Fifth Edition
March 2026

Published by the
Texas Justice Court Training Center

An educational endeavor of the
Justices of the Peace and Constables Association of Texas, Inc.

Funded by Grants from the Texas Court of Criminal Appeals and Texas Department of Transportation

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User Notes

This deskbook on Magistration (5th *ed. March 2026)* represents the Texas Justice Court Training Center's ongoing commitment to provide resources, information, and assistance on issues of importance to Texas Justices of the Peace and Constables and their court personnel, and continues a long tradition of support for judicial education in the State of Texas by the Justices of the Peace and Constables Association of Texas, Inc. We hope you will find it to be a valuable resource in providing fair and impartial justice to the citizens of Texas. It is intended to offer a practical and readily accessible source of information relating to issues you are likely to encounter while performing your duties as a magistrate but is not intended to replace original sources of authority, such as the Code of Criminal Procedure. We strongly recommend that you refer to the applicable statutory provisions and rules when reviewing issues discussed in this book.

Rather than including the citations to cases in the text of the deskbook, we have listed only the case name in the text but have included the entire citation in the appendix of cases.

This volume covers general information about the duties of a magistrate as performed by a justice of the peace. Specific information about the prosecution of juvenile criminal defendants, processing of criminal cases, and assessment of court costs and fees may be found in other deskbooks.

TJCTC forms referenced in this manual are not mandatory for use, but TJCTC encourages their use to ensure that court forms are in compliance with statutory guidelines and due process requirements.

Please do not hesitate to contact us should you have any questions or comments concerning any of the matters discussed in *Magistration*.

Texas Justice Court Training Center
March 2026

Chapter 1: What is a Magistrate?

A. Who are Magistrates?

A justice of the peace is a magistrate, and so are:

- the justices of the Supreme Court,
- the judges of the Court of Criminal Appeals,
- the justices of the courts of appeals,
- the judges of the district courts,
- the county judges,
- the judges of the county courts at law,
- the judges of the county criminal courts,
- the judges of statutory probate courts,
- the mayors and recorders and the judges of the municipal courts of incorporated cities or towns, **and**
- various other magistrates appointed in certain counties.

Code of Criminal Procedure Art. 2A.151.

COMMON PITFALL

Please keep in mind that the clerk of a justice court is **not** a magistrate and cannot perform any of the duties described in this deskbook.

B. What are the Duties of a Magistrate?

It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means, to issue all process intended to aid in preventing and suppressing crime, and to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment. *Code of Criminal Procedure Art. 2A.152.*

But what does that actually mean? The duties often collectively described as "magistration" include tasks aimed at reducing crime, at protecting victims of crime, and at ensuring that the due process rights of criminal defendants are preserved.

Magistrates fulfill this duty by performing several functions authorized by Texas law, including:

- determining whether probable cause exists to keep a defendant in state custody,
- administering legal warnings to those accused of crimes,
- setting bail,
- setting bond conditions,
- issuing search and arrest warrants,
- issuing emergency mental health detention warrants,
- issuing orders for emergency protection,
- issuing peace bonds, **and**
- conducting examining trials.

Note that any signed order issued by a magistrate under the Code of Criminal Procedure or pertaining to any criminal case must include, in addition to the magistrate's signature, the magistrate's name in legible handwriting, legible typewritten form, or legible stamp print. *Code of Criminal Procedure Art. 2A.1521.*

What is "Magistration"?

"Magistration" is not a technical term that is defined in the law, it is an informal term that has gained widespread use in justice and municipal courts.

Magistration is simply a reference to an "initial appearance" following arrest or, in some instances, a "probable cause hearing."

Magistration is **not** the same as an **arraignment**. An arraignment occurs when formal charges are read to the defendant and the defendant enters a plea.

Chapter 2: Magistrate Duties Following an Arrest

Whenever a defendant is arrested, they must be brought before a neutral magistrate, whose job is to ensure that due process is provided and to inform the defendant of their rights. *Code of Criminal Procedure Art. 14.06(a).*

The statute governing the process of informing the defendant of their rights is Article 15.17 of the Code of Criminal Procedure, leading many to refer to the process as the Article 15.17 hearing, or, as described above, "**magistration**."

TJCTC has developed a series of bench cards that cover many of the topics discussed in this Chapter. Please see ***page 77*** to download the bench cards.

Which Type of Magistrates Must Conduct Article 15.17 Hearings at the County Jail?

KEY POINT

None! In many Texas counties, it is customary for justices of the peace—and not district judges—to conduct the majority of Article 15.17 hearings, but no statute states that district judges have the weekend off, while justices of the peace must spend Saturday nights setting bail. Furthermore, no statute dictates **where** an Article 15.17 hearing must occur. In fact, the Code of Criminal Procedure states that a peace officer shall bring the accused before a magistrate, not vice versa. *Code of Criminal Procedure Art. 15.17(a).*

In certain situations, described below, a defendant may be released on a citation rather than brought immediately before a magistrate. However, those defendants **must** ultimately be provided with the admonishments required by Art. 15.17 when they later appear before a magistrate.

Do We Have to Have an "On-Duty" Schedule?

Although magistrates in several Texas counties have created schedules which provide an "on-duty magistrate" at the county jail twenty-four hours a day, such a policy is not mandated by statute. TJCTC encourages all justices of the peace to work with their fellow county officials to develop policies which are acceptable to all parties in order to facilitate a smoothly operating criminal justice system.

Release of Defendants Charged with Class C Misdemeanors on Issuance of Citation
A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, **other than public intoxication**, may, instead of taking the person before a magistrate, issue a citation to the person that contains:

- written notice of the time and place the person must appear before a magistrate,
- the name and address of the person charged,
- the offense charged,
- information regarding the alternatives to the full payment of any fine or costs assessed against the person if the person is convicted of the offense and is unable to pay that amount, **and**
- the admonishment contained in Art. 14.06(b) regarding consequences related to gun possession following family violence convictions, in boldfaced, underlined type or in capital letters.

Code of Criminal Procedure Art. 14.06(b).

Release of Defendants Charged with Jailable Misdemeanors on Issuance of Citation
If the person resides in the county where the offense occurred, a peace officer who is charging a person with **certain Class A or B misdemeanors listed in Art. 14.06(d)** may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate of this state as described by Art. 14.06(a), the name and address of the person charged, and the offense charged. *Code of Criminal Procedure Art. 14.06(c)(d).*

When Person Charged with Misdemeanor Appears Before Magistrate After Receiving Citation
If a person charged with an offense punishable as a misdemeanor appears before a magistrate in compliance with a citation issued under Article 14.06(b) or (c) (as described above), the magistrate **shall** perform the Article 15.17 hearing as if the person had been arrested and brought before the magistrate by a peace officer.

Then, the magistrate may release the person on personal bond **unless** good cause exists not to do so. If a person who was issued a citation for a jailable offense fails to appear as required by that citation, the magistrate before which the person was required to appear **shall** issue a warrant for the arrest of the accused. *Code of Criminal Procedure Art. 15.17(g).*

A. Determination of Probable Cause Following a Warrantless Arrest

Many Article 15.17 hearings occur following an arrest which is not supported by a warrant. A peace officer may arrest an offender without a warrant for any offense committed in the police officer's presence or within the police officer's view. *Code of Criminal Procedure Art. 14.01(b).*

For example, the majority of driving while intoxicated (DWI) arrests occur after a peace officer observes the accused operating a motor vehicle in a public place while intoxicated.

When a peace officer presents a defendant to a magistrate following a **warrantless** arrest, the magistrate must first determine whether **probable cause** exists to continue to hold the defendant in state custody.

KEY POINT

If a person has been arrested without a warrant, a magistrate must determine whether or not probable cause exists to believe that the person committed the offense within 24 hours for a misdemeanor arrest and within 48 hours for a felony arrest. *Code of Criminal Procedure Art. 17.033.*

Probable Cause When There Was a Warrant

If the arrest **was** pursuant to an arrest warrant, probable cause was already determined by the magistrate who issued the warrant. *Code of Criminal Procedure Art. 15.03(a).*

The magistrate who sees the defendant after the arrest **does not** have the authority to reevaluate the original magistrate's determination of probable cause and should proceed with explaining the defendant's rights as described in ***Section B*** below.

1. What is Probable Cause?

"Probable cause exists where the police have reasonably trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense." ***Chapnick v. State***.

BEST PRACTICE

If a determination of whether or not probable cause exists has not been made within 24 or 48 hours, as required by Art. 17.033, the accused must be released on a bail bond not to exceed $5,000 for a misdemeanor arrest and not to exceed $10,000 for a felony arrest. If the accused is unable to post bail, he or she must be released on a personal bond. For more information, see page 23 of this volume. Because of this law, the best practice is to have any people arrested without a warrant brought before a magistrate within 24 hours of the time of arrest.

Probable Cause Affidavits

Typically, the peace officer who presents the accused to the magistrate will also submit an affidavit, describing the facts of the offense, which seeks to establish probable cause to believe the accused committed the charged offense. This document doesn't merely allege the commission of the offense, instead it must contain factual statements which establish probable cause for the arrest of the accused.

KEY POINT

Because it is not the charging complaint, it does **not** need to track the statutory language defining the offense. However, it **must** contain facts that establish each element of the offense (refer to the statute creating the offense to make sure of this).

Complaint or Probable Cause Affidavit?

In some counties, this document is referred to as a probable cause affidavit. In others, it is referred to as a complaint, and in some counties the magistrate receives both a complaint and a probable cause affidavit. This deskbook refers to such documents as probable cause affidavits.

Probable cause determinations **must** be based on information in the affidavit, and not opinions or conclusory statements. For example, on a

DWI arrest, "I pulled the defendant over. He was intoxicated." is **not** an acceptable statement of probable cause. The officer needs to give the facts that led to that conclusion, such as slurred speech, glassy bloodshot eyes, the odor of alcoholic beverage, etc.

Probable Cause and Admissibility of Evidence at Trial

KEY POINT

A magistrate determining probable cause may rely on hearsay and other information that would not be admissible under the Rules of Evidence. Additionally, it is not up to the magistrate to determine if the original police contact was lawful or whether the evidence gathered will be admissible at trial.

For example, say that a peace officer pulls a person over, because they don't like the type of car they drive. Once they pull them over, they ask to search the trunk, the person consents, and then the peace officer discovers a kilo of cocaine. The person states, "Oh no, I forgot to take my cocaine out of the car!" Presuming the probable cause affidavit contains all of this information, there **is** probable cause to find the person committed the offense of Possession of a Controlled Substance. This evidence will likely be thrown out by the trial court because there was no reasonable suspicion for the officer to pull the person over, but that is **not relevant** to the determination whether probable cause exists.

a. What if the Probable Cause Affidavit is Insufficient?

COMMON PITFALL

When determining whether probable cause exists following an arrest **without** a warrant, a justice of the peace should not ask the officer who presents the accused to provide additional facts regarding the arrest or "coach" the officer on what to say. Instead, the magistrate should determine whether probable cause exists based only on the information found within the "four corners" of the affidavit submitted by the presenting officer. If the affidavit establishes probable cause, a full Article 15.17 hearing as described below must be conducted. If the affidavit fails to establish probable cause, the accused **must** be immediately released without bond. Additionally, if the magistrate determines that no probable cause existed for the arrest, they must issue written findings to support their decision within 24 hours of the determination and kept with the records of the case. *Code of Criminal Procedure Art. 15.17(h).* For example, "No evidence was found in the affidavit to support an element of the charged offense" or "The affidavit was conclusory in nature."

