



TEXAS JUSTICE COURT TRAINING CENTER

# Quarterly Report September 2015

## GREETINGS FROM THE TRAINING CENTER

The 2016 academic year is here and we are excited to kick off this year’s training events. While we don’t travel during October here at the Training Center, we aren’t sitting still!

One exciting change at the Training Center is the addition of a 4th part-time attorney. Randy Sarosdy is familiar to many of you as he was previously a TJCTC attorney from 2008-2010. After working for the Training Center, he served as the Executive Director of the Texas Center for the Judiciary for two years. Randy has over 35 years experience as an attorney specializing in civil and commercial trial and appellate law. He will be an excellent asset to justice courts and many of you will see him this year at the 20-hour JP seminars as well as leading webinars and workshops throughout Texas.

We were pleased to see many of you throughout July and August at our legislative updates. Over 1,300 judges, clerks, and constables attended a legislative update at one of the eight locations around the state. Hopefully, the information we have provided will make the application of new laws easier on your court.

On that note, as you all know there have been significant changes in how justice courts handle truancy. The Training Center has created a webpage ([www.tjctc.org/truancy](http://www.tjctc.org/truancy)) that we hope will serve as a one-stop-shop for truancy forms, FAQ’s, webinars, and other information. We will also be offering several truancy focused webinars, workshops, and courses throughout the year. (See page 2 for details.)

Finally, the 2016 academic year marks something else special at our office. After more than 20 years leading the Training Center, Executive Director Roger Rountree will be retiring in the Spring. Please join us in showing Roger your appreciation for his years of service and leadership as you see him around the state. Stay tuned for our Spring newsletter for a look back at Roger’s accomplishments throughout his tenure.

As always, your feedback is considered and appreciated. If you have any suggestions for future newsletter topics, please don’t hesitate to contact us. Here’s to a great year!

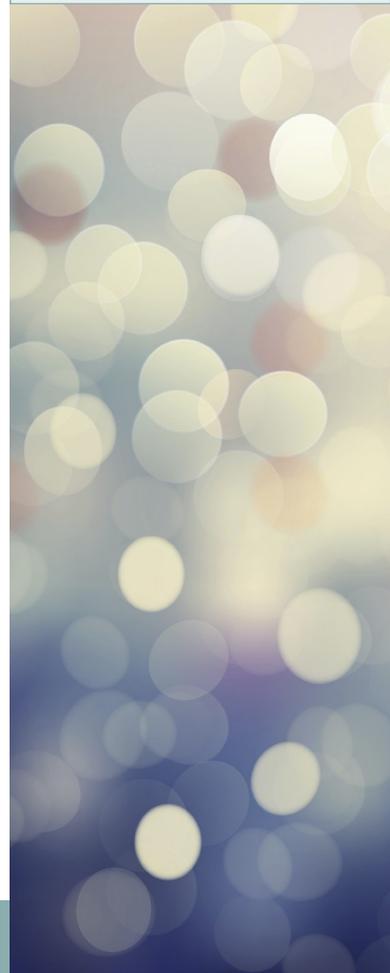
-The Training Center Staff

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### SPECIAL POINTS OF INTEREST

- HB 1334 Flowchart
- Upcoming webinars
- Faculty for JP 20-Hour
- Faculty for Court Personnel 16-Hour
- TJCTC Social media accounts



# TRUANCY COURT: A BRAVE NEW WORLD

By Bronson Tucker, TJCTC Program Attorney

Unless you have been living under a rock, you are aware that the 84<sup>th</sup> Texas Legislature dramatically changed how courts process the failure of students to attend school. HB 2398 eliminated the criminal offense of Failure to Attend School (“FTAS”), formerly codified in Sec. 25.094 of the Education Code, and created a new system of dealing with truant conduct. Now, instead of criminal cases, truant conduct cases are filed with truancy courts. Which courts are truancy courts? Any justice court or municipal court is also a truancy court. Additionally, in counties of over 1.75 million people, the constitutional county court is a truancy court. It is not necessary for a county to ‘designate’ a court as a truancy court, the Legislature has done this statutorily. Counties can implement a ‘uniform truancy policy,’ which would set a policy for which truancy court cases should be filed in.

You have probably heard that truant conduct cases are classified as civil cases now, but they have retained many characteristics of criminal cases. Your best bet to fully understand the way these cases will work (in addition to reading this entertaining and informative article) is to

*Your best bet to fully understand the way these cases will work is to familiarize yourself with Chapter 65 of the Family Code.*

## TRUANCY TRAINING

### Webinars\*

September 24th-This webinar is archived on TJCTC’s website.

October 14th

January 6th

May 12th

\*Each webinar will cover the same material.

### Juvenile Law Workshops

Fredericksburg, Nov. 11-13

Galveston, April 3-5

### JP 20-Hour Seminars

-A 2-hour class entitled “Intro to Truancy Court” will be held twice at each seminar.

-An optional expunction Q&A will be held at the end of Day 2.

### 16-Hour Clerk Seminars

A 2-hour class entitled “Brave New World of Truancy Court” will be held twice at each seminar.

familiarize yourself with Chapter 65 of the Family Code, which details how these cases will work. Note that you won’t find Chapter 65 of the Family Code in the online Texas Constitution and Statutes index ([www.statutes.legis.state.tx.us](http://www.statutes.legis.state.tx.us)) yet, but you can find it in the TJCTC Legislative Update book, which was handed out at our Legislative Update workshops and is available for download at [www.tjctc.org](http://www.tjctc.org).

### **So What Do We Do With the Old Cases?**

All FTAS cases under Education Code 25.094 must be expunged if there has been either a conviction of the defendant or a dismissal of the complaint. If the case hasn’t reached conviction, and hasn’t been dismissed yet, the court is unable to expunge it until one of those events occurs. For more information on the expunction process, please review our Expunction FAQ and sample expunction forms, available at [www.tjctc.org/truancy](http://www.tjctc.org/truancy). All of the truancy forms that are discussed in this article are located there, along with instructions for how and when to use these forms.

Additionally, we recommend doing what the court can do to remove driver license suspensions related to FTAS cases that are expunged. DPS has stated that they need name and date of birth for any individual needing a suspension lifted. Any fines or other orders that accompanied a conviction would also be vacated when the case is expunged. We have received multiple questions about expunging old Parent Contributing to Nonattendance (“PCN”) cases. There is no authority for a court to expunge these cases. I will discuss the changes to PCN cases later in this article.

