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Attn: Opinion Committee
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March 20, 2019

RQ-0276-KP

SUBMITTED VIA EMAIL:
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REQUEST FOR OPINION

Dear Mr. Paxton:

As the County Attorney of Kinney County, Texas, I respectfully request an Attorney General Opinion from your office. The question presented in this request is:

I.

May a Clerk deny the defendant's request to withdraw deposits of money made by the defendant and accepted by the Clerk's Office when such deposits were made as payments toward fines and court costs when there has been no plea of guilty by the Defendant and no finding of guilt by the Court?¹

¹ The incumbent District and County Clerk took office in January 2019; the payments in question were made to and accepted by the predecessor in office, and deposited into the Clerk's' escrow account.

To: Hon. Ken Paxton, Attorney General of Texas
From: Todd A. Durden, County Attorney

March 20, 2019
page 2 of 7

Background Facts

Kinney County is a rural Texas county about 100 miles due West of San Antonio, with about four thousand people. In addition to management responsibilities, the County Judge presides over the County Court. The County Court exercises original criminal jurisdiction over Class A and B misdemeanors and appellate criminal jurisdiction over Class C misdemeanors, in addition to civil jurisdiction as provided by law.

The County Judge of Kinney County was sole prosecutor in the County Court for over thirty years prior to taking the bench.

In the exercise of his jurisdiction over criminal cases, the County Judge maintains a policy that requires defendants to pay their fines and court costs in full before the Court will conduct a hearing to receive a plea of guilty and formally pronounce the sentence.² Under the prior administration, the Clerk prepared a *Bill of Cost* at the beginning of the case, and payments toward the fines and court costs were accepted by the Clerk and deposited by her into the registry.³ The fines and court costs are set forth in the *Case Reset Form* used by the Court.⁴ Upon the full amount of fines and court costs being deposited or otherwise present, the Court will entertain the defendant's plea of guilty.

The Clerk is unclear as to his duties with respect to those monies deposited with his office during the prior administration, especially as it relates to withdrawals.

² Referred to as "Pay to Plea," this policy, and the procedures necessary to implement it are at issue before the Fourth Court of Appeals under cause numbers 04-18-00764-CR *et. seq.* of that Court. No opinion or comment upon the Pay to Plea practice is sought by this Request For Opinion.

³ As an example only, a public record entitled *Bill of Cost*, disclosed with the consent of the Defendant, is attached hereto as Exhibit A.

⁴ As an example only, a public record entitled *Case Reset Form*, disclosed with the consent of the Defendant, is attached as Exhibit B-1. Exhibit B-2 is a redacted copy of the Court's standard *Case Reset Form* (revised 03/15) and shows the signature line for the representative of the Court.

The Office of Court Administration maintains a District Clerk Procedure Manual. The 2016 edition contains the following language at page III-11:

9. Costs of Court

Upon conviction, the defendant becomes liable for all court costs and the fine, if one was levied. It is the Clerk's responsibility to collect the fine and costs for all county offices at the termination of each case. This applies ONLY when the defendant pleads guilty or is found guilty. When the defendant is acquitted or the charges are dismissed, no costs of court are owed.

While the language in this paragraph is helpful, it does not specifically address payments made to the Clerk throughout the pendency of the case. Further, other language in the Manual seem to require it the monies so deposited be held until the conclusion of the legal proceeding.

A. GENERAL PROVISIONS

Each District and County Clerk must maintain a registry of the court to receive payments ordered tendered into the court's registry. In addition to money, the court may also order property to be held in the court's registry for the benefit of whomever it is ultimately adjudged to belong. According to the Attorney General, any money or property deposited with the court to "satisfy the result of a legal proceeding or to await the result of a legal proceeding" falls under the definition of funds and property to be held in the registry of court.

Office of Court Administration, "District Clerk Procedure Manual," (2016 edition) at p. VII-1

This *Request for Opinion* is made under authority of Section 402.403 of the Texas Government Code, and in accordance therewith, the following brief is submitted.

Brief

The Constitutions of the United States and of Texas provide:

“No State shall . . . deprive any person of life, liberty or property without due process of law. . . .”

United States Constitution, Amendment XIV.

“No citizen of this State shall be deprived of life, liberty or property, privileges or immunities, or in any manner disenfranchised, except by due course of the law of the land.”

Texas Constitution, Art. 1, Sec. 19.

Kinney County is a political subdivision of the State. In order to deny a refund request, it appears the Clerk would have to demonstrate a right to the money so deposited, or a duty to maintain custody of it, that accrued in a manner that afforded the defendant due process of law.

