proceedings could be violated if a member of the grand jury had to tell an auditor, clerk, commissioner's court or treasurer the purpose for which the proceeds were to be used. Even a District Court judge is removed from knowledge about the specific proceedings occurring within the grand jury. *See* TEX. CODE CRIM. PROC. art. 20.06. Because of the nature of the proceedings within the grand jury, the state's attorney is a logical choice to administer the proceeds for the grand jury.

Unlike other county officials, the attorney representing the state is one of the few individuals permitted to have access to grand jury proceedings. *See* TEX. CODE CRIM. PROC. art. 20.011. Very few people outside the members of the grand jury have permission to hear testimony and be present when documents are presented to the grand jury. The attorney representing the State, however, is an exception. Of all participants involved in the grand jury process, the prosecutor is granted the most access to the grand jury. The Code of Criminal Procedure permits the prosecutor to be present in the grand jury chambers during testimony and both permits and directs the prosecutor to ask questions. *See* TEX. CODE CRIM. PROC. art. 20.011, 20.03, & 20.04. The Code also permits the grand jury to ask the prosecutor for legal advice. *See* TEX. CODE CRIM. PROC. art. 20.05. Since the attorney for the State is already privy to the events occurring in the grand jury, permitting the State's attorney to administer and hold the proceeds would not create a risk that proceedings before the grand jury would become public or that the purpose of the grand jury would be infringed.

But even if the State's attorney may hold the proceeds, does the attorney have discretion to determine how the proceeds will be spent, or at least request the grand jury to approve how its proceeds are to be used? While the grand jury can act as an independent body, most "investigations are made for the grand jury by local law enforcement officials, mainly the Sheriff's office, local police officers, constables and the District Attorney's Office." *Tex. Att'y Gen. Op. WW-1086 (1961)*. Rarely does a grand jury initiate its own investigations without at least some input from the attorney representing the State. If the members of the grand jury could only spend the proceeds on projects that it initiated and directed, it is likely that the proceeds would remain unused. A situation where proceeds remain in an unused position would not meet the legislature's expectation that that a just and reasonable result occur with the enactment of its statutes. *See* TEX. GOV'T CODE § 311.021 (3). The State's attorney, however,

would know of ongoing police or district attorney investigations which might benefit from the proceeds. The legislature's intent that the proceeds be used for investigating criminal offenses would be met in a more timely and efficient manner if the State's attorney could be an administrator of the gambling proceeds.

Question 3: Must gambling proceeds be spent investigating Penal Code violations?

Article 18.18 specifies that proceeds distributed to the grand jury should be spent investigating alleged violations of the Penal Code. *See* TEX. CODE CRIM. PROC. art. 18.18(a). Yet the language committing gambling proceeds to criminal investigation may or may not apply if the proceeds are delivered to the State, a political subdivision of the state, or a state agency or entity. If the proceeds are awarded to an entity other than the grand jury, how may the proceeds be spent or used by the entity receiving the proceeds?

The specific language at issue is as follows:

If gambling proceeds were seized, the court shall order them forfeited to the state and shall transmit them to the grand jury of the county in which they were seized for use in investigating alleged violations of the Penal Code, or to the state, any political subdivision of the state, or to any state institution or agency.

See id. Does the language "for use in investigating alleged violations of the Penal Code" modify only the use of proceeds by the grand jury or by all agencies that may receive gambling proceeds under article 18.18?

The gambling forfeiture statute previously declared that gambling proceeds could be used by the State or a political subdivision for purposes other than those related to the investigation of criminal offenses:

[gambling proceeds shall] be delivered to the State of Texas or any political subdivision thereof, or to any State institution to be *used by it for its own use and benefit*, or the Court may in its discretion order such money or coins to be delivered to the Grand Jury of the County in which such equipment or paraphernalia was seized, to be used by said Grand Jury for the purpose of investigating the violation of the gaming laws of this State or for the purpose of investigating violations of any of the provisions of the Penal Code of this State.

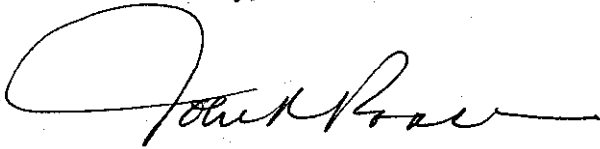
Act of May 3, 1941, 47th Leg., R.S., ch. 192, 1941 Tex. Gen. Laws 354, *amended by* Act of May 1973, 63rd Leg., R.S. ch. 399, 1973 Tex. Gen. Laws 986. (emphasis

added). The language "to be used by it for its own use and benefit" implies that the state, a state agency, and a political subdivision were not required to use the distributed funds solely for investigative purposes. The current statute, however, does not contain this language.

The current language does not clearly exclude the other three entities from the mandate requiring the proceeds to be used for investigating violations of the Penal Code. Since the legislature specifically removed the phrase "to be used by it for its own use and benefit", it is arguable that the proceeds, no matter where distributed, were intended to be used for investigation of criminal offenses. Yet since the specific language requiring the proceeds to be used for investigative purposes is positioned specifically after the grand jury language, it is also arguable that the language was only intended to modify the grand jury's use of the funds.

I appreciate your help in this matter. If you have any questions regarding this request, feel free to contact me at my office.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Roach". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

John R. Roach
Criminal District Attorney
Collin County, Texas