### **Referrals, Petitions, Dismissals**

Although they are outside the scope of this article, HB 2398 also created changes for how schools are expected to deal with truant conduct. These changes are expected to decrease the number of cases that reach the court system, which was one of the main goals of the proponents of the legislation. For the most part, the court is uninvolved with these changes. However, if your court employs a juvenile case manager (either solely or jointly with another governmental entity), that person may be involved with the school in implementing truancy prevention measures and intervening to try to solve the problem before a court referral is necessary.



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If the school's internal measures are unsuccessful, the next step is a referral to a truancy court for truant conduct. This referral can only be made once a student who is required to attend school under Education Code 25.085 has missed 10 or more days or parts of days without excuse, with all absences occurring within a six month period and within the same school year. Additionally, a referral cannot be made if the underlying cause of the truancy is the student's homelessness, pregnancy, status in the foster care system, or status as the primary income earner for the student's family. A student must be at least 12 years old to be referred for truant conduct,

and not yet have reached their 19<sup>th</sup> birthday.

Once the truancy court receives the referral, they must pass it on to the truant conduct prosecutor. The truant conduct prosecutor is the individual responsible for prosecuting misdemeanors in your court and may be a county attorney, assistant county attorney, district attorney, or assistant district attorney depending on your individual county's system. At the conclusion of the Legislative Session, there was some confusion and debate about whether your court can dismiss the referral without sending it to the prosecutor. After a full review of the law, we have concluded that there is no authority for a truancy court to dismiss the referral at this point in the case. We have also been asked whether the court should create a file at this point. There is no actual case as yet, so there is no legal requirement to do so. Many courts, however, will be maintaining a record of the referrals sent to them, either in their case management software, an Excel spreadsheet, or some other manner.

After receiving the referral, the truant conduct prosecutor will review the case and decide if they wish to file a petition. If they elect not to file a petition, they must notify the referring school and truancy court. The truancy court must then destroy any record of the referral and order the prosecutor to do the same. If the truant conduct prosecutor wishes to file the petition, they must do so no later than 45 days after the student's last absence. The court does not charge the prosecutor a filing fee for the filing of the petition. Once the petition is filed, now the court may review the case to ensure that the requirements are met by the referral and the petition. If there are any defects in the referral or petition, at this point the court may dismiss the case, without the necessity of a motion from the prosecutor. There is a sample petition available at [www.tjctc.org](http://www.tjctc.org) that complies with all of the statutory requirements found in Family Code 65.054. Although the petition itself will contain the student's full name and identifying information, the style of the case itself is "In the matter of (the child's initials), Child". That style is what should appear in the header of case documents and on docket sheets. The child's full name should never appear on a docket sheet.

### **Getting to the Adjudication Hearing**

Once a petition has been filed and reviewed by the court, the next step is to set an adjudication hearing date and summon all of the necessary parties to court. The hearing must be held at least 11 days after the petition was filed with the court. The student must be summoned, as must their parent or guardian. Additionally, the court has discretion to summon any other necessary parties to the hearing. The Training Center has summons forms available for each category. The summons must be served either personally or by certified mail, must be served at least 5 days before the hearing, and may be served by 'any suitable person.' A copy of the petition should be attached to the summons, and the court could also, if desired, attach a copy of the answer form and/or the rights information sheet created by the Training Center to allow the child to understand and answer the allegations. Most courts will be using constables and deputy constables to serve these papers, which raises the question of whether the constable can charge for this service. Certainly the state is not going to pay a service fee. Assessing a service fee against the respondent child is very likely to land a court in hot water with, at a minimum, activist groups and the media, since there is no statutory authority to do so, and no requirement that a constable personally serve the summons in the first place.

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### **Process of the Adjudication Hearing**

The first question with regard to the adjudication hearing is, what if someone doesn't show up? If the parent doesn't appear, the court could issue a writ of attachment (including an order to bring the child if no one appeared). The court also has the authority to proceed without the parent, and may appoint a guardian ad litem or attorney for a child who appears without one. If the parent appears but the child does not, the court could order the parent to retrieve the child, or issue an attachment to have the child brought directly to court for the hearing, based on the court's inherent authority to enforce its lawful orders pursuant to Government Code 21.001.

At the adjudication hearing, the court must first inform the respondent of their rights. These rights include the right to a jury trial (the case will be a jury trial, with no jury fee required, unless waived in writing, and approved by the signature of the child's parent/guardian and attorney, if any), the right to an attorney (they do not have the right to appointed counsel, though the court may appoint an attorney and/or a guardian ad litem, if in the interest of justice), and the right not to testify against themselves. The respondent may then enter an answer of true or not true, if they have not already done so. If the child fails to answer, an answer of not true is presumed.

If the student answers true, the court may enter a judgment that the child engaged in truant conduct, and go forward with a remedial order at that point. There is no need for further prosecutorial involvement, and an open discussion may occur between the student, school, prosecutor (if present), and judge about what methods will best work to ensure the student resumes attendance at school.

If the student answers not true, a trial must be held. The burden of proof, like a criminal case, is beyond a reasonable doubt. Also as in a criminal case, if it is a jury trial, the jury's verdict must be unanimous. This hearing is held in open court, although the court can close the proceedings to the public if good cause is shown. We recommend using this option very sparingly, when highly sensitive topics will be discussed, i.e., sexual abuse of the student. If the child is found not to have engaged in truant conduct, the court shall dismiss the case with prejudice. If the child is found to have engaged in truant conduct, the court enters a judgment reflecting that finding, and proceeds to the remedial order stage. A judgment that the child engaged in truant conduct is not a criminal conviction and may not be used against the child in any other proceeding other than one to enforce the remedial order or on appeal.

A motion for new trial may be filed within 14 days of the judgment, and the judge must rule on the motion within 21 days of judgment, otherwise it is automatically denied. If the child wishes to appeal the finding of truant conduct, they have 21 days to do so, from the later of the date of the judgment or the date their motion for new trial was denied. No appeal bond is necessary to appeal the judgment, and appeal is a de novo review by the juvenile court.