Even a "PR bond" is not legally allowed if there is no probable cause established for the arrest of the defendant. For more information on bail, and the various types of bonds, please see ***pages 15-26*** of this volume.

Can I Have the Officer Make Minor Adjustments to the Affidavit?

KEY POINT

It is critical for the magistrate to remain neutral, which is why the magistrate should not coach the officer on what else to say to establish probable cause. That said, it is reasonable to point out to the officer a technicality such as failure to sign the affidavit, which doesn't suggest to the officer substantive changes to the document.

Won't I Get in Trouble for Dismissing Serious Criminal Offenses?

KEY POINT

If a magistrate releases a defendant without bond due to finding that probable cause does not exist, it **does not** "dismiss" the case or prevent the defendant from being prosecuted. The magistrate is merely stating that, based on the affidavit, there is not currently enough information to justify holding a defendant in custody, and if a defendant cannot legally be held in custody, they **cannot** be forced to put up any security, even a mere promise, to secure their release from custody. If sufficient evidence is provided, a prosecutor may still file an information, or a grand jury may return an indictment, and an arrest warrant may then be issued against the defendant.

2. Why is Probable Cause Important?

Although this requirement is not listed in the Code of Criminal Procedure, the Supreme Court of the United States has consistently stated that constitutional due process rights require that, "persons arrested without a warrant must promptly be brought before a neutral magistrate for a determination of probable cause." ***County of Riverside v. McLaughlin***.

B. Informing the Defendant of Their Rights

KEY POINT

The accused **must** be brought before a magistrate (either in person or through videoconference) "without unnecessary delay," but not later than 48 hours after the person is arrested. **Note** that many counties have a "24-hour policy," due to the requirement that a magistrate determine whether probable cause exists within 24 hours on misdemeanor arrests where there was no warrant. For more information on that

requirement, see ***page 6*** of this volume. The magistrate can be any magistrate in the county where the person is arrested, or, to provide the required warnings more quickly, any magistrate in the state. If the arrested person is civilly committed as a sexually violent predator under Health and Safety Code Chapter 841 and residing at a civil commitment facility as defined by Penal Code Section 1.07, the magistrate may also choose to perform the required duties at the civil commitment facility. *Code of Criminal Procedure Art. 15.17(a).*

Note that it is now a criminal offense to disrupt a virtual meeting, including by electronic disturbance or hacking. *Penal Code § 42.05(a).* This could be an important tool in maintaining decorum during virtual hearings, but criminal charges should of course be a last resort.

Video Magistration

If an Article 15.17 hearing is required, a magistrate may conduct the hearing by means of a videoconference, which must include **two-way electronic communication of image and sound** between the defendant and magistrate. If you are interested in obtaining a videoconference system, this expense may be paid for using your county's justice court technology fund (or other court technology funds if other judges will also be using the videoconferencing system). *Code of Criminal Procedure Art. 102.0173.*

1. Conducting the Art. 15.17 Hearing

a. Required Admonishments

Article 15.17 provides that a person accused of a criminal offense **must** receive the following admonishments pertaining to his or her constitutional and statutory rights:

- The accused must be informed "of the accusations against him and of any affidavit filed therewith." State the offense the defendant has been charged with and provide them with a copy of the probable cause affidavit submitted by the officer.

- The accused must be informed "of his right to obtain counsel." Please keep in mind that the right to retain counsel differs from the right to have counsel appointed if the accused cannot afford to hire an attorney, discussed on ***page 51*** of this volume. **Every** person accused of **any** crime has the right to retain an attorney.

- The accused must be informed "of his right to remain silent."

- The accused must be informed "of his right to have an attorney present during any interview with peace officers or attorneys representing the state."

- The accused must be informed "of his right to terminate the interview [with peace officers or prosecutors] at any time."

- The accused must be informed "of his right to have an examining trial." The right to have an examining trial applies **only** when the accused has been charged with a **felony**. If the defendant has been charged with a misdemeanor or arrested on an administrative warrant, TJCTC recommends explaining that the right to an examining trial does not apply.

- The accused must be informed "of his right to request the appointment of counsel if the person cannot afford counsel." This right applies only when the accused has been charged with an offense which is potentially punishable by confinement or imprisonment. If the accused has been charged with a misdemeanor punishable by fine only, TJCTC recommends explaining that the accused is not entitled to a court appointed attorney.

- The accused must be informed "that he is not required to make a statement and that any statement made by him may be used against him."

- The accused must be informed "of the procedures for requesting appointment of counsel." Every county must have specific procedures in place for this process. Additionally, a magistrate must "ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time [the Article 15.17 warnings are administered]."

- The accused must be informed that they may file the affidavit described by Article 17.028(f) (stating that they are unable to afford the bond set), if applicable ***(see page 35)***.

Code of Criminal Procedure Art. 15.17(a); ***Miranda v. Arizona***.

Record of the Proceedings

A record (which may be written forms, electronic recordings, etc.) of the communication between the arrested person and the magistrate shall be made and preserved until whichever is earlier — the date that the pretrial hearing ends, or the 91st day after the record is made for a misdemeanor or the 120th day after the record is made for a felony. *Code of Criminal Procedure Art. 15.17(a).*

Additionally, a record shall be made of:

- the magistrate informing the person of the person's right to request appointment of counsel;
- the magistrate asking the person whether the person wants to request appointment of counsel; **and**
- whether the person requested appointment of counsel.

Code of Criminal Procedure Art. 15.17(e).

For more information on requirements for maintaining these and other records, please see Chapter 1 of the *Recordkeeping and Reporting Deskbook*.

b. Interpreter Issues at the 15.17 Hearing

If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person of the rights listed in a manner consistent with Articles 38.30 and 38.31, as appropriate. Article 38.30 deals with the appointment of an interpreter when the English language is not understood. Article 38.31 deals with interpreters for deaf persons.

For resources on locating interpreters and full procedural details, including qualifications and compensation, please view the TJCTC module on the topic, available at **https://www.tjctc.org/onlinelearning/selfpacedmodules.html**.

What About Using a Jailer or Inmate as an Interpreter?

BEST PRACTICE

TJCTC recommends **against** the admittedly common practice of using jailers or inmates as interpreters. Using law enforcement personnel can call into question the neutrality of the translation and using an inmate can call into question the integrity and reliability of the translation. If you feel you have no other valid option, be sure to swear the interpreter in to provide a true and accurate verbatim translation.

c. Waiver of the 15.17 Hearing

The Attorney General's Office has indicated that a person accused of a criminal offense may waive his or her right to receive the oral admonishments required by Article 15.17. ***Attorney General Opinion GA-0993***. Some counties have interpreted this opinion as a green light to ask an accused to waive the entire Article 15.17 hearing. However, the Attorney General's opinion was careful to note that the Article 15.17 hearing includes several components, such as the administration of oral admonishments, setting bail, and providing consular notification when appropriate.

Furthermore, the opinion expressly takes no position on whether other aspects of the Article 15.17 hearing (such as setting bail or providing consular notification) may be waived. Therefore, it is TJCTC's position that **only** the oral admonishments, and not the entire Art. 15.17 hearing, may be waived.

BEST PRACTICE

Finally, a person is not deemed to have waived a right unless he says so plainly, freely, and intelligently. ***Sanchez v. State***. When a person is promised a speedier release from the county jail in exchange for waiving rights, including the right to an Article 15.17 hearing, the waiver is not voluntary. TJCTC believes the best practice is to conduct the Article 15.17 hearing rather than soliciting a waiver of the hearing.

d. Coming into Contact with Bodily Fluids of the Accused

A person who is arrested for a misdemeanor or felony and causes the person's bodily fluids to come into contact with a peace officer, a magistrate, or an employee of a correctional facility where the person is confined shall, at the direction of the court having jurisdiction over the arrested person, undergo a medical procedure or test designed to determine whether the person has a communicable disease.

KEY POINT

The court may direct the person to undergo the procedure or test on its own motion or on the request of the peace officer, magistrate, or correctional facility employee. If the person refuses to submit voluntarily to the procedure or test, the court shall require the person to submit to the procedure or test.

The person performing the procedure or test shall make the test results available to the local health authority, and the local health authority shall notify the peace officer, magistrate, or correctional facility employee, as appropriate, of the test result. *Code of Criminal Procedure Art. 18.22(a).*

e. Ensuring Public Access to the Magistration Process

The Fifth Circuit Court of Appeals has recently held that a closed magistration hearing violates the First Amendment. ***Texas Tribune v. Caldwell County***. In the original case, magistration occurred via videoconference while the defendant was in the county jail. No counsel, family, friends, or press were present at the magistration hearing. The sheriff had a policy of prohibiting access to the jail to observe magistration. The federal district judge found a substantial likelihood that the two news outlets and an advocacy organization would succeed at trial.

The court of appeals recently affirmed the trial court's ruling. The three-judge panel stated, "There can be no question that public access to bail hearings plays a significant positive role in the functioning of bail hearings." While there may be exceptions, they found that there is a presumptive First Amendment right to access to magistration hearings. ***Read the opinion***.

Counties may comply by streaming the proceedings via Zoom and YouTube. This seems to be the most accepted method, because magistration hearings often take place in a secure location in the jail where there could be safety and liability issues for the public to be physically present during the hearings. Other methods of compliance may also be reasonably implemented. Because your county attorney would represent you in any litigation, it's important that you seek their advice on this important issue.

Also be aware, however, that the court may not allow electronic transmission or broadcast of any court proceeding, including an Art. 15.17 hearing, if there is evidence or testimony

offered depicting acts of a sexual nature as described in the sections listed in Government Code § 21.014(a) unless notice is provided to and express consent received from the prosecutor, defendant, **and** victim or victim's parent, guardian, or conservator, as applicable. *Government Code § 21.014(b).*

2. Art. 15.17 Hearing Flowchart

Click Here to Open the Art. 15.17 Hearing Flowchart

C. Consular Notification

When conducting an Article 15.17 hearing, TJCTC recommends asking whether the accused is a citizen of a foreign country. When foreign nationals from most countries are arrested or detained, they may, upon request, have their consular officers notified without delay of their arrest or detention, and may have their communications to their consular officers forwarded **without delay**. In addition, foreign nationals must be advised of these rights without delay.

BEST PRACTICE

"Are You a United States Citizen?"

Be sure to ask this question of every defendant presented, rather than making assumptions or judgments about whether or not someone is a citizen based on factors like name or appearance.

Additionally, if the accused is a citizen of a foreign country identified by international law as a "mandatory reporting country," consular officers **must** be notified of the arrest or detention even if the accused foreign national does not request or want notification. A full list of mandatory reporting countries may be found in the U.S. State Department's guide to "Consular Notification and Access" which we highly recommend reading thoroughly. ***Download the guide***.

CLICK HERE

If you find yourself with a question regarding consular notification, you may contact the Law Enforcement Liaison at the Office of the Attorney General, Criminal Investigations Division, at (512) 463-9570.

D. Setting Bail and Release of the Defendant

KEY POINT

Bail is defined as the security given by a defendant that they will appear before the court and answer the accusation brought against the defendant, and includes both bail bonds and personal bonds, defined below. *Code of Criminal Procedure Art. 17.01.*

The purpose of bail is to obtain the release of the defendant from custody and to secure the defendant's presence in court at the time of trial. ***Ex parte Milburn***. When a defendant is unable to make bail, confinement in jail is **not** designed to exact punishment for the offense charged, but to ensure appearance in trial. ***Bennett v. State***.

Any person shall be eligible for bail unless denial of bail is specifically permitted by the Texas Constitution or other law. *Code of Criminal Procedure Art. 1.07*.

