

## **Opinion No. 70-22**

February 16, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Honorable George E. Fettinger New Mexico State Representative New Mexico  
House of Representatives Legislative-Executive Building Santa Fe, New Mexico 87501

### **QUESTIONS**

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May a municipal police officer in charge of a municipal jail release a state or county prisoner held in the jail pending trial in magistrate court on charges within the magistrate's jurisdiction, (A) upon receipt of telephoned instruction from the committing magistrate, or (B) without notice to the county or state officer who made the arrest?

#### CONCLUSION

(A) See analysis.

(B) Yes.

### **OPINION**

#### **{\*35} ANALYSIS**

Under the particular facts described above, it would appear that the procedures for the release of prisoners on bail pending trial are less than clear, and may permit the release of prisoners without the necessity of written orders from the magistrate. The provisions of this state's law governing the situation are found in Sections 36-6-6 and 36-6-7, N.M.S.A., 1953 Compilation.

"Criminal actions -- Appearance of defendant. -- Upon appearance of the defendant before the magistrate in response to summons or warrant or following arrest for a misdemeanor within magistrate trial jurisdiction, a pleading to the complaint shall be made, and, in case of a plea of not guilty, the action shall be set for trial as soon as possible. Pending trial, the magistrate may release the defendant on bail or upon his own recognizance."

"Criminal actions -- Bail. -- A. Whenever a magistrate is not immediately available for admitting to bail any person arrested and brought to the magistrate court or jail on a charge of committing a misdemeanor within magistrate trial jurisdiction, the person may be admitted to bail by a responsible person designated by the magistrate to accept bail.

B. Whenever the magistrate or his designee to accept bail deems it proper bail may be upon personal recognizance without security or surety. Otherwise, at the election of the accused, any bail required may be in the form of:

- (1) cash;
- (2) property bond or corporate surety bond; or
- (3) guaranteed arrest bond certificate.

C. Whenever any person fails to appear before the magistrate at the time fixed by the terms of the bond or recognizance, the magistrate:

- (1) may issue a warrant for his arrest; and
- (2) shall notify any sureties and, unless good cause is shown, enter judgment of forfeiture of the bail. If any amount remains unpaid ten [10] days after entry of judgment, the magistrate may issue execution for satisfaction of the judgment."

It will be observed that upon the approval of the magistrate or his designee, the arrested party may be released on personal recognizance without security or surety. It may be assumed that in the majority of such cases, the release will be made at once, and not after a temporary confinement. Thus, it may be further assumed that those prisoners who are temporarily confined and then released from jail on bond will have been required to post some sort of security with either the magistrate, his designee, or the sheriff as permitted by Section 41-4-12, N.M.S.A., 1953 Compilation.

When the magistrate or his designee {36} accepts any form of bail, security, he is required to furnish the prisoner a written receipt for the same, Rule 27 (c), RULES OF PLEADING, PRACTICE, AND PROCEDURE FOR THE MAGISTRATE COURTS. The rule does not require that this receipt be served on the jailer having custody of the prisoner, but it does provide for at least an elementary form of written memorandum concerning the release of prisoners. It would further appear reasonable to suppose that in the majority of cases this receipt would be delivered to the prisoner at the jail, since his signature is required on each copy of the instrument, and, in all likelihood, the jailer would have notice of the existence of the receipt.

However, it must be understood that the bail receipt form cannot be regarded as an order necessary to the release of a prisoner, since it is neither required in all bail releases nor required to be shown to the jailer in situations where such a form must be executed. It should be further understood that the jailer, in situations similar to that presented here, may act at his peril in releasing prisoners on oral or telephoned instructions, since no proper record of the authority by which the prisoner's release was obtained might exist.

It would therefore appear that provisions do not presently exist which require written notice or authority to jailers concerning the release of prisoners. The authority directing such release may originate either with the magistrate or with his designee; either of these parties may admit a prisoner to bail. Since a written memorandum of admission to bail is not required in all cases, and since this memorandum is not required to be served on the jailer, serious difficulties could easily develop in the administration of jails as a result of these faults. The situation could be remedied, however, by requiring all releases from confinement under the facts described above to be accomplished by service of a copy of the bail receipt on the jailer, and further requiring the magistrate or his designee to employ the receipt form, properly marked, to indicate a release ordered on personal recognizance. We therefore answer part A of the question in the affirmative -- the authorization can, under the law, take any form (cf. D C procedure).

An arresting officer is required to be notified and given written evidence of a prisoner's release on bail only under special circumstances not present here. Cf. Section 41-4-3, N.M.S.A., 1953 Compilation. Since the state or county prisoner, once delivered to municipal jail, is no longer in the custody of the arresting officer, there would appear to be no legal reason for requiring such notice. Release is a matter with which only the committing magistrate and the jailer are concerned.

By: Richard J. Smith

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