All records in the case from start to finish are confidential, meaning they may only be released in limited circumstances, outlined in Family Code 65.202. Once the child turns 18, they may make a motion to have the records sealed. If the court finds that the child complied with the remedial orders in the case, the court should order the records sealed, which means that the index references to the case should be removed, and the court should respond to a records request related to the case that no records exist with respect to that individual. Once the child turns 21, the records may be permanently destroyed.

### **The Remedial Order and Its Enforcement**

Upon a finding of truant conduct, the court enters a remedial order. Even in a jury trial, it is the judge that determines what conditions will be contained in the remedial order. The order must be read aloud in court to the child, and also reduced to writing and given to the child and the child's parent/guardian. Additionally, the court must inform the child of the right to appeal, and the process described above for sealing the records of the truant conduct case. The order is good for 180 days or until the end of the school year, whichever period is longer.

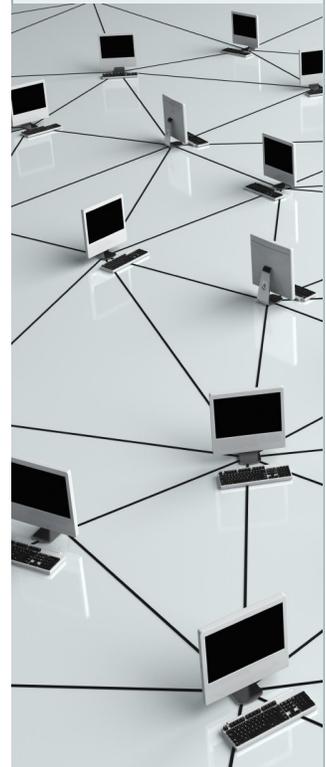
### **CHECK OUT OUR FALL WEBINARS**

October 8- Occupational Driver Licenses

October 14 - Introduction to Truancy Court

October 27- Magistrate Duties at the jail

November 17- Processing Non-Truancy Juvenile Cases



Follow us on Social media!

Our social media accounts post legislative changes, links to resources, and fun snippets of JP & Constable history.

Facebook:

[www.facebook.com/TexasJusticeCourtTrainingCenter](http://www.facebook.com/TexasJusticeCourtTrainingCenter)

Twitter: @TJCTC

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The court may assess a court cost of \$50 against the student, parent, guardian or other person, but only upon a finding that they are able to pay. This order must be in writing, and the clerk must make a record of all costs received. Importantly, due to Government Code 51.607, this cost may not be assessed until January 1, 2016. This cost goes into a fund that may only be used to offset the costs of truancy court. The Training Center does think that the commissioners court could approve using some of these funds to help offset the costs of constables serving summonses in these cases. Additionally, if the court finds the parent able to pay, the parent may be ordered to pay the costs of any guardian ad litem or attorney that was appointed for the child. At no point during a truant conduct case may the court order any party to pay any money without making a finding of ability to pay.

In addition to the court cost, there are several sanctions that the court may impose on the child, most of which are carried over from the old FTAS statutes. However, there is NOT a catch-all clause like in deferred disposition, so a court's authority to impose conditions that are not explicitly listed, like drug testing or GPS monitoring, is murky at best. The explicit list is located at Family Code 65.103. Some important highlights are as follows: special programs must be nonprofit and community-based; community service may not exceed 16 hours in a week or 50 hours total; and a truancy court may not order boot camps, juvenile justice alternative education programs, or for-profit truancy classes.

In addition to the remedial order for the child, the court can enter orders pertaining to the parent/guardian or any other person found by the court to be a contributing cause to the truant conduct. Before entering an order against someone that is not the child, the court must have provided notice of the hearing to that person and given them an opportunity to be heard. Among other things, the court can enjoin (stop) all contact between the child and a person (other than a relative within the 3<sup>rd</sup> degree) who is contributing to the truancy. Additionally, the parent can be ordered to do any act that would be beneficial to the child or stop doing any act that is detrimental to the child and the goal of the child's attendance at school. The full list of sanctions the court may impose on other parties is found at Family Code 65.105.

So what happens if the child, or another person, violates an order issued by the truancy court? If the child is noncompliant, after a hearing and a finding of contempt, the court may fine the child \$100, suspend or deny the issuance of a driver license until the child complies, or both. If a child under 17 has already been found in contempt twice, on the third violation they may be referred to juvenile probation, who may refer the case to the juvenile court for a detention hearing or take other action. See Family Code 65.251-65.252 for a full discussion of that process. Persons other than the child may be fined \$100 for disobedience, or if they are found in direct contempt (disrespecting the court during proceedings), may be fined \$100, confined in jail for up to 3 days, and/or ordered to do 40 hours of community service. Any order of contempt, whether against the child or another party, must be in writing and must be after notice and a hearing.

### **Hey, What About the Parents?**

As mentioned earlier, courts may not expunge PCN cases. PCN remains a criminal offense which parents may be charged with if they, with criminal negligence, fail to make their child attend school without unexcused absence. However, HB 2398 did make some changes to this offense. First, the fine range changed from a Class C misdemeanor (\$1-500) to a graduated fine schedule, where the maximum fine on a first offense is \$100, second is \$200, up to \$500 for fifth and subsequent offenses. Prior offenses could include offenses from prior school years, and even different children, however, they must be alleged in the charging instrument for the court to consider them. The court may not use its own knowledge to enhance the case to, say, a third offense. If the charging instrument is silent, the court must treat the case as a first offense.

Additionally, a parent may not be filed on for PCN unless the child misses the required amount of absences for truant conduct, so PCN is no longer an option after only 3 absences in a 4 week period. Finally, courts were given inherent authority to dismiss these cases, with the factors to consider being the interests of justice, the justification for the missed school, and the likelihood of repeating the offense. Another thing courts must watch for is that the complaint for PCN must allege what the criminal negligence on the part of the parent is (this is a requirement for any criminal offense with a mental state of criminal negligence). Many school districts just file a boilerplate complaint for PCN on any parent whose kid misses school, and that is inappropriate. If a parent drops a child off at school and watches them walk into the building, then leaves for work and the child ditches school, where exactly is the parent's criminal negligence?