1. The Bail Decision

Without unnecessary delay, and within 48 hours of the defendant's arrest, the magistrate **shall** order, after considering all circumstances, including the factors listed in sub-section a below, that the defendant be:

- granted a personal bond with or without conditions;
- granted a surety or cash bond with or without conditions; **or**
- denied bail in accordance with the Texas Constitution and other law.

Code of Criminal Procedure Art. 17.028(a).

In setting bail the magistrate must impose the least restrictive conditions, if any, and the personal bond or cash or surety bond necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

There is a rebuttable presumption (unless contrary to another law) that bail, conditions of bail, or both, are sufficient to accomplish these objectives. *Code of Criminal Procedure Art. 17.028(b),(c).* See ***page 28*** for information on bond conditions.

a. Factors to Consider in Setting Bail

When making the bail decision, a magistrate **must** consider the following factors:

- The bail and conditions of bail shall be sufficient to give reasonable assurance that the undertaking will be complied with;

- The power to require bail is not to be used to make bail an instrument of oppression;

- The nature of the offense and the circumstances under which the offense was committed are to be considered, including whether the offense is an offense involving violence as defined by Article 17.03 ***(see page 23)*** or involves violence directed against a peace officer;

- The ability to make bail shall be considered, and proof may be taken on this point;

- The citizenship status of the defendant shall be considered;

- The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered; **and**

- Unless the defendant is charged with a fine-only misdemeanor or was issued a citation under Art. 14.06(c), the criminal history record information for the defendant, shall be considered, including any acts of family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail. This must include information obtained through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system (PSRS) developed by OCA. See section b. below for more information on the PSRS.

Code of Criminal Procedure Article 17.15(a).

How Much Should the Bail be for a Given Offense?

Preset bonds are **not** allowed in Texas. There are several factors that you must consider **every** time you are making a bail decision, including ability to pay, nature of the offense, flight risk, and more. It is impossible to assign a dollar amount to a case based only on the

offense. A bail schedule must require the magistrate to consider all of the factors listed in Article 17.15(a) when making a bail decision. *Code of Criminal Procedure Art. 17.028(d).*

Do I Have to Follow the Amount Listed on the Warrant?
The answer to this question depends on what type of warrant it is. For a regular arrest warrant, the bond amount is a **recommended** bond. The magistrate has a duty to consider all of the factors listed above, which may result in the bond amount being increased or decreased.

However, if the warrant is one issued after the trial court has assumed jurisdiction over the case, such as a post-indictment capias, or a motion to revoke, proceed, or adjudicate, the trial court has full control over the amount of the bond, and the magistrate should merely take a bond in the amount that is indicated. For more information on the procedure for these specific types of arrests, please see ***page 52*** of this volume.

Do I Have to Have an Evidentiary Hearing to Make the Bail Decision?
No, unless required by some other law. *Code of Criminal Procedure Art. 17.028(c-1).*

b. Public Safety Reports and the Public Safety Report System

In 2021, the Texas Legislature mandated that OCA develop and maintain a public safety report system for magistrates to use to assist in determining the amount and conditions of release on bail. The system is required to provide to the magistrate:

- identifying information for the defendant,
- information on their criminal history, such as previous convictions or pending charges, including any that involve violence toward a peace officer, other violent offenses, or previous failures to appear following release on bail,
- information on required or discretionary bond condition, **and**
- information on their eligibility for release on a personal bond.

KEY POINT

Effective April 1, 2026, the system must also provide information about whether the defendant is currently on community supervision, parole, mandatory supervision for an

offense; is currently released on bail or participating in pretrial intervention and any related conditions; any outstanding warrants entered into NCIC or TCIC; and any current protective orders applicable to the defendant. *Code of Criminal Procedure Art. 17.021.*

KEY POINT

A magistrate considering the release on bail of any defendant charged with a Class B misdemeanor, or higher-level offense, **must** order that a public safety report on the defendant be generated and provided to the magistrate as soon as practicable, but no later than 48 hours after the defendant's arrest, and must consider the report in determining the amount of bail. If the defendant is charged with only a misdemeanor offense and the public safety report system is unavailable for longer than 12 hours due to technical failure, the magistrate may determine bail without considering the public safety report. *Code of Criminal Procedure Art. 17.022(f).*

A magistrate may also order, prepare, or consider a public safety report in setting bail for a defendant who is not in custody at the time the report is ordered, prepared, or considered. *Code of Criminal Procedure Art. 17.022(g).*

The magistrate, the personal bond office for the county, or any other suitably trained person (including judicial personnel or sheriff's department personnel) may prepare the report, but the magistrate may not order the sheriff or the sheriff's department personnel to prepare the report without the consent of the sheriff. *Code of Criminal Procedure Art. 17.022(a),(b),(c).*

c. Bail Bonds, Personal Bonds, and PR Bonds

KEY POINT

The same factors used to determine the amount of bail set also must determine the other part of the magistrate's bail decision – whether to require a bail bond or allow the defendant to post a personal bond. **Note** that in many situations, a defendant will be ineligible to post a personal bond ***(see page 21)***.

Bail Bonds

A **bail bond** is "a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the [defendant] before a court or magistrate to answer a criminal accusation . . . ." *Code of Criminal Procedure Art. 17.02.* A bail bond is often referred to as a **surety bond** because the defendant's agreement to show up for trial is

guaranteed by the surety, who is liable for payment of the amount of bail if the defendant fails to appear.

A bail bond could also be a **cash bond** instead of a surety bond. Article 17.02 expressly allows a defendant to deposit cash "in the amount of the bond in lieu of having sureties sign the same." Whether the defendant posts a cash bond, or a surety bond is usually up to the defendant, not the magistrate or court. A defendant may be required to post a cash bond only following a bail forfeiture or surety surrender proceeding. *Code of Criminal Procedure Art. 23.05.*

Bail Bond Requirements in Certain Offenses

In addition to the standard requirements, a bail bond for a defendant charged with an offense under Sections 20A.02, 20A.03, 43.02, 43.03, 43.031, 43.032, 43.04, 43.041 or 43.05 of the Penal Code [trafficking of persons, prostitution, and related prostitution offenses] must include the address, identification number, and state of issuance on a valid driver's license or identification card for the defendant and any surety. *Code of Criminal Procedure Art. 17.081.* Additionally, certain bond conditions must be imposed upon release of a defendant charged with these offenses. *See Code of Criminal Procedure Art. 17.465 and the Magistration Bench Cards available on* ***page 77*** *for details.*

KEY POINT

What if a Warrant Says "Cash Bond Only"?

Generally speaking, the magistrate may only set the amount of a defendant's bond. Requiring the defendant to post a cash bond, as opposed to a surety bond, is **not** permitted by Chapter 17 of the Code of Criminal Procedure. ***Attorney General Opinion JM-363***.

COMMON PITFALL

A trial court may require a defendant to post a cash bond in a pending criminal case **only** when the defendant's original bond has been forfeited by the trial court, or the surety on the original bond has surrendered the defendant. *Code of Criminal Procedure Art. 23.05.*

In any other scenario, the magistrate should **not** require the defendant to post a cash bond. For more information on bond forfeiture, please see Chapter 22 of the *Code of Criminal Procedure* and Chapter 3 of the *Criminal Deskbook*. For more information on surety surrender, please see Art. 17.19 of the *Code of Criminal Procedure*, and ***page 38*** of this volume.

Personal Bonds and PR Bonds

A **personal bond** does not require sureties or other security and is simply a sworn oath to pay the bail amount if the defendant does not appear as required. *Code of Criminal Procedure Art. 17.04.* A personal bond may be enforced through a bail forfeiture proceeding under Chapter 22 of the Code of Criminal Procedure just like a bail bond would be.

There is also the option of a **personal recognizance bond**, or **"PR bond"**, which is a personal bond in which the defendant simply agrees to appear for any future hearings or for trial without having to swear to pay any amount in the event he fails to do so.

Trend Toward Release on Personal Bond

Currently, significant attention is being paid to the issue of pretrial release, and how bond issues impact indigent defendants, especially those being accused of nonviolent misdemeanor offenses. These defendants lack the resources to post a bail bond, since even a surety bond generally requires the defendant to post 10% of the total bond amount to the bonding company (which is nonrefundable, even if the defendant subsequently appears.)

KEY POINT

Therefore, many jurisdictions are looking at personal bonds and examining if the goals of bail (securing the defendant's appearance and protecting the community) are met effectively when allowing release on personal bond. Findings are that personal bonds, especially those which include conditions of release, are at least as effective, and in many cases **more** effective than money bonds. For more information on bond conditions, please see ***page 28***.

d. Prohibition of Release on Personal Bond in Certain Cases

Generally, a justice of the peace may, at their discretion, release a defendant on a personal bond. There are, however, some exceptions to this. A magistrate **may not** release a defendant on personal bond who is civilly committed as a sexually violent predator under Chapter 841 of the Health and Safety Code at the time of the alleged offense. Also, only the trial court, which will not be a justice of the peace, may release a defendant on a personal bond if the defendant:

- is charged with an offense under:

- Section 30.02, Penal Code (Burglary),
- Section 71.02, Penal Code (Engaging in Organized Criminal Activity), **or**
- Section 481, Health and Safety Code (Controlled Substances Act), if punishable by imprisonment for a minimum term or maximum fine that is more than a minimum term or maximum fine for a first-degree felony, **or**

- does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate as a condition of personal bond, **or**

- submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body. (**Note**: this bond condition is mandatory depending on the circumstances; see Bench Card 8, available on ***page 77*** for more information.)

Additionally, a defendant **may not** be released on a personal bond, except as provided by Articles 15.21 (because of delayed remand to another county), 17.032 (to seek mental health treatment, ***see page 68***), 17.033 (because of delayed determination of probable cause), or 17.151 (because of delayed trial), if they:

- are charged with an offense involving violence (see below) or an offense under:
  - Section 19.02(b)(4) (murder as a result of manufacture or delivery of a controlled substance),
  - Section 22.07 (terroristic threat) if the offense is punishable as a Class A misdemeanor or higher,
  - Section 25.07 (violation of certain bond conditions), **or**
  - Section 46.04(a) (unlawful possession of firearm) of the Penal Code; **or**

- while released on bail, parole, or community supervision for an offense involving violence, are charged with committing **any felony or** any offense under the following sections of the Penal Code:
  - Section 22.01(a)(1) (Assault),
  - Section 22.05 (Deadly Conduct), **or**
  - Section 42.01(a)(7) or (8) (Disorderly Conduct Involving Firearm).

Code of Criminal Procedure Art. 17.03(b-2).