My research indicates that the monies so deposited are the property of the defendant and must be returned upon request.⁵

Article 102.005, Code of Criminal Procedure, requires that court costs be paid by a person convicted of an offense. *Id.* at (a). For purposes of this Article, a person is considered convicted upon entering a plea of guilty, even if the Court defers adjudication or disposition of the case. *Ibid.* at (b). Still, a guilty plea is a necessary prerequisite to charging a defendant court costs. *Weir v. State*, 278 S.W.3d 364 (Tex.Crim.App., 2009) (court costs are “a collateral consequence of the defendant’s conviction.”). A clerk may not charge court costs to a defendant whose case has been dismissed. *See*, Tex. Atty. Gen. Op. GA-0638 (2008). *See*

⁵ This preliminary opinion does not address in any way a case implicating a right to restitution of a victim to the offense alleged.

also, Section 102.021, Government Code (entitled, “Court Costs on Conviction”). Further, wrongfully withholding such monies without legal authority might be the basis of a penalty. Section 118.801, Local Government Code; *see also*, *Bowles v. Clipp*, 920 S.W.2d 752 (Tex.App.—Dallas, 1996, writ denied) (charging unauthorized fees constituted an unconstitutional taking under the State Constitution).

Still, there appears to be some authority for a position contrary to that indicated by my research. The language of the Manual at VII-1, *supra*, cites Tex. Atty. Gen’l Op. JM-1162 (1990) and also makes reference to Tex. Atty. Gen’l Ltr. Op. LO96-023 (1996).⁶ The sentence fragment, in the manner cited, seems to indicate that “any money” deposited with respect to “a legal proceeding” must be held by the Clerk until “the result of the legal proceeding.”⁷

Upon closer reading, however, it would seem that criminal proceedings would not be included in the term, “legal proceedings,” in this context. The opinion in JM-1162 quotes extensively from a prior Attorney General Opinion, Tex. Atty. Gen’l. Op. H-183 (1973), that addressed “... civil court deposits, probate court deposits, and child support payments” *Id.* at p. 2. Further, both JM-1162 and LO96-023 cite to Tex. Local Gov’t Code §117.052, which contains a listing of legal proceedings to which it applies. The list has eight items, numbered (c)(1) through (c)(8). The proceedings specifically described at (c)(1) –(c)(7) are civil proceedings.⁸ A general description is numbered (c)(8), “[A]ny other funds tendered to the clerk for deposit into the registry of the court.” Such a general

⁶ Copies are attached for reference purposes as Exhibit C and Exhibit D, respectively.

⁷ The terms “the result of the legal proceeding” and “the termination of the case” appear to be synonymous for practical purposes.

⁸ Tex. Local Gov’t Code § 117.052 (c)(6) addresses cash bail bonds, and one might think this to refer to criminal proceedings; however proceedings related to cash deposited as bail are conducted generally as civil proceedings. *See generally*, Tex. Code Crim. Proc. Chapter 22. *See also*, Tex. Code Crim. App. Art. 22.05 (entitled, “Citation As In Civil Actions”).

description as set forth in (c)(8) might support an inference that it applies deposits made against the fine and court costs in criminal proceedings. However, a fair reading of Chapter 117 as a whole, and consideration of its stated purpose and plan, does not support such an inference. As to registry funds, Chapter 117 primarily addresses the use of banks as depositories. The only criminal-related proceedings made reference to in Chapter 117 are to cash bail bond proceedings, which are civil in nature.⁹

Of greater import, restricting the defendant's right to withdraw the monies so deposited does not appear to be consistent with the Constitutions of the United States and of Texas.¹⁰

This Request for Opinion is based on the following premises:

- that incarceration is an available penalty in the case;
- that there is no allegation supporting the payment of restitution to a victim;
- that there is no agreement between the Defendant and the Clerk that places a restriction upon the Defendant's right to withdraw the funds; and
- that there is no agreement between the Defendant and the Clerk that places a duty upon the Clerk to hold the funds until the termination of the case.¹¹

⁹ Tex. Local Gov't Code §§ 117.002, 117.052(c)(6). See also, references to the Texas Code of Criminal Procedure in the preceding footnote.

¹⁰ A fundamental due process right is the right to be presumed innocent in a criminal proceeding. *Coffin v. United States*, 156 U.S. 432 (1895). Preventing a defendant's right to withdraw the funds might be equated to requiring a defendant to pay fines and court costs without a plea or finding of guilt. Further, any restriction placed upon the Defendant's access to these funds might affect his or her ability to exercise the right to be represented by counsel. See, *Alabama v. Shelton*, 535 U.S. 654 (2002).

To: Hon. Ken Paxton, Attorney General of Texas
From: Todd A. Durden, County Attorney

March 20, 2019
page 7 of 7

Thank you for your attention to this request, and please do not hesitate to contact me if further information or briefing is necessary.

Sincerely,



Todd A. Durden
County Attorney

cc: The Hon. James T. "Tully Shahan
Kinney County Judge
Kinney County Courthouse, PO Box 348
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cc: The Hon. Ricky Alvarado
District and County Clerk
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¹¹ A standard *Case Reset Form* (rev. 3/15) of the County Court of Kinney County does contain language regarding agreements, but does not contain language as to an agreement touching upon monies deposited by the Defendant with the Clerk. Further, the *Case Reset Form* identifies and provides spaces for signatures of the Defendant, Defense Counsel, a representative of the State, and an official of the Court, but not for the Clerk or his or her deputy. *See*, Exhibit B-2.