We hope this review of the truancy process has been helpful, and encourage you to view our webinar on the same topic, either live or in our Webinar Archive at [www.tjctc.org](http://www.tjctc.org), as well as attending live classes at our 20 hour judge seminars, 16 hour court personnel seminars, and 10 hour workshops, which will all contain information on this new process.

## CAPIAS PRO FINE CHANGES

By Rob Daniel, TJCTC Program Attorney

Unpleasant things may happen to criminal defendants who fail to pay fines and court costs following a conviction. Texas law authorizes justice courts to refer such defendants to a collections agency, report such defendants to DPS using the OmniBase system, or issue a capias pro fine authorizing the arrest of such defendants, provided that they are adults. In this article, we'll focus on the third option: capias pro fines.

Just to refresh your memory, a capias pro fine is a writ which may be issued by a trial court when the defendant has failed to satisfy the judgment. The writ authorizes a peace officer to arrest the defendant for the purpose of bringing him or her before the trial court (or a court authorized by law to act on behalf of the trial court) for a hearing. The defendant may be taken to the county jail only if no appropriate court is available to conduct such a hearing. Furthermore, if a peace officer must take the defendant to the county jail the defendant may be held there only until the end of the following business day.

If a justice court issues a capias pro fine, the court which conducts the post-arrest hearing may take one of the following actions:

1) If the defendant has money to pay the outstanding fine and costs, the court may accept payment from the defendant.

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*Justice courts...should be aware that the Texas Legislature made some important changes to Articles 45.045 and 45.046 of the Code of Criminal Procedure.*

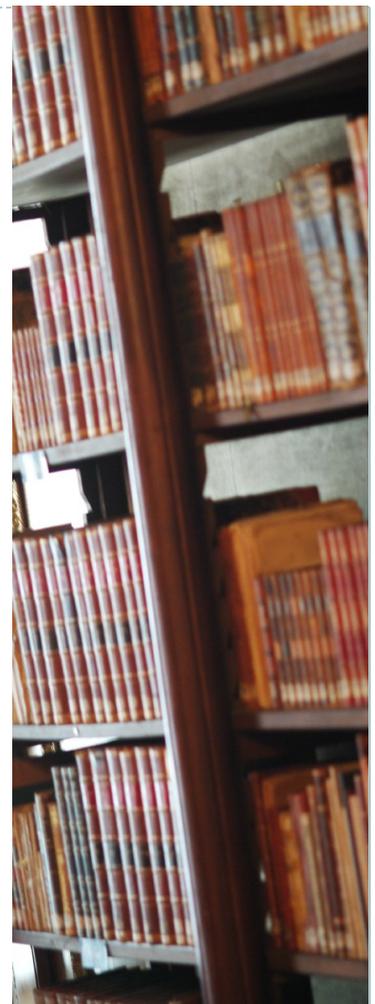
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2) If the defendant cannot pay the outstanding fine and costs and the court determines that the defendant is not indigent, the court may: A) place the defendant on a payment plan; B) authorize the defendant to discharge the fine and costs by performing community service; or C) commit the defendant to the county jail if the court determines that the defendant has failed to make a good faith effort to discharge the fine and costs. (If the court commits the defendant to jail, the court must specify the rate at which the defendant earns credit toward the fine and costs.) (See Art. 45.048, Code of Criminal Procedure.)

3) If the defendant cannot pay the outstanding fine and costs and the court determines that the defendant is indigent, the court may: A) place the defendant on a payment plan; B) authorize the defendant to discharge the fine and costs by performing community service; or C) commit the defendant to the county jail if the court determines that the defendant has failed to make a good faith effort to discharge the fines and costs by performing community service and could have done so without experiencing any undue hardship. (Again, the court must specify the rate at which the defendant earns credit toward the fine and costs.)

Justice courts which choose to issue capias pro fines to dispose of criminal cases with unpaid fines and costs should be aware that the Texas Legislature made some important changes to Articles 45.045 and 45.046 of the Code of Criminal Procedure during the 84th Legislative Session. These changes affect the actions that occur following an arrest based on a capias pro fine.

The first major procedural change implemented by the Legislature came about via the passage of House Bill 121, which took effect on June 15, 2015. HB 121 creates Article 103.0025 of the Code of Criminal Procedure, which authorizes a peace officer who takes a defendant into custody based on a capias pro fine to "...accept, on behalf of the court, the defendant's immediate payment of the fine and related court costs by use of a credit or debit card..." If the defendant hands his or her credit card to the peace officer, the payment obviates the need to take the defendant before a court, so the officer may "release the defendant" once the transaction has occurred (unless the defendant has additional warrants or has committed a new offense). (See Art. 103.0025(b)(2), Code of Criminal Procedure.) Please note that this procedure may be used only to dispose of cases in which the defendant has failed to pay a fine and costs following conviction. *Cont. on page 7*



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Peace officers may not accept payment in criminal cases that are still pending in a justice court, even if the court has issued an arrest warrant in connection with the offense.

However, before accepting such a payment, the peace officer must obtain the permission of the court. TJCTC recommends creating a written policy or issuing a written order authorizing peace officers to accept such payments if the court wishes to utilize this new statute. TJCTC also recommends that the policy address the issue of whether the swiping of the defendant's credit card results in a direct payment to the justice court or in payment to some other entity which will forward the funds collected to the justice court.



Additionally, a peace officer may not accept such a payment unless he or she first informs the defendant of “the defendant’s available alternatives to making an immediate payment.” Therefore, it’s TJCTC’s position that a justice court’s written policy should state that a peace officer may not accept payment unless he or she first provides the information listed below to the defendant.

- 1) If payment is not made, the defendant must be immediately taken before a court for a hearing. However, if no judge is available to conduct a hearing, the defendant may be temporarily confined in jail.
- 2) A hearing before a court could result in the court placing the defendant on a payment plan.
- 3) A hearing before a court could result in the court allowing the defendant to discharge the fine and costs by performing community service.
- 4) A hearing before a court will result in the defendant’s commitment to jail only if the court determines that the defendant is:
  - 1) not indigent and the court determines that the defendant has failed to make a good faith effort to discharge the fine and costs; or
  - 2) indigent and the court determines that the defendant has failed to make a good faith effort to discharge the fines and costs by performing community service and could have done so without experiencing any undue hardship.
- 5) If the defendant is committed to jail, the court will determine the rate at which the defendant will earn credit towards the fine and costs.