For purposes of the above, an "offense involving violence" means an offense under the following sections of the Penal Code:

- Section 19.02 (Murder),
- Section 19.03 (Capital Murder),
- Section 20.03 (Kidnapping),
- Section 20.04 (Aggravated Kidnapping),
- Section 20A.02 (Trafficking of Persons),
- Section 20A.03 (Continuous Trafficking of Persons),
- Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Person),
- Section 21.11 (Indecency with a Child),
- Section 22.01(a)(1) (Assault), if the offense is:
  - punishable as a felony of the second degree, **or**
  - punishable as a felony and involves family violence.
- Section 22.011 (Sexual Assault),
- Section 22.02 (Aggravated Assault),
- Section 22.021 (Aggravated Sexual Assault),
- Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual),
- Section 25.072 (Repeated Violation of Certain Court Orders or Bond Conditions),
- Section 25.11 (Continuous Violence Against the Family),
- Section 29.03 (Aggravated Robbery),
- Section 38.14 (Taking or Attempting to Take Weapon from Certain Persons),
- Section 43.04 (Aggravated Promotion of Prostitution), if the defendant is not alleged to have engaged in conduct constituting an offense under Section 43.02(a) (Prostitution),
- Section 43.05 (Compelling Prostitution),
- Section 43.25 (Sexual Performance by a Child).

e. Required Release on Personal Bond in Certain Cases

There are also situations in which a justice of the peace is **required** to release the defendant on a personal bond. These include the following:

- As discussed on ***page 6***, if a defendant is arrested without a warrant, and a magistrate is unable to determine if probable cause exists, in a misdemeanor case the defendant must be released **24 hours** after arrest on a bond not to exceed **$5,000**, and in felony cases, must be released **48 hours** after arrest on a bond not to exceed **$10,000**. If the defendant is unable to post a bail bond in the required amount, they **must** be released on a personal bond. *Code of Criminal Procedure Art. 17.033.*

KEY POINT

- If a defendant is arrested on an out-of-county warrant and fails or refuses to give bail, and the county that issued the warrant does not take charge of the arrested person before the **11th day** after the person is committed to the jail in the county where they were arrested, then a magistrate of the county where the person was arrested shall release the arrested person on personal bond without sureties or other security. The personal bond shall then be forwarded to the sheriff of the county where the offense is alleged to have been committed or to the court that issued the arrest warrant. *Code of Criminal Procedure Article 15.21.*

- If a magistrate is provided written or electronic notice of credible information that may establish reasonable cause to believe that the defendant has a mental illness or an intellectual disability, the magistrate **shall** conduct the proceedings described by Code of Criminal Procedure Article 17.032.If each of the five conditions listed under Article 17.032(b) apply, then the magistrate shall release the defendant on personal bond (pursuant to the requirements of Article 17.032) unless good cause is shown otherwise. For more information on a magistrate's role regarding defendants exhibiting mental illness or intellectual disability, please see ***page 64*** of this volume.

f. Can the Defendant be Denied Bail?

KEY POINT

A justice of the peace generally **cannot** order that a defendant is denied bail at the time of the defendant's original arrest. Although bail may be denied in certain cases, this determination may only be made by a district judge. ***Ex parte Moore***.

The Texas Constitution provides for the denial of bail only by a district judge where an accused:

- ***has been convicted of two previous felonies;***
- ***is charged with a second felony while released on bond for a prior felony for which the person has been indicted; or***
- ***is accused of a non–capital felony involving the use of a deadly weapon after being convicted of a prior felony.***

Texas Constitution Art. 1, § 11a; Ex parte Smith.

Additionally, bail may be denied in capital cases where the proof of accused's guilt is evident. Code of Criminal Procedure Art. 1.07. Only a district judge may deny bail in these cases. Texas Constitution Art. 1, § 11a.

However, when a defendant violates bond conditions related to the safety of the victim of the community in a family violence case or a case involving a child victim, in some instances a magistrate may have the option to deny subsequent bail following a hearing. *Texas Constitution Art. 1, §§ 11b, 11c; Code of Criminal Procedure Arts. 17.152, 17.153.*

In addition, if a defendant is accused of committing:

- Murder (including capital murder);
- Aggravated assault if the person caused serious bodily injury or used a firearm, club, knife, or explosive weapon during the assault;
- Aggravated kidnapping;
- Aggravated robbery;
- Aggravated sexual assault;
- Indecency with a child; **or**
- Trafficking or continuous trafficking of persons;

the state may demonstrate at a hearing either that by a preponderance of evidence that bail is insufficient to prevent willful nonappearance ***or*** by clear and convincing evidence that bail is insufficient to reasonably ensure the safety of the community, law enforcement, and any victim of the offense.

If the state meets either burden of proof, the magistrate shall deny bail. If a hearing is held and bail is granted, the magistrate must prepare a written order that includes findings of fact and a statement explaining the justification for granting bail and the determinations made at the hearing. The defendant is entitled to have counsel at the hearing. *Texas Constitution, Art. 1, § 11d.*

What if the Warrant Says, "No Bond"?

A warrant stating "no bond" may fall into one of several categories:

- It may mean that the issuing magistrate hasn't determined a bond amount, in other words, "no bond determined." In this case, the magistrate should set and take a bond.

- It may mean that the warrant is for an offense described above where the defendant is not eligible for bond due to violation of a bond condition in a family violence case. In this case, the magistrate should inform the defendant that they are not eligible for bond.

- It may mean that the warrant is for an offense described above where a district judge may deny bail. In this case, the magistrate should meet with county officials to determine if a district judge can perform the Art. 15.17 hearing in a timely fashion, or if the magistrate should perform it and set bond.

- It may mean that the warrant was issued by the trial court, which has the authority to deny bond for certain warrants until a hearing can be held. In this case, the magistrate should inform the defendant that they are not eligible for bond.

2. Who Can Set Bail?

a. Training Requirements

In order to set bail for any offense punishable as a Class B misdemeanor or higher-level offense, a magistrate must be in compliance with educational requirements. These include an eight-hour course on magistrate duties within 90 days of taking office (or by December 1, 2022, for magistrates who were in office on April 1, 2022), including a DPS course on accessing criminal history records. Additionally, a two-hour course on magistrate's duties

must be completed each state fiscal biennium (the two-year period beginning on September 1 in odd-numbered years, such as September 1, 2023-August 31, 2025). *Code of Criminal Procedure Arts. 17.023, 17.024.*

b. Bond Set by Jailer or Peace Officer

KEY POINT

In a misdemeanor case, a sheriff, a peace officer, or a jailer "may…take defendant's bail." *Code of Criminal Procedure Art. 17.20.* If a magistrate is not available, the sheriff, peace officer, or jailer may determine the amount of bail that is required. ***Attorney General Opinion No. JM–1217***; ***Hokr v. State***. In determining that amount, the public safety report regarding the defendant's criminal history information system must be considered, as required by Art. 17.15(a)(6), unless the offense is a fine-only misdemeanor, or the defendant received a citation under Art. 14.06(c). *Code of Criminal Procedure Art. 17.20(b),(c).*

In a felony case, the sheriff, peace officer, or jailer may take bail set by the court or magistrate with jurisdiction, if that court or magistrate is unavailable. If no amount has been set, the officer may set an amount that is considered reasonable and in compliance with the factors discussed on ***page 17***. Before taking bail in a felony, the officer must obtain the defendant's criminal history information through DPS and the public safety report system ***(see page 18)***. *Code of Criminal Procedure Art. 17.22(a),(b).*

KEY POINT

However, whether the case is a misdemeanor or felony, if the defendant is currently charged with or has been previously convicted of an offense involving violence as defined by Art. 17.03, the sheriff, peace officer, or jailer **may not** determine the amount of bail but may take bail in the amount set by the court or magistrate having jurisdiction over the defendant. *Code of Criminal Procedure Arts. 17.20(d); 17.22(c).*

COMMON PITFALL

Additionally, a sheriff, peace officer, or a jailer may not take a personal bond of the defendant. Only a magistrate may release a defendant on a personal bond. *Code of Criminal Procedure Art. 17.03.* If a defendant is not presented to a magistrate for a determination of probable cause in a timely manner and cannot post bail, the jail **must** contact a magistrate so that the defendant may be released on personal bond in accordance with Article 17.033 of the CCP.

c. Release on Bail of Defendant Charged with Felony Committed While on Bail for a Previous Felony Offense

If a defendant who is already on bail for a previous felony offense is taken before a magistrate for a new felony offense, special rules apply to who can release that defendant on bail.

- If the offense occurred **in the same county as the previous offense**, the defendant may only be released on bail by the court in which the previous offense is pending or another court designated in writing by that court. See ***page 42*** for a discussion of how to determine in which court a case is pending.

- If the offense occurred in a different county from the previous offense, electronic notice of the new offense must be promptly given to the court before whom the original offense is pending (or a court designated in writing by that court) in order to allow that court to re-evaluate the bond decision, determine if bail conditions were violated, or take any other applicable action. Effective April 1, 2026, this notice must be given to the individual designated by the local administrative district judge to receive electronic notices for the county in which the previous offense was committed, **no later** than the next business day after the defendant is taken before the magistrate. Upon receiving this notice, the court before which the previous offense is pending must consider whether to revoke or modify the pervious bond or otherwise re-evaluate the bond decision.

Code of Criminal Procedure Art. 17.027.

3. Bond Conditions

Regardless of whether the accused is released on a bail bond or a personal (or PR) bond, Texas law authorizes a magistrate to place conditions upon the defendant's release in order to ensure community safety and ensure the defendant's appearance in court. *Code of Criminal Procedure Art. 17.40.*

Note that any signed order issued by a magistrate under the Code of Criminal Procedure or pertaining to any criminal case must include, in addition to the magistrate's signature, the magistrate's name in legible handwriting, legible typewritten form, or legible stamp print. *Code of Criminal Procedure Art. 2A.1521.*

The magistrate has broad discretion in setting these conditions, as long as they are reasonable and related to these goals. The magistrate must provide the defendant with written notice of the bond conditions, as well as the penalties for violating the conditions, and must make a record of that notice. *Code of Criminal Procedure Art. 17.51(e),(f),(g).*

KEY POINT

Additionally, in some instances, Texas law **requires** the magistrate who conducts the Article 15.17 hearing to set certain bond conditions, discussed below.

If a community supervision and corrections department (CSCD) is monitoring a defendant's compliance with their bond conditions, the CSCD may charge the defendant $25-$60 per month for those services. *Government Code § 76.015.*

a. Ignition Interlock Devices

If the accused is alleged to have committed Intoxication Assault, Intoxication Manslaughter, Driving While Intoxicated with Child Passenger, or a second or subsequent offense of Boating While Intoxicated with Child Passenger or Driving, Boating, or Flying While Intoxicated, the magistrate **shall order** the defendant, as a condition of bond, to:

- have an ignition interlock device installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, **and**
- not operate any motor vehicle unless the vehicle is equipped with that device.

Code of Criminal Procedure Art. 17.441.

KEY POINT

The mandatory interlock ignition device requirement may be waived **only** if the magistrate finds that to require the device would not be in the best interest of justice.

Designation of Monitoring Agency for Ignition Interlock Device

Additionally, the magistrate may, but is not required to, designate an appropriate agency to verify the installation of the ignition interlock device and to monitor the device. The magistrate may also authorize the designated monitoring agency to collect a monthly monitoring reimbursement fee.

The monitoring reimbursement fee must be set by the county auditor in an amount "to be sufficient to cover the cost incurred by the designated agency in conducting the verification or providing the monitoring service." The fee may not exceed $10.00.

The magistrate has broad discretion to determine what constitutes an "appropriate agency." Examples include a local Community Supervision and Corrections Department, a local District Attorney's Office, or the magistrate's own court staff. For a list of CSCDs throughout Texas, please see the ***Resources*** section of this volume.

Ignition Interlock Devices as Bond Condition in Other Cases

Article 17.40 of the Code of Criminal Procedure authorizes a magistrate to "impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community."

Therefore, a magistrate may also order the accused to install an ignition interlock device following the commission of any first-time driving while intoxicated offense, or any other offense, if the magistrate believes the condition is reasonable and related to community safety.

b. DNA Specimen Required on Arrest for Felony Offense

A magistrate **shall** require as a condition of release on bail or bond of a defendant, as described by Section 411.1471(a) of the Government Code, that the defendant provide to a local law enforcement agency one or more specimens for the purpose of creating a DNA record under Subchapter G, Chapter 411, Government Code. *Code of Criminal Procedure Art. 17.47.*

KEY POINT

Effective September 1, 2023, "defendants described by Section 411.1471(a) of the Government Code" includes any defendant arrested for a felony offense.