Assuming that a peace officer has obtained permission from a trial court to accept such payments and has provided the defendant with the information required by law, the peace officer may also collect “fees for the issuance and execution of the *capias pro fine*.” (These fees are established by Chapter 102 of the Code of Criminal Procedure, and may vary depending on the circumstances.)

The second major change implemented by the Texas Legislature with regard to *capias pro fines* involves Senate Bills 873 and 1139. These bills both modify Articles 45.045 and 45.046 of the Code of Criminal Procedure. Although the bills contain slightly different language, the effect of both bills is the same: they create an automatic bench exchange policy among justices of the peace in the same county for the purpose of conducting a hearing following a *capias pro fine* arrest. Criminal law magistrates with jurisdiction over Class C misdemeanors are also included in the automatic bench exchange agreement, but municipal courts are not included.

How will these new laws work in practice? Let’s say that the Precinct 1 Justice of the Peace in a county that has eight justice courts and two criminal law magistrates with jurisdiction over Class C misdemeanors issues a *capias pro fine*. If the defendant is arrested on a Friday afternoon when the Precinct 1 Justice Court is closed and the Precinct 1 Justice of the Peace is attending a TJCTC seminar, the arresting officer may take the defendant before any of the other seven justice courts in the county or either of the criminal law magistrates in lieu of confining the defendant in the county jail. If implemented correctly, these changes should result in fewer defendants being confined in the county jail for unpaid fines and court costs prior to a hearing before an appropriate judge.

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TJCTC recommends creating a written, county-wide policy pertaining to the acceptance of fines and court costs on behalf of another court. (This policy could be part of the administrative rules pertaining to the transfer of criminal cases that each county is required to adopt pursuant to Article 4.12(e) of the Code of Criminal Procedure.) For example, if a peace officer takes a defendant before the Precinct 3 Justice Court after arresting a defendant on a *capias pro fine* issued by the Precinct 5 Justice Court, the money collected by the Precinct 3 Justice of the Peace should find its way back to Precinct 5 so that the trial court can close out its case. Adopting such a policy as soon as possible may save justice courts significant time and headache in the future.

Additionally, it's important for justices of the peace who process other justice courts' *capias pro fines* to document the actions that they have taken and forward that documentation to the appropriate court. For example, if the Precinct 4 Justice of the Peace holds a hearing involving a defendant arrested on a Precinct 8 *capias pro fine*, and authorizes the defendant to discharge the outstanding fine and costs by performing community service, the Precinct 8 Justice Court needs to have this information. Regardless of the action taken by the justice court acting under the bench exchange agreement (be it commitment, authorizing community service, placing the defendant on a payment plan, or accepting payment for the outstanding fine and costs), TJCTC recommends documenting that action in writing, keeping a copy of the documentation for the court's own records, and providing a copy of the documentation to the court that issued the *capias pro fine*.

If you have questions regarding this article or the new laws affecting *capias pro fine* procedures, please feel free to contact the Training Center by posting a question to the legal questions board or calling 512-347-9927 and asking to speak with an attorney.

## Welcome!

TJCTC would like to welcome our faculty for the 2016 Justice of the Peace 20-Hour Seminars.

Along with our Program Attorneys, the faculty will be teaching over 27 classes throughout the year.



Hon. Melissa Goodwin– Third Court of Appeals, Place 4

Hon. Jeff Monk– Justice of the Peace, Johnson County

Hon. Roberto Vazquez– Justice of the Peace, Bexar County

Ms. Katie Chancia– Staff Attorney, Harris County Justice Courts

Mr. Gary Teeler– Assistant Commander, Texas Parks & Wildlife

Hon. Bill Gravel– Justice of the Peace, Williamson County

Hon. Al Cercone– Justice of the Peace, Dallas County

Hon. Gary Jackson– Justice of the Peace, Potter County

Mr. Shawn Qualls– Deputy Constable, Denton County

## EVICTED TENANTS ON APPEAL: IF YOU DON'T PAY, YOU DON'T STAY

By Thea Whalen, TJCTC Program Attorney

When a tenant fails to pay rent, a landlord can file an eviction petition. If the landlord receives a judgment in their favor, there is no guarantee that the landlord will actually have possession of their property soon because the tenant has the right to appeal. In the past, when the tenant would post a bond or file what was called a 'pauper's affidavit', the tenant remained in possession of the property and the case was forwarded to county court. The case would often sit for several weeks, maybe months, in county court before it was heard *de novo*. The tenant was supposed to pay rent on the pauper's affidavit appeal into the county court registry, but often they would not. The landlord would then need to file a sworn motion in county court proving that a writ of restitution (effectively, a writ of possession) should be issued because the tenant was not continuing to pay rent. There was not a required timeframe in which the county court had to respond to this motion. This left the property in possession of an evicted nonpaying tenant for an unknown time.

To keep tenants from taking advantage of the court process in this manner, the legislature passed HB 1111 in 2011 creating Section 24.004 of the Property Code. That bill created the procedure you are now familiar with where a tenant evicted for nonpayment of rent who appeals with what is now called a 'statement of inability to pay' must receive a notice to pay rent into the justice court registry or a writ of possession may be issued against them *in justice court*, even though their appeal would continue to county court. In other words, they could still appeal, but faced removal from the property through a writ of possession earlier in the process. To trigger Section 24.004, two things must have happened: 1) a nonpayment of rent case, 2) appealed with a statement of inability to pay.

But these nonpaying tenants found yet another way to 'game' the system. Instead of appealing the case with a statement of inability to pay, they would post a bond. This way, their action did not trigger the requirement of paying rent into the justice court registry.

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*Cont. from page 8*

However, the bonds they posted were defective or supported by sureties who did not possess sufficient resources to pay the judgment and costs – a fact the landlords would often find out too late. So again, landlords were in the tough situation of having evicted a non-paying tenant who was staying in the property for free waiting for the county court to take action.

In response to this problem, the legislature recently passed HB 1334, which added Sections 24.00511 and 24.00512 to the Property Code.\* Starting January 1, 2016, if a non-paying tenant appeals their eviction by posting a bond, the landlord can challenge the bond. This new law adds the requirement that an eviction judgment must state the amount of the appeal bond. Tex. Prop. Code § 24.00511 (a). Also, when the nonpayment of rent tenant posts a bond the surety must “provide their contact information, including an address, phone number, and e-mail address, if any. If any of the contact information changes, the surety shall inform the court of the surety's new contact information.” *Id* at (b).

A landlord may challenge a surety bond amount, form, or financial ability of a surety to pay if a nonpayment of rent case is appealed by surety bond. (Corporate sureties authorized by the Texas Department of Insurance cannot be subjected to this new procedure). Tex. Prop. Code § 24.00512.

To contest the bond, the landlord must file a written notice within 5 days of the date the appeal bond is filed and serve a copy on the tenant. The justice court must then notify the tenant and the surety of the contest. *Id.* At (b) Within 5 days of the contest being filed, the justice court shall hold a hearing to determine whether to approve or disapprove the amount or form of the bond or the surety. Evidence may be presented at this hearing. *Id.* at (c)

If the amount or form of the bond is being contested, the landlord has the burden to prove it is insufficient. If the financial ability of a surety to pay the bond is being contested, the tenant has the burden to prove that the surety has sufficient nonexempt assets to pay the judgment and costs assessed against the tenant if he or she loses the trial de novo in county court. The standard for both is a preponderance of the evidence. The justice court must disapprove the bond if the form of the bond is defective, the amount of the bond is insufficient, or if the sureties lack sufficient financial resources. It is prima facie evidence that the bond should be disapproved if the surety fails to appear at the contest hearing. This means it will be very difficult for a tenant's bond to receive the justice court's approval if the surety fails to show. *Id.* at (d).

If the justice court approves the bond, the appeal continues to county court. If the justice court disapproves the bond, the tenant has 5 days to make a cash deposit, file a sworn statement of inability to pay, or appeal the decision disapproving the appeal bond to the county court. Failing to take one of these steps makes the judgment of the justice court final. Then, a writ of possession and other processes to enforce the judgment may be issued on the payment of the required fee. *Id.* at (e).

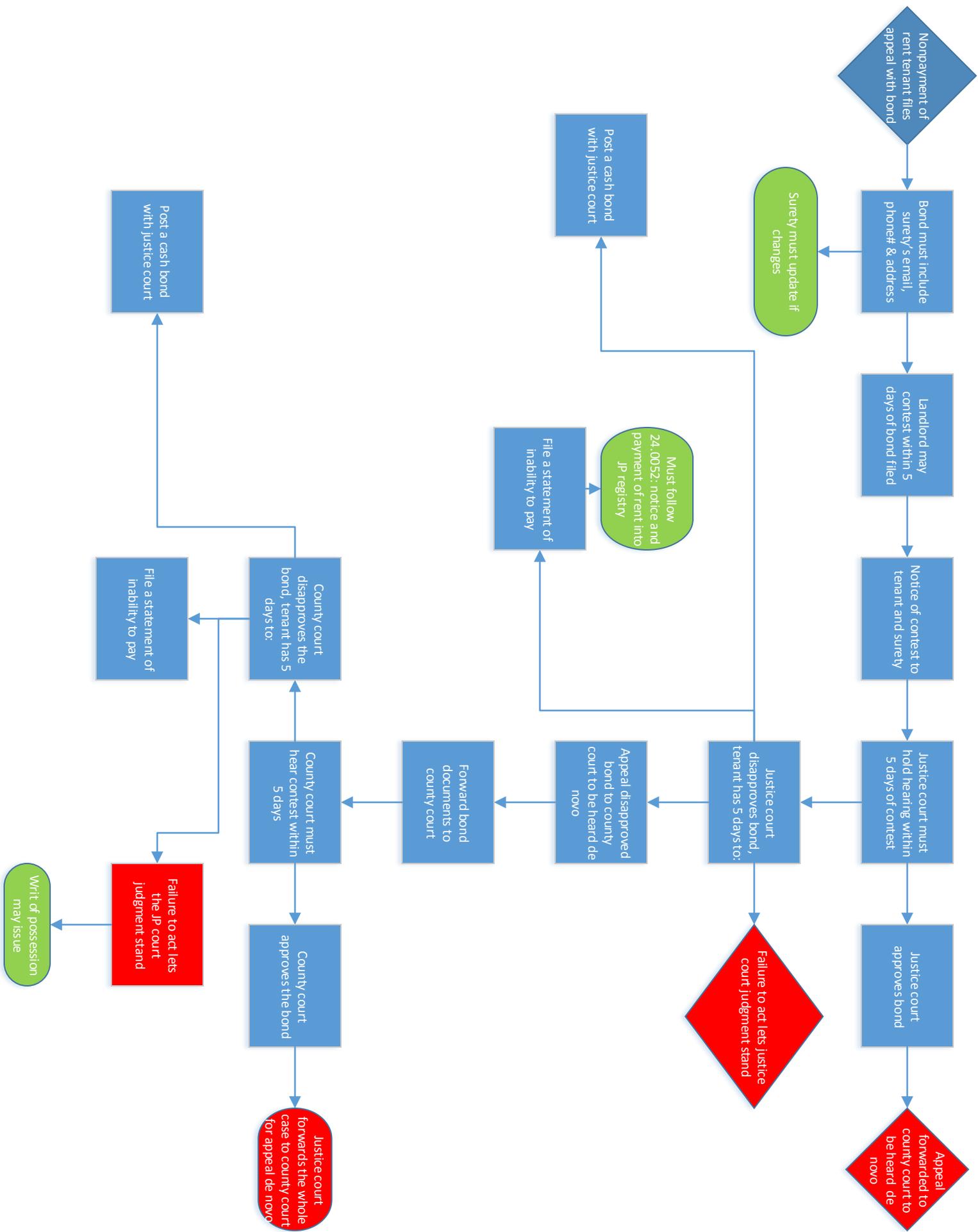
If a tenant appeals the justice court decision to disapprove the bond, the justice court must forward to county court all relevant documents regarding the decision to disapprove the bond. The county court should hear the appeal de novo within 5 days of docketing the appeal. If the county court does not hear the appeal within those 5 days of receiving the appeal, it does not affect the approval or denial of the appeal. The county court must issue a final decision on the appealed bond before a writ of possession may issue. *Id.* at (f).