Note that often this will have already taken place before the defendant is magistrated, in which case the condition of release is satisfied, there is no requirement that a second specimen is obtained.

c. Other Mandatory and Optional Bond Conditions Chart

Several other statutes also authorize or require Texas magistrates to set specific conditions of bond. These requirements may be found on Bench Card Number 8 in the TJCTC Magistration Bench Cards, ***see page 77***.

4. Pretrial Release and Bond Condition Reporting

a. Bail Form and Pretrial Release Reporting

Bail Form

OCA has promulgated a bail form to be completed for every defendant charged with a Class B misdemeanor or higher-level offense. The form must:

- State the cause number, if available, the defendant's name and date of birth, and the offense for which the defendant was arrested;
- State the name and office or position of the person setting bail;
- Require the person setting bail to:
  - Identify the bail type, the amount of the bail, and any conditions of bail;
  - Certify that the person considered each factor provided by Art. 17.15(a);
  - Certify that the person considered the information provided by the public safety report system ***(see page 18)***; **and**
- Be electronically signed by the person setting bail, or the person releasing a defendant on any jailable offense under the authority of a standing order related to bail.

Government Code § 72.038.

The magistrate must submit the bail form promptly, and no later than 48 hours after bail is set, through the public safety report system. *Code of Criminal Procedure Art. 17.022(d); Government Code § 72.038(c).*

Additionally, the clerk of each court setting bail in criminal cases, as part of their monthly reporting, must report to OCA:

- The number of defendants for whom bail was set after arrest, including:
  - The number for each category of offense;
  - The number of personal bonds; **and**
  - The number of surety or cash bonds;

- The number of defendants released on bail who subsequently failed to appear;

- The number of defendants released on bail who subsequently violated a condition of release; **and**

- The number of defendants who committed an offense while released on bail or community supervision.

Government Code § 71.0351.

b. Reporting Bond Conditions on Violent Offenses or Stalking to the County Sheriff, TCIC, Protected Persons, and Victims

KEY POINT

Magistrates have a duty to notify the sheriff of any bond condition imposed on a defendant for a violent offense or for stalking under § 42.072 of the Penal Code.

Note that the definition of a violent offense for this purpose is different than the definition of a violent offense which restricts a defendant from being released on a personal bond ***(see page 23)***.

Additionally, a magistrate **must** notify the sheriff in any case involving a violent offense or stalking offense of any revocation of bond that contains a condition of release, any modification of a condition of bond in any case, or any disposition of a case involving conditions of release involving a violent offense. The notification should occur as soon as practical, but **no later than the day after the issuance of an order releasing the defendant on bond**. *Code of Criminal Procedure Art. 17.50 (b),(c).*

Violent Offense

For purposes of this statute, "violent offense" includes murder, capital murder, kidnapping, aggravated kidnapping, indecency with a child, sexual assault, aggravated assault, aggravated sexual assault, injury to a child or elderly or disabled person, aggravated robbery, continuous sexual abuse of young child or disabled person, continuous trafficking of persons, or any offense involving family violence as defined by Family Code § 71.004. *Code of Criminal Procedure Art.17.50(3).*

The report notifying the sheriff of new bond conditions must contain:

- The identifying information listed in Government Code § 411.042(b)(6);
- The name and address of any person the condition of bond is intended to protect as well as the name and address of any victim of the alleged offense if different;
- The date the order releasing the defendant on bond was issued; **and**
- The court that issued the order releasing the defendant on bond.

DPS has developed a form to facilitate this report.

KEY POINT

The sheriff is then required to either add or remove, as applicable, the condition of bond from the statewide law enforcement information system maintained by DPS, also known as the Texas Crime Information Center (TCIC). This addition or removal should be done as soon as practical but must be done by the next business day after receiving the information from the magistrate. *Code of Criminal Procedure Art. 17.50(d).*

Additionally, the court **must** send any order imposing a bond condition in a violent offense or stalking offense to any named person that the condition is intended to protect, as well as any victim of the alleged offense, if different. **The order must be sent no later than the next business day after the court issued the order.** *Code of Criminal Procedure Art. 17.50(e).*

c. Reporting Bond Conditions in All Cases to the County Sheriff and State's Attorney

KEY POINT

As soon as possible, but no later than the next business day after a magistrate imposes, modifies, or removes a condition of bond, the clerk must send a copy of the order to the appropriate attorney representing the state, and the sheriff of the county where the defendant lives. *Code of Criminal Procedure Art. 17.51(a).*

Sending the order may only be delayed if the clerk lacks information needed to ensure service and enforcement. *Code of Criminal Procedure Art. 17.51(b).*

Additionally, if the order prohibits a defendant from going to or near a childcare facility or school, the clerk must send a copy of the order to the facility or school. *Code of Criminal Procedure Art. 17.51(c).*

The clerk may send this information electronically or by any manner that can be accessed by the recipient. *Code of Criminal Procedure 17.52(d).*

A chief of police or sheriff receiving a copy of an order described above must, as soon as practicable but no later than the 10th day after the copy was received, enter the information into the appropriate statewide law enforcement database. *Code of Criminal Procedure Art. 17.52.*

5. Release of the Defendant or Failure to Make Bail

Generally, when the accused has given the required bond, either to the magistrate or the officer having him in custody, they shall be **immediately** released. *Code of Criminal Procedure Art. 17.29(a).*

a. Release of Defendant Charged with Fine-Only Misdemeanor Without Bail

After an accused person charged with a misdemeanor punishable by fine only, **with no previous convictions other than fine-only misdemeanors**, is taken before a magistrate and the magistrate has identified the accused with certainty, the magistrate **may** release the accused without bond and order the accused to appear at a later date for arraignment in the applicable justice court or municipal court. The order **must** state in writing the time, date, and place of the arraignment, and the magistrate must sign the order. The accused **shall** receive a copy of the order on release. This provision does not apply to a defendant who is civilly committed as a sexually violent predator under Health and Safety Code Chapter 841 at the time of the offense. *Code of Criminal Procedure Art. 15.17(b).*

b. Delayed Release Following Family Violence Arrest

The release of a person who has been arrested or held without a warrant in the prevention of family violence must be delayed if there is probable cause to believe the violence will continue if the person is immediately released. The head of the agency arresting or holding such a person shall hold the person for a period of **four hours** after bond has been posted. *Code of Criminal Procedure Art. 17.291(b).*

A magistrate can extend this period for **up to 24 hours** if the magistrate issues a written order directed to the person having custody of the detained person concluding that the violence would continue if the person were released. The magistrate can extend the period **up to 48 hours** if probable cause exists to believe that the person committed the instant offense and that, during the 10-year period preceding the date of the instant offense, the person has been arrested:

- on more than one occasion for an offense involving family violence, **or**

- for any other offense, if a deadly weapon, as defined by § 1.07, Penal Code, was used or exhibited during commission of the offense or during immediate flight after commission of the offense.

Code of Criminal Procedure Art. 17.291(b).

c. If the Defendant Can't Afford to Post Bail

A defendant who is charged with an offense punishable as a Class B misdemeanor or a higher-level offense and who is unable to give bail in the amount required by a bail schedule or standing order, must be warned of the right to file an affidavit stating they are unable to post the bail. *Code of Criminal Procedure Art. 15.17(a).*

The defendant must be provided with the opportunity to file with the applicable magistrate, a sworn affidavit in substantially the following form:

"On this ___ day of _____, 2____, I have been advised by _____ (name of the court or magistrate, as applicable) of the importance of providing true and complete information about my financial situation in connection with the charge pending against me. I am without means to pay $_____ and I hereby request that an appropriate bail be set. (signature of defendant)."

The defendant must also complete a form to allow the magistrate to assess the information relevant to the defendant's financial situation. The magistrate must ensure that reasonable assistance in completing the affidavit and/or form is provided. *Code of Criminal Procedure Art. 17.028(f),(g),(g-1).*

The form must be the same form used to request the appointment of counsel or a form issued by OCA. Forms complying with the statutory requirements are available under the Magistration Forms section on the TJCTC forms page.

The affidavit may be filed at any time before or during the bail decision proceeding. A defendant who files an affidavit is entitled to a prompt review by the magistrate on the bail amount. The review may be conducted by the magistrate making the bail decision or may occur as a separate pretrial proceeding. The magistrate shall consider the facts presented and the rules established by Article 17.15(a) and shall set the defendant 's bail.

If the magistrate does not set the defendant ’s bail in an amount below the amount required by the bail schedule or standing order, the magistrate must issue written findings of fact supporting the bail decision. *Code of Criminal Procedure Art. 17.028(h).*

The judges of the courts trying criminal cases and other magistrates in a county must report to OCA if a review of the bail amount after the defendant filed such an affidavit was not held within 48 hours of the defendant’s arrest. If a delay occurs that will cause the review to be held later than 48 hours after the defendant ’s arrest, the magistrate or an employee of the court or of the county in which the defendant is confined must provide notice of the delay to the defendant ’s counsel, or to the defendant if the defendant does not have counsel. *Code of Criminal Procedure Art. 17.028(i).*

d. Release of Defendant Who Fails to Make Bail

A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

- **90 days** from the commencement of his detention if he is accused of a felony,
- **30 days** from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days,
- **15 days** from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less, **or**
- **five days** from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

These time restrictions **do not** apply to a defendant who is:

- serving a sentence of imprisonment for another offense while the defendant is serving that sentence;
- being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;
- incompetent to stand trial, during the period of the defendant's incompetence;
- civilly committed as a sexually violent predator under Health and Safety Code Chapter 841; **or**

- being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

Code of Criminal Procedure Art. 17.151.

See ***page 35*** for procedures when the defendant cannot afford to post the bond amount determined for the defendant's release.

E. Bond Modification, Bond Revocation, and Surety Surrender

1. Bond Modification

The magistrate or court before which the prosecution is pending ***(see page 42)*** may modify the bond order if it is defective, excessive, or insufficient, if the sureties are not acceptable, or for any other good and sufficient cause. However, a bond cannot be increased due to waiving the right to counsel or requesting the assistance of, or appointment of counsel. *Code of Criminal Procedure Art. 17.09.* If a new bond is required, the magistrate or court may issue an arrest warrant or summons to bring the defendant in.

BEST PRACTICE

While there is debate over whether a Public Safety Report (PSR) must be considered before modifying bond, a recent opinion from the Court of Criminal Appeals indicates that it is at minimum a best practice. All the factors listed in Art. 17.15 must be considered, and TJCTC recommends using a PSR to review the defendant's criminal history, which is a required consideration. ***Ex parte Gayosso***.

KEY POINT

The magistrate or court **must** give notice to the state, and an opportunity for a hearing upon request by the state, or by the defendant or defendant's attorney, before **reducing** the bond on a defendant charged with:

- Trafficking of Persons or Continuous Human Trafficking,
- Criminal Solicitation, if the offense is punishable as a felony of the first degree,
- Murder or Capital Murder,
- Aggravated Kidnapping,
- Indecency with a Child,
- Sexual Assault or Aggravated Sexual Assault,

- Injury to a Child, Elderly Individual, or Disabled Individual, if the offense is punishable as a felony of the first degree and the victim of the offense is a child,
- Aggravated Robbery,
- Burglary, if the actor committed the offense with the intent to commit a felony under §§ 21.02, 21.11, 22.011, 22.021, or 25.02, Penal Code,
- Compelling Prostitution,
- Sexual Performance by a Child,
- Subsequent Texas Controlled Substance Act offenses for which punishment is increased under § 481.140 of that code (Use of Child in Commission of Offense) or §§ 481.134(c),(d),(e), or (f) of that code (Drug-free Zones), **or**
- Any felony committed while the defendant is civilly committed as a sexually violent predator under Health and Safety Code Chapter 841.