If the county court approves the bond on appeal, the justice court shall forward the remainder of the case, including the transcript and bill of costs, to county court and the case will continue on appeal de novo. *Id.* at (g).

If the county court disapproves the appeal bond, the tenant has 5 days to perfect the appeal in another manner – either by posting a cash bond with justice court or by filing a statement of inability to pay. (If a tenant who is evicted for nonpayment of rent ever chooses to appeal with a statement of inability to pay, then the court must follow Section 24.0052 of the Property Code and issue the notice to the tenant instructing when and how much of the rent must be paid into the justice court registry. The notice must also state that the court may issue a writ of possession, without holding a hearing, if the tenant fails to timely deposit the rent. Tex. Prop. Code § 24.0053 (a-1), (a-2), & (a-3)). Failure to timely take one of these two options will result in the justice court judgment being final. Post judgment enforcement may then take place, including a writ of possession, when the proper request and fees are paid. *Id.*

As stated above, this legislation does not take effect until January 1, 2016. So remember to stat the amount of the appeal bond in your judgments and be on the lookout for appeal bond contests in your court starting on that date. We have included a flowchart of this process to assist you and as always, please call the Training Center offices at (512) 347-9927 with any additional questions.

*\*This procedure can apply to a landlord appealing as well, but landlords rarely appeal judgments in eviction cases.*



## CELL PHONE WARRANTS UNDER NEW CCP Arts. 18.02(a)(14) AND 18.0215



By Randall L. Sarosdy, Attorney at law, Austin

In the 2015 Session the Legislature passed HB 1396, effective September 1, 2015, which created Articles 18.02(a)(14) and 18.0215 of the Code of Criminal Procedure. These statutes govern the issuance of warrants for the search and seizure of cell phones but raise several questions for justices of the peace. First, is the issuance of these search warrants limited to certain types of judges -- e.g., a judge of a municipal court of record who is an attorney, a judge of a county court who is an attorney, or a judge of a statutory county court, district court, the Court of Criminal Appeals or the Supreme Court? See CCP Art. 18.01(h) and (i). Or does any justice of the peace have authority to issue these search warrants without regard to whether or not the county in which he sits has those types of judges? Second, what are the procedures that must be followed in the issuance of these search warrants?

We believe the issuance of cell phone warrants is **not** limited to a certain type of judge and that any justice of the peace has authority under the new law to issue such warrants in the circumstances discussed below.

*“We believe the issuance of cell phone warrants is not limited to a certain type of judge.”*

### TJCTC Forms

TJCTC is in the process of updating all of the forms available for download at [www.tjctc.org](http://www.tjctc.org) under the Resources tab. Click on **New Forms** to see what's available.

The Order of Retrieval authorizes a person who has been excluded from their current or former residence to go with a peace officer to retrieve personal items that they need immediately. Starting on **October 1st**, you will be able to find an example of the order of retrieval on TJCTC's forms page.

Truancy forms are already available at [www.tjctc.org/truancy](http://www.tjctc.org/truancy)

Art. 18.02(a)(14) authorizes the issuance of a search warrant for “a cellular telephone or other wireless communication device, subject to Article 18.0215.” Art. 18.0215(a) states that a “peace officer may not search a person’s cellular telephone or other wireless communications device, pursuant to a lawful arrest of the person, without obtaining a warrant under this article.” Thus, an officer may not simply take a person’s cell phone upon arresting him and start perusing the contents of his cell phone to see what’s there. Unless exigent circumstances exist (discussed below), the officer must first obtain a search warrant for the cell phone.

Who may issue that warrant is determined by Art. 18.0215(b). It states that “a warrant under this article may be issued only by a judge in the same judicial district as the site of: (1) the law enforcement agency that employs the peace officer, if the cellular telephone or other wireless communications device is in the officer’s possession; or (2) the likely location of the telephone or device.” Under this provision **any judge** in the same judicial district as the site of the law enforcement agency or the location of the cell phone may issue the warrant. A justice of the peace is a judge. See Govt. Code § 27.031 (defining jurisdiction of justice courts). Judicial districts are established in Govt. Code §§ 24.101 – 24.5995. (No judicial district is less than a single county and many judicial districts cover multiple counties. *Id.*). Therefore, provided the justice of the peace is in the same judicial district as the law enforcement agency or the location of the cell phone, he or she may issue the warrant.

This is in contrast with search warrants issued under Art. 18.02(10), (12) and (13). Art. 18.02(10) covers search warrants for “property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense.” These are commonly called evidentiary search warrants. Art. 18.02(12) covers search warrants for “contraband subject to forfeiture under Chapter 59 of this code.” As you may recall, the issuance of those two types of search warrants is generally limited by Art. 18.01(h) to the following types of judges: a judge of a municipal court of record who is an attorney, a judge of a county court who is an attorney, or a judge of a statutory county court, district court, the Court of Criminal Appeals or the Supreme Court. However, Art. 18.01(i) carves out an exception for counties that do not have those types of judges and in those counties “any magistrate may issue a search warrant under Subdivision (10) or Subdivision (12) of Article 18.02 of this code.” Accordingly, a justice of the peace acting as a magistrate in a county that has those

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types of judges may not issue a search warrant under Subdivision (10) or (12) but a justice of the peace acting as a magistrate in a county that does not have those types of judges may issue such a search warrant. But issuance of a search warrant for a cell phone is **not** limited in this manner since “any judge in the [appropriate] judicial district” may issue the warrant.

Similarly, Art. 18.02(13) authorizes a search warrant for “electronic customer data held in electronic storage, including the contents of and records and other information related to a wire communication or electronic communication held in electronic storage.” But a search warrant for such data may be issued only by a district judge under Art. 18.21, Sect. 5A(b). Again, this limitation does **not** apply to the issuance of a search warrant for a cell phone.

The procedures for issuance of a search warrant for a cell phone are fairly straightforward. See Art. 18.0215(c). The warrant may be issued “only on the application of a peace officer. An application must be written and signed and sworn to or affirmed before the judge.” The application must:

- (1) state the name, department, agency, and address of the applicant;
- (2) identify the cellular telephone or other wireless communications device to be searched;
- (3) state the name of the owner or possessor of the telephone or device to be searched;
- (4) state the judicial district in which:
  - (A) the law enforcement agency that employs the peace officer is located, if the telephone or device is in the officer’s possession; or
  - (B) the telephone or device is likely to be located; and
- (5) state the facts and circumstances that provide the applicant with probable cause to believe that:
  - (A) criminal activity has been, is, or will be committed; and
  - (B) searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A).

A peace officer may search a cellular telephone or other wireless communications device **without** a warrant if: (1) the owner or possessor consents to the search; (2) the telephone or device is reported stolen by the owner or possessor; or “(3) the officer reasonably believes that: (A) the telephone or device is in the possession of a fugitive from justice for whom an arrest warrant has been issued for committing a felony offense; or (B) there exists an immediate life-threatening situation as defined by Section 1, Art. 18.20.” Art. 18.0215(d). These are the exigent circumstances mentioned above that permit a search of a cell phone initially without a warrant.

If a peace officer conducts a search without a warrant under Art. 18.0215(d)(3), he must apply for a warrant to search the telephone or device “as soon as practicable after the search is conducted.” Art. 18.0215(e). If the judge finds that the facts did not justify the warrantless search and declines to issue the warrant, then “any evidence obtained is not admissible in a criminal action.” Art. 18.0215(e).

Should you have questions concerning the issuance of search warrants for cell phones under new Arts. 18.02(a)(14) and 18.0215, please feel free to contact the Training Center.



## Welcome!

TJCTC would like to welcome our faculty for the 2016 Court Personnel 16-Hour Seminars.

Along with our Program Attorneys, the faculty will be teaching over 33 classes throughout the year.

- Mr. Brian Stanley– Chief of Staff, Montgomery County
- Hon. Kaye Phillips– Retired Justice of the Peace, Hale County
- Ms. Dolly Welch– Office Manager, Gregg County
- Hon. David Patronella– Justice of the Peace, Harris County
- Mr. Bobby Gutierrez– Chief Deputy Constable, Travis County
- Hon. Matt Hayes– Justice of the Peace, Tarrant County
- Hon. Vicki Gray– Justice of the Peace, Navarro County
- Ms. Liz Chavez– Justice Court Function Analyst, Cameron County
- Deputy Renee Merrick– Sherriff’s Deputy, Travis County
- Hon. Janice Sons– Justice of the Peace, Wichita County

- Ms. Pam Terry– Chief Clerk, Randall County
- Hon. Karen Diaz– Justice of the Peace, San Patricio County
- Ms. Tammy Jenkins– Chief Clerk, Chambers County

# TJCTC'S TXDOT TRAFFIC SAFETY GRANT: AN IMPORTANT PART OF YOUR EDUCATION

By Rob Daniel, TJCTC Program Attorney

If you have ever taken a class on DWI bond conditions, perused the Texas Justice Court Training Center's DWI Magistration & Inquest Field Guide, or downloaded TJCTC's blood search warrant flowchart from [www.tjctc.org](http://www.tjctc.org), you've benefitted directly from a grant awarded to TJCTC by the Texas Department of Transportation (TxDOT). This grant focuses on traffic safety and criminal procedure relating to intoxication offenses. Even if you've never taken a TxDOT-sponsored class or read a TxDOT-sponsored publication, you may have benefitted indirectly from this grant, as it helps to fund the salaries of several TJCTC employees. TxDOT currently provides grants to all of the Court of Criminal Appeals-sponsored judicial education entities in Texas, because all members of the judiciary play a role in reducing injuries and fatalities caused by intoxicated drivers. TJCTC is honored to receive one of these grants, which assists us in providing the services listed below.

- 1) Education at 20 Hour Justice of the Peace Seminars: Every 20 hour seminar for JPs includes classes relating to TxDOT program areas. As a result, the TxDOT grant pays for part of the cost of these seminars.
- 2) Education at 16 Hour Court Personnel Seminars: Every 16 hour seminar for court clerks includes a class relating to TxDOT program areas. The TxDOT grant also pays for part of the cost of these seminars.
- 3) Publications: TJCTC revises the DWI Magistration & Inquest Field Guide and the Reporting Requirements Guide on an annual basis using funds provided by the TxDOT grant. (Please note that newly-revised versions of these publications were posted to our website and distributed via email last week!)
- 4) Newsletters: Our quarterly reports and our annual traffic safety program newsletter receive funding from the TxDOT grant.
- 5) Website resources: TJCTC receives funding from the TxDOT grant to provide DWI-related traffic resources via the "Traffic Safety Initiative" tab on [www.tjctc.org](http://www.tjctc.org).
- 6) DWI Bond Schematic Program: TJCTC manages a program to assist counties which seek to implement a system for setting, monitoring, and enforcing bond conditions in DWI cases. Additional information regarding this program may be found below or on [www.tjctc.org](http://www.tjctc.org).
- 7) Impaired Driving Symposium: TJCTC partners with other judicial education entities to put on the Texas Impaired Driving Symposium on an annual basis. Attendees include justices of the peace, municipal judges, county judges, and district judges. Next year's symposium will be held at the Austin Sheraton from August 4-5.

If you have an idea that would help TJCTC to disseminate information regarding intoxication-related criminal offenses to justices of the to

## TEXAS JUSTICE COURT TRAINING CENTER

Funded by a Grant from the COURT  
OF CRIMINAL APPEALS

In Association with Texas State  
University and the Justices of the  
Peace and Constables Association of  
Texas, Inc.

"The mission of the Texas Justice  
Court Training Center is to provide  
quality education opportunities for  
justices of the peace, constables and  
court personnel, insuring the credi-  
bility of, and confidence in, the  
justice courts enabling them to  
better serve the people of The State  
of Texas."

justices of the peace and court personnel, please contact Program Attorney Rob Daniel at 512-347-9927. Comments and questions about the services described above are also welcome. We hope that this grant has made a positive impact on your courts in 2015, and we look forward to continuing to provide education in these areas in 2016.

## DWI BOND CONDITION SCHEMATIC PROGRAM

The Texas Justice Court Training Center's bond schematic program assists Texas counties in creating consistent conditions of bond in all DWI cases. TJCTC works with all stakeholders (including all criminal magistrates, prosecutors, and probation departments) in participating counties to establish a system for setting, monitoring, and enforcing appropriate conditions of bond. If you are interested in having your county participate in this program, please contact Rob Daniel at 512-347-9927.