Code of Criminal Procedure Art. 17.091.

2. Bond Revocation

If the defendant fails to comply with a condition of their release, the magistrate or court before which the prosecution is pending ***(see page 42)*** may issue a warrant or summons to have the defendant re-arrested and brought before the magistrate for a revocation hearing.

If it is shown by a preponderance of the evidence that the defendant violated the terms of their release, they may be admitted to a new bond, or held without bond until trial. *Code of Criminal Procedure Art. 17.40(b).* However, there are limitations on how long a defendant may remain in jail pending trial. For more information on those limitations, see ***page 36*** of this volume.

3. Surety Surrender

"Surety surrender" refers to the procedure when a surety (such as a bail bondsman) surrenders a defendant back into the custody of law enforcement and is discharged from liability on the bail bond for that defendant. After a surety surrenders a defendant, the defendant will have to give a new bond in order to be released from custody.

Surety surrender must take place prior to bond forfeiture. For more information about bond forfeiture, see Chapter 3 of the *Criminal Deskbook*.

The magistrate or court before which the prosecution is pending ***(see page 42)*** must follow certain procedures for surety surrender as outlined below.

Depending on the circumstances there are three different options for how surety surrender can happen:

- **Option 1**: The surety may surrender the defendant into the custody of the sheriff of the county where the prosecution is pending.
- **Option 2**: The surety may deliver an affidavit stating that the defendant is currently incarcerated.
- **Option 3**: The surety may file an affidavit of their intention to surrender in order to have an arrest warrant issued for the defendant.

Option 1: The surety may surrender the defendant into the custody of the sheriff of the county where the prosecution is pending.

Once the surety delivers the defendant to the sheriff, the sheriff should provide a verification to the magistrate or court where the prosecution is pending. The magistrate or court should then follow the post-verification steps below. *Code of Criminal Procedure Art. 17.16(a)(1).*

Option 2: The surety may deliver an affidavit stating that the defendant is currently incarcerated.

The affidavit must be delivered to the sheriff of the county in which the prosecution is pending and delivered to the office of the prosecuting attorney. It must state that the defendant is in:

- federal custody (but the surety will not be relieved from liability on the bond if the defendant is in federal custody to determine whether the defendant is lawfully present in the US),

- the custody of any state, **or**

- the custody of any county in Texas.

Code of Criminal Procedure Art. 17.16(a)(2), (a-1).

When the sheriff receives the affidavit, the sheriff must verify whether the defendant is incarcerated as claimed in the affidavit. If the sheriff verifies that the defendant is incarcerated, the sheriff must notify the magistrate or court. The verification of the incarceration and a copy of the affidavit from the surety must be filed with the magistrate or the court, and a copy of the verification must also be delivered to the office of the prosecuting attorney. *Code of Criminal Procedure Art. 17.16(b),(f).*

Once the sheriff has verified the incarceration, the bond is discharged, and the surety is released from any liability on it. The sheriff shall then place a detainer against the defendant with the appropriate officials in the jurisdiction in which the defendant is incarcerated. A **detainer** is a request for that jurisdiction to let the sheriff's office know before they release the defendant. *Code of Criminal Procedure Art. 17.16(c),(e).*

When the Magistrate or Court Receives Verification of Incarceration

Upon receiving notice that the incarceration has been verified by the sheriff, the magistrate or court must direct the clerk of the court to issue a capias for the arrest of the defendant, unless:

- a warrant has been issued for the defendant's arrest and remains outstanding; **or**
- the issuance of a capias would otherwise be unnecessary for the purpose of taking the defendant into custody.

Code of Criminal Procedure Art. 17.16(c),(d).

The magistrate or court may also issue a summons instead of a capias. If the defendant does not appear in response to the summons, a capias can be issued at that time. *Code of Criminal Procedure Art. 15.03.*

Surety Liable for Expenses of Returning Defendant to Custody

A surety is liable for all reasonable and necessary expenses incurred in returning the defendant into custody of the sheriff of the county in which the prosecution is pending. *Code of Criminal Procedure Art. 17.16(g).*

Option 3: The surety may file an affidavit of their intention to surrender in order to have an arrest warrant issued for the defendant.

Before the affidavit may be filed, the surety must first notify the defendant's attorney, if any, of the surety's intention to surrender the defendant. The notice may be provided in any manner allowed by Rule 21a.

Where the Affidavit is Filed and Contents

The surety **must** file the affidavit with the magistrate or court and **must** state in it:

- the court and cause number of the case,
- the name of the defendant,
- the offense with which the defendant is charged,
- the date of the bond,
- the cause for the surrender, **and**
- that notice of the surety's intention to surrender the principal has been given to the principal's attorney, if any, as required by this subsection.

Code of Criminal Procedure Art. 17.19(a).

Additionally, if the offense with which the defendant is charged is classified as a felony under the Penal Code, the surety must, before filing the above affidavit, notify the prosecutor with jurisdiction in the case that the surety intends to surrender the principal. *Code of Criminal Procedure Art. 17.19(a-1).*

If the magistrate or court with jurisdiction is not available, the surety may deliver the affidavit to any other magistrate in the county. *Code of Criminal Procedure Art. 17.19(c).*

Issuance and Execution of the Warrant, Capias, or Summons

If a **magistrate** finds that there is cause for the surety to surrender the defendant, the magistrate **must** issue an arrest warrant for the defendant. If a **court** finds that there is cause for the surety to surrender the defendant, the court must issue a capias for the defendant. *Code of Criminal Procedure Art. 17.19(b).*

The arrest warrant or capias shall be issued to the sheriff of the county in which the case is pending, and a copy of the arrest warrant or capias shall be issued to the surety or his agent. *Code of Criminal Procedure Art. 17.19(d).*

The arrest warrant or capias may be executed by a peace officer, a security officer, or a private investigator licensed in this state. *Code of Criminal Procedure Art. 17.19(e).*
The magistrate or court may also issue a summons instead of an arrest warrant or capias. If the defendant does not appear in response to the summons, an arrest warrant or capias can be issued at that time. *Code of Criminal Procedure Art. 15.03.*

Affirmative Defense to Liability on the Bond for the Surety
It is an affirmative defense to any liability on the bond that:

- the magistrate or court refused to issue a capias or warrant of arrest for the principal; **and**
- after the refusal to issue the capias or warrant of arrest, the principal failed to appear.

Code of Criminal Procedure Art. 17.19(b)

Contest of Surrender for No Reasonable Cause
If a defendant is surrendered under Option 3, and the defendant, the defendant's attorney, or an attorney representing the state determines that the surrender was without reasonable cause, they may contest the surrender in the court that authorized the surrender.

If the court finds that the surrender was without reasonable cause, the court may require the surety to refund to the defendant all or part of the fees paid for execution of the bond. The court shall identify the fees that were paid to induce the surety to execute the bond regardless of how those fees are described. *Occupations Code § 1704.207.*

4. Who Presides Over Bond Modification, Bond Revocation, and Surety Surrender Proceedings?

The magistrate or court before which the prosecution is currently pending presides over the proceedings:

- Following a warrantless arrest (and before a formal charging instrument is filed), the magistrate who conducts an Art. 15.17 hearing exercises sole jurisdiction over bail issues to the exclusion of other courts. For example, another judge could not change a surety bond to a personal bond. ***Guerra v. Garza***; ***Attorney General Opinion GA-1021***.

- If the arrest was based on a warrant (and no formal charging instrument has been filed yet), the magistrate who issued the warrant has jurisdiction over bail issues.

- Once a formal charging instrument is filed (a complaint, information, or indictment), the trial court has jurisdiction over any bail issues. ***Ex parte Clear***.

Exception: For a surety surrender proceeding under **Option 3** as described above, if the magistrate or court before which the prosecution is pending is not available, **any** magistrate in the county may handle it. *Code of Criminal Procedure Art. 17.19(c)*.

The Bottom Line:

Whether the arrest was warrantless or under arrest, **once the case is filed with the trial court**, the trial court has jurisdiction over any motions or issues related to bond.

Before the case is filed with the trial court, the magistrate issuing the warrant has jurisdiction **if the arrest was under warrant**.

Before the case is filed with the trial court, the magistrate performing the 15.17 hearing has jurisdiction **if there was a warrantless arrest**.

F. Magistrate's Order of Emergency Protection and Family Violence Issues

A Magistrate's Order for Emergency Protection (commonly referred to as an **EPO**, **emergency protective order**, or **MOEP**) is a separate order—as opposed to a bond condition—which may be issued at a defendant's appearance before a magistrate after arrest for an offense involving **family violence** or an offense under Penal Code Sections:

- 20A.02 (human trafficking),
- 20A.03 (continuous human trafficking),
- 22.011 (sexual assault),
- 22.012 (indecent assault),
- 22.021 (aggravated sexual assault), **or**
- 42.072 (stalking).

Code of Criminal Procedure Art. 17.292(a).

Delayed Release After Family Violence Arrest

For more information on delaying the release of certain defendants arrested on offenses involving family violence, please see ***page 34*** of this volume.

"Family violence" includes:

- ***Violence by member of family or household against another member intended to result in physical harm, bodily injury, assault or sexual assault or a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault. Family Code § 71.004(1).***
- ***Abuse by member of family or household toward a child including:***
    - ***physical injury or a genuine threat of substantial harm***
    - ***sexual conduct harmful to a child's mental, emotional, or physical welfare***
    - ***compelling or encouraging the child to engage in sexual conduct. Family Code §§ 71.004(2), 261.001(1),(C),(E),(G).***
- ***An act by an individual against another with whom that person has or has had a dating relationship, or because of the victim's relationship with someone the individual had a previous dating relationship with.***
    - ***Intended to result in physical harm, bodily injury, assault, or sexual assault or a threat thereof. Family Code §§ 71.004(3), 71.0021(b),(c).***

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1. Ability to Issue an EPO

Note that any signed order issued by a magistrate under the Code of Criminal Procedure or pertaining to any criminal case must include, in addition to the magistrate's signature, the magistrate's name in legible handwriting, legible typewritten form, or legible stamp print. *Code of Criminal Procedure Art. 2A.1521.*

A magistrate can **only** issue an EPO after the defendant's arrest for an **eligible offense**. An alleged victim **cannot** come get an EPO from a magistrate without the alleged offender being arrested. A magistrate **cannot** issue an EPO after an arrest for an offense other than those listed, even if evidence indicates family violence may be present. For example, Scarface is arrested for Possession of Controlled Substance. When arrested, he slaps his girlfriend and says it is her fault. This information is in the arrest report, but no charges are

filed against Scarface other than POCS. The magistrate **would not** be able to issue an EPO in this scenario.

a. Mandatory Issuance of an EPO

The magistrate **shall** issue an EPO if the arrest is for a family violence offense that involves **serious bodily injury** to the victim or the use or exhibition of a **deadly weapon** during the commission of an assault. If the accused is charged with an offense which authorizes a magistrate to issue an emergency protective order, but the offense **does not** involve serious bodily injury or the use or exhibition of a deadly weapon, issuance of the EPO is discretionary with the magistrate. *Code of Criminal Procedure Art. 17.292(b).*

Serious Bodily Injury and Deadly Weapon

"**Serious bodily injury**" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. *Penal Code § 1.07(46).*

"**Deadly weapon**" means a firearm, or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

2. Discretionary Issuance of an EPO

The magistrate **may** (but does not have to) issue an EPO following an arrest for any offense involving family violence if the magistrate believes it is appropriate or an EPO is requested by:

- the victim of the offense,
- the guardian of the victim,
- a peace officer, **or**
- the attorney representing the state.

Code of Criminal Procedure Art. 17.292(a).

Must an EPO be Issued Upon Request?

No. An EPO **must be** issued only in one of the situations described in the "Mandatory Issuance of an EPO" section above. The magistrate is not obligated to issue an EPO on the request of the alleged victim, law enforcement, or a prosecutor.

3. Duration and Contents of an EPO

KEY POINT

OCA is required to create and make available standard EPO forms. *Government Code § 72.039.* Magistrates must use those forms when issuing an EPO. However, failure to do so does not affect the validity or enforceability of the order. *Code of Criminal Procedure Art. 17.292(d-1),(d-2).*

If issuance of the EPO is mandatory **and** the defendant exhibited a deadly weapon during the commission of the offense, the EPO must remain in effect for at least **91 days** but no later than **121 days**. Otherwise, the EPO must remain in effect for at least **61 days** but no later than **91 days**. *Code of Criminal Procedure Art. 17.292(j).*

Please keep in mind that the issuance of an EPO can provide the time and safety that victims trapped in a cycle of violence need to receive appropriate help and counseling. In extreme cases, issuance of an EPO can mean the difference between life and death for a victim.

Terms of the EPO

An EPO **may** prohibit the accused from:

- committing family violence or an assault on the person protected under the order;
- committing an act in furtherance of an offense under Section 42.072, Penal Code (stalking);
- communicating directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner;
- communicating a threat through any person to a member of the family or household or to the person protected under the order;
- communicating in any manner with the person protected under the order or a member of the family or household of a person protected under the order (except through the party 's attorney or a person appointed by the court), but only if the magistrate finds good cause;

- going to or near the residence, place of employment, or business of a member of the family or household or of the person protected under the order;

- going to or near the residence, childcare facility, or school where a child protected under the order resides or attends;

- possessing a firearm (unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision); **and**

- tracking or monitoring personal property or a motor vehicle in the possession of the protected person or a member of the family or household of the protected person without the consent of the protected person, including by using a tracking application or device or by physically following the person or causing another to physically follow the person.

In addition to the prohibitions above, the magistrate in the order for emergency protection may impose a condition described by Article 17.49(b) in the manner provided by that article, including ordering a defendant's participation in a global positioning monitoring system or allowing participation in the system by an alleged victim or other person protected under the order. *Code of Criminal Procedure Art. 17.292(c),(c-1).*

COMMON PITFALL

Note that there is **no authority** to order the accused to stay a minimum distance from the protected person, only from the prohibited locations. Therefore, if the defendant runs into the protected person while they are grocery shopping at H-E-B, this **would not** be a violation of the EPO.

All prohibited locations and distances must be specifically described in the order **unless** the magistrate determines for the safety of the person or persons protected by the order that specific descriptions of the locations should be omitted. For example, it is best to not disclose the location of a battered women's shelter in the EPO.

How Does the Magistrate Know the Required Information to Issue an EPO?

The person making the arrest or the person having custody of the defendant shall provide to the magistrate any information regarding the defendant that will aid the magistrate in

issuing an EPO. To the extent the information is available, the person making the arrest or the person having custody shall provide information regarding the victim of the offense to the magistrate to aid the magistrate.

The person making the arrest or the person having custody, as applicable, shall, at a minimum, provide any information described by Section 411.042(b)(6), Government Code, available to the person and may use a form adopted by OCA for this purpose. The failure to provide the necessary information to the magistrate does not negate the magistrate's authority or duty to issue an EPO. *Code of Criminal Procedure Arts. 14.06(a-1), 15.052, 15.17, 17.292(d-3).*

Suspension of Handgun License

An EPO **shall** suspend the handgun license, if any, of the accused. *Code of Criminal Procedure Art. 17.292(l).* An EPO suspending a handgun license **must** be sent **immediately** to DPS so that they may enter the EPO into their system and suspend the license. *Code of Criminal Procedure Art. 17.293.* Issuance of an EPO also makes it illegal for the defendant to possess a firearm (including a concealed or holstered handgun), whether they have a handgun license or not.

Required Warning

An order for emergency protection must contain the following statements printed in bold-face type or in capital letters:

REQUIRED LANGUAGE

"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS $4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR OR BY BOTH. AN ACT THAT RESULTS IN A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE, AS APPLICABLE, IN ADDITION TO A VIOLATION OF THIS ORDER. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS. THE POSSESSION OF A FIREARM BY A PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO THIS ORDER MAY BE PROSECUTED AS A SEPARATE OFFENSE PUNISHABLE BY CONFINEMENT OR IMPRISONMENT."

"NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER." *Code of Criminal Procedure Art. 17.292(g).*

4. Confidentiality of Certain Information

The mailing address of a person protected by an EPO may be kept confidential if the person requests it or if the magistrate determines that it is necessary.

This is done by entering an order:

- requiring the protected person to disclose their address to the court, designate another person to receive any notices or documents on their behalf, and provide that person's address to the court;

- requiring the clerk to strike the protected person's address from all public records and maintain a confidential record of the address for use only by the court, or by a law enforcement agency entering information required by Section 411.042(b)(6), Government Code, into the statewide law enforcement information system; **and**

- prohibiting the release of the address to the defendant.

Code of Criminal Procedure Art. 17.294.

Confidentiality of Information of Child Victims of Certain Offenses

Except as required or permitted by other law or court order, the name, address, phone number, or other identifying information of a sexual offense or family violence victim younger than 17 years of age or trafficking victim younger than 18 years of age may not be released or disclosed to any person who is not assisting in the investigation, prosecution, or defense of the case. *Code of Criminal Procedure Arts. 58.105; 58.151; 58.205; 58.255.*

5. Issuance and Service of an EPO

The victim of the offense need not be present when the order for emergency protection is issued. An order for emergency protection issued under this article is effective on

issuance, and the defendant **shall** be served a copy of the order by the magistrate or the magistrate's designee in person or electronically. The magistrate **shall** make a separate record of the service in written or electronic format. *Code of Criminal Procedure Art. 17.292(j).*

6. EPO Reporting Requirements

As soon as possible but **not later than the next business day** after the date the magistrate issues an order for emergency protection under this article, the magistrate **shall** send a copy of the order to the chief of police in the municipality where the member of the family or household or individual protected by the order resides, if the person resides in a municipality, or to the sheriff of the county where the person resides, if the person does not reside in a municipality.

If the victim of the offense is not present when the order is issued, the magistrate issuing the order **shall** order an appropriate peace officer to make a good faith effort to notify, within 24 hours, the victim that the order has been issued by calling the victim's residence and place of employment. The clerk of the court **shall** send a copy of the order to the victim at the victim's last known address as soon as possible but **not later than the next business day** after the date the order is issued. *Code of Criminal Procedure Art. 17.292(h).*

The above requirements do not apply if the magistrate or clerk lacks the necessary information to make the report. *Code of Criminal Procedure Art. 17.292(h-1).*

If an order for emergency protection issued under this article prohibits a person from going to or near a childcare facility or school, the magistrate **shall** send a copy of the order to the childcare facility or school. *Code of Criminal Procedure Art. 17.292(i).*

Additionally, as described on ***page 48***, the magistrate must send to DPS a notice suspending a handgun license, if any, held by the defendant.

7. Protective Order Registry

OCA is required to maintain a protective order registry and a training program for magistrates, court personnel, and peace officers on how to use the registry.

Magistrate's emergency protective orders issued by a justice of the peace are among the orders that would need to be entered into this registry.

Procedures include:

- Applications and orders (original or modified) must be entered as soon as possible, but not more than 24 hours after filing/issuance;
- A clerk can delay only to the extent that they lack the specific information required to be entered; **and**
- If an EPO is vacated or expired, the clerk shall update the status of the order in the registry. A vacated order **may not** be accessed by the public.

Government Code § 72.151–72.158.

CLICK HERE

The protective order registry may be accessed at ***https://www.txcourts.gov/judicial-data/protective-order-registry/***.

8. Modification of an EPO

To modify an EPO, the magistrate or, on request, the court with jurisdiction over the underlying criminal case **must** hold a hearing and make findings that the order as it exists is unworkable, and that modifying it will not endanger the victim or any person protected under the order. *Code of Criminal Procedure Art. 17.292(j),(n).*

KEY POINT

If the magistrate or court cannot make those findings, the EPO **must** run its course. Keep in mind that the victim cannot authorize the defendant to violate the EPO. If the protected person invites the subject home and the subject comes back, the subject is in violation.

G. Appointment of Attorneys for Indigent Defendants

Every county must designate procedures for appointing counsel for indigent defendants. These procedures will designate the court or designee authorized to appoint counsel. *Code of Criminal Procedure Art. 26.04.* A magistrate who conducts an Article 15.17 hearing and is authorized to appoint counsel pursuant to Article 26.04 of the Code of Criminal Procedure shall appoint an attorney for the defendant. *Code of Criminal Procedure Arts. 1.051, 15.17(a).*

KEY POINT

However, most justices of the peace are not authorized to appoint counsel. If a magistrate who conducts an Article 15.17 hearing is **not** authorized to appoint counsel, the magistrate "shall without unnecessary delay, but **not later than 24 hours** after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel."

KEY POINT

This means that if a justice of the peace conducts an Article 15.17 hearing following a DWI arrest on Saturday at 2:00 AM and the defendant requests appointed counsel, all appropriate paperwork **must** be transmitted (by fax, mail, or hand delivery) to the judge who appoints counsel within 24 hours, even though the judge who appoints counsel is unlikely to review the paperwork until Monday morning.

A court, or the courts' designee, under Article 26.04 **shall** appoint counsel as soon as possible, but not later than the **end of the third working day** after the date on which the court or the courts' designee receives the defendant's request for appointment of counsel. In a county with a population of 250,000 or more the court, or the court's designee, shall appoint counsel as soon as possible, but **not later than the end of the first working day** after the date on which the court, or the court's designee, receives the defendant's request for appointment of counsel *Code of Criminal Procedure Art. 1.051(c).*

When Must an Attorney Be Appointed?

Please keep in mind that the right to counsel attaches at the time of the "first adversarial proceeding."

In Texas, the Article 15.17 hearing is the first adversarial proceeding. ***Rothgery v. Gillespie County***.

Unfortunately, many counties in Texas continue to wait until the date of arraignment in the county or district court to appoint counsel. This practice is procedurally **incorrect** and exposes such counties to liability.

H. Procedure for Specific Types of Arrests

1. Arrest on Out-of-County Warrant

As discussed above, the magistrate who issues an arrest warrant will have jurisdiction over issues such as bond modification or surety surrender before the case is filed with the trial

KEY POINT

court. ***Ex parte Clear***. However, the magistrate who conducts the Article 15.17 hearing must still perform all required tasks, including consular notification, setting bond, and appointment of counsel. Since the magistrate who issued the warrant will have authority to modify the bond, the magistrate who performs the Article 15.17 hearing may be more inclined to follow the recommended bond amount on the warrant. If no amount is stated on the warrant, the magistrate should set bond as described on ***page 16*** of this volume.

Transmission of Bond Following Arrest on Out of County Warrant

If the arrest warrant was issued by a judge in another county, and the offense is punishable by confinement or imprisonment, the magistrate who conducts the Article 15.17 hearing **shall** "immediately transmit the bond taken to the court having jurisdiction of the offense." This procedure should also be followed when the arrest warrant was issued by a judge in the county where the Article 15.17 hearing was conducted but a different judge conducted the Article 15.17 hearing.

Failure of Defendant Arrested on Out of County Warrant to Make Bail

If the defendant fails or refuses to make bail, the magistrate **must** immediately notify the sheriff of the county where the offense occurred. *Code of Criminal Procedure Art. 15.19.*

That county has **11 days** to pick up the defendant, otherwise the defendant **must** immediately be released on personal bond without sureties or other security. The personal bond must then be forwarded to the sheriff of the county where the offense is alleged to have been committed or the court that issued the warrant of arrest. *Code of Criminal Procedure Art. 15.21*.

If the defendant has not been transferred or released into the custody of the county issuing the warrant before the 11th day after the date of the arrest, and counsel has not otherwise been appointed for the

Does the County Release on Personal Bond After 11 Days or Appoint Counsel?

But wait? Isn't the defendant supposed to be released on personal bond if they haven't been picked up within 11 days? **Yes.** This requirement to appoint counsel was added to the law before the requirement of release on personal bond. However, it remains on the books, and a county could face liability if you failed to both release the person as required and failed to appoint counsel as required.

defendant in the arresting county, the arresting county **must** appoint counsel for habeas corpus or bail issues. *Code of Criminal Procedure Art. 1.051(c-1).* If counsel is appointed for the defendant in the arresting county as required, the arresting county may seek from the county that issued the warrant reimbursement for the actual costs paid by the arresting county for the appointed counsel.

KEY POINT

Appointment of Counsel on Out-of-County Warrants
The magistrate who conducts the Article 15.17 hearing **must** also transmit, within 24 hours, all forms for requesting appointment of counsel to the judge responsible for appointing counsel in the county in which the warrant was issued.

View a list of contacts of the judge responsible for appointing counsel in each county.

If an indigent defendant is arrested on an out-of-county warrant, the county that issued the warrant shall appoint counsel within three working days after request if the arresting county has <250k population, or within one working day if county has 250k+ population. Counsel shall be appointed regardless of whether formal proceedings have begun in the county that issued the warrant. *Code of Criminal Procedure Art. 1.051.*

Who Appoints the Attorney?

A list of judges responsible for appointing counsel to indigent defendants in each county is available by ***clicking here*** and also may be obtained by contacting the Texas Indigent Defense Commission at 512-936-6994.

Taking Pleas on Arrests on Out of County Warrant for Fine Only Misdemeanor
If the arrest warrant was issued by a judge in another county, and the offense is punishable by fine only, the magistrate, after conducting the Article 15.17 hearing, shall accept a plea if the defendant desires, set a fine, determine costs, accept payment, give credit for time served, determine indigency, or discharge the defendant as the case may indicate. *Code of Criminal Procedure Art. 15.18(a)*. The magistrate who conducts the Article 15.17 hearing **shall** transmit the defendant's written plea, any orders entered in the case, and any fine or costs collected in the case to the court that issued the arrest warrant within **11 business days.** *Code of Criminal Procedure Art. 15.18(b)*.

For information on taking pleas at the jail in other cases, please see ***page 70***.

KEY POINT

Remember that a plea should be in writing, and that if the plea is guilty or nolo, that a judgment must be created convicting the defendant of the offense. Also remember that since the plea was entered at the jail, the defendant has **10 days** to request a new trial, and if they do so, their plea **must** be set aside, and the new trial granted. *Code of Criminal Procedure Art. 45A.154(b).*

Taking Pleas in a Case Involving Family Violence

Before accepting a plea of guilty or nolo by a defendant charged with a misdemeanor involving family violence (as defined by § 71.004 of the Family Code), the court shall provide the following admonishment both orally and in writing, unless the defendant is not appearing in court, in which case the admonishment should be given in writing:

REQUIRED LANGUAGE

> "If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun, or long gun, or ammunition, pursuant to federal law under 18 U.S.C. Section 922(g)(9) or Section 46.04(b), Texas Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney." *Code of Criminal Procedure Art. 27.14(e).*

For information on additional requirements when the trial court (and not the magistrate) takes a plea in a family violence case, see Chapter 4 of the *Criminal Deskbook*. For information on reporting requirements related to family violence cases, see Chapter 3 of the *Recordkeeping and Reporting Deskbook*.

2. Motions to Revoke Probation

A magistrate may be required to conduct an Article 15.17 hearing following an arrest based on a warrant issued by a trial court under Chapter 42A of the Code of Criminal Procedure (issued when the state alleges that a defendant has violated the terms and conditions of community supervision, or "probation" set by the trial court). The defendant should be brought before the trial court judge but must be brought before a magistrate of the county in which they were arrested if the trial court judge is unavailable at the time of the defendant's arrest. *Code of Criminal Procedure Art. 42A.751.*

KEY POINT

Once the defendant is brought before the magistrate, the magistrate shall perform all appropriate duties and may exercise all appropriate powers as provided by Article 15.17 with respect to an arrest for a new criminal offense, **except that only the judge who ordered the arrest for the alleged violation may authorize the person's release on bail.**

Therefore, a magistrate has **no jurisdiction** to **set** a bond when a defendant is arrested on a warrant issued under Article 42.12; only the trial court judge does. However, the magistrate **may accept** a bond in the amount set by the trial court. The judge of the trial court may also order the defendant to be held in the custody of the state until a hearing to determine whether the defendant violated the terms and conditions of his community supervision. If the person has not been brought before the trial court or released on bond within 20 days of the filing of the motion, they must be brought before the trial court immediately for a hearing.

BEST PRACTICE

What if the Probation Revocation Warrant Doesn't Specify a Bond Amount?
TJCTC recommends treating a probation revocation warrant that is silent as to bond amount as a warrant ordering the defendant to be held in custody until the revocation hearing, and therefore no bond should be set or taken.

COMMON PITFALL

Additionally, keep in mind that Article 42.12 authorizes a magistrate to perform all appropriate duties. A defendant arrested on a warrant issued under Article 42.12 will not have the full range of rights afforded someone in a full Article 15.17 hearing. (For example, such defendants have no right to an examining trial.) **Be careful not to exceed the authority granted to you in these cases, as doing so may open your county up to liability.**

3. Motions to Proceed/Adjudicate

A **motion to adjudicate** (or **motion to proceed with adjudication)** may be filed when a defendant who has been placed on deferred adjudication community supervision is alleged to have violated any condition of community supervision. In that case the judge in whose court the criminal case against the defendant is pending may issue a warrant for the arrest of the defendant. *Code of Criminal Procedure Art. 42A.751(b).*

The person should be brought directly to the judge who had placed them on deferred adjudication but may be detained in jail until that occurs. The person is to be brought

KEY POINT

before that judge, or if that judge is unavailable, before a magistrate without delay, but no later than 48 hours after arrest. If they are brought before a magistrate instead of the presiding judge, the magistrate may perform all applicable Article 15.17 functions, **but only the presiding judge of the trial court may authorize release on bond.**

If the person has not been brought before the trial court or released on bond within 20 days of the filing of the motion, they must be brought before the trial court immediately for a hearing.

4. Parole Violation Warrants

Magistrates may conduct an Article 15.17 hearing and set bail when a person is arrested for an administrative parole violation, but only if the parole division of the Texas Department of Criminal Justice has authorized the person's release on bond, **and** the magistrate determines the person is not a threat to public safety. *Government Code § 508.254.* Administrative parole violations, also called technical violations, include such violations as failure to report to a parole officer, nonparticipation in treatment programs, or violating a curfew.

5. Out-of-State Warrants – Fugitives from Justice

KEY POINT

There are two different types of warrants that a magistrate may encounter when another state wants a person found in Texas brought into custody. The procedure for the two have important differences, so be sure you are following the proper steps.

The Uniform Criminal Extradition Act is used when a person who is wanted to stand trial for a criminal offense in another state has fled that state, and the **Interstate Compact for Adult Offender Supervision (ICAOS)** is used when a person who was on probation or parole in another state has unlawfully fled that state.

a. Out-of-State Criminal Offenses – Uniform Criminal Extradition Act

The Uniform Criminal Extradition Act, a nationwide procedure governing the **extradition** of criminals, has been adopted in Texas. *Code of Criminal Procedure Art. 51.13.*

This statute is followed when a person is accused of a crime in another state but has not yet been convicted.

Complaint and Issuance of Warrant by Magistrate

When a complaint is made to a magistrate that any person within their jurisdiction is a fugitive from justice from another state, the magistrate **shall** issue a warrant of arrest directing a peace officer to apprehend and bring the accused before the magistrate. *Code of Criminal Procedure Art. 51.03.*

The complaint is sufficient if it states:

- the name of the accused,
- the state from which the accused has fled,
- the offense committed by the accused,
- that the accused has fled to this state from the state requesting the return, **and**
- that the act that is alleged to have been committed by the accused is a violation of the penal law of the state from which he fled.

Code of Criminal Procedure Art. 51.04.

Extradition and Waiver

Extradition is the process where a person arrested in one jurisdiction is sent back to the jurisdiction where they are wanted on criminal charges.

A **"waiver of extradition"** means that the person waives the hearing and Governor's warrant portion of the process and agrees to be transferred immediately to the jurisdiction which has requested the person.

A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued **shall** be attached to the warrant. *Code of Criminal Procedure Art. 51.03.* When the accused is arrested under the magistrate's warrant, the accused shall be brought before the magistrate who issued the warrant or any other magistrate who may be available in, or convenient to, the place where the arrest was made. *Code of Criminal Procedure Art. 51.13 § 13.*

Hearing Following Arrest

KEY POINT

The magistrate shall hear evidence to determine whether the accused is the person charged with having committed the crime and fled from justice. A certified copy of the complaint or indictment against the accused in the other state is sufficient to show that the accused is charged with the crime. *Code of Criminal Procedure Art. 51.05; **Ex parte Dalton**.*

Commitment and Setting Bond in Extradition Cases

If it appears to the magistrate from an examination that the accused is the person charged with having committed the crime alleged and fled from justice, the magistrate must commit the accused to the county jail for a specified time, not to exceed 30 days.

The defendant may be released on bail, in an amount determined by the magistrate, instead of remaining in jail for that period **unless** the offense with which the accused is charged is an offense punishable by death or life imprisonment under the laws of the state in which it was committed.

The bond should be conditioned that the person will appear at a specific time and place before the magistrate, and that the person will surrender upon issuance of a warrant by the Governor of Texas. If the accused is admitted to bail and fails to appear or surrender according to the conditions of the appearance bond, the magistrate shall declare the bond forfeited and order the accused's immediate arrest without warrant if the accused is within the state. *Code of Criminal Procedure Art. 51.13, § 18.*

Notification Requirements

If the magistrate determines the person is a fugitive from justice, the magistrate **shall** immediately notify the Secretary of State and district or county attorney of the magistrate's county, stating the name of the fugitive, the state the fugitive fled, and the crime with which the fugitive is charged. *Code of Criminal Procedure Art. 51.06.*

Those officers so notified by the magistrate shall notify the governor of the proper state. That state's governor may then request that the Governor of Texas issue a warrant for the person's transport back to the proper state.

Discharge or Recommitment

KEY POINT

If the accused is not arrested under warrant of the Governor of Texas at the end of the initial 30-day period, the magistrate may discharge **or** recommit the accused. If the magistrate recommits the accused at the end of the 30-day period, the recommitment **may not** be for more than 60 days, and, in no event shall the accused be committed to jail or held to bail for longer than 90 days. *Code of Criminal Procedure Art. 51.05.*

COMMON PITFALL

A person who has been arrested once as a fugitive from justice, and discharged by a magistrate or by habeas corpus, **shall not** be arrested again on a charge of the same offense, except by a warrant from the Governor of Texas. *Code of Criminal Procedure Art. 51.08.*

Arrest on Governor's Warrant

If a person is arrested on a Governor's Warrant, they **must** immediately be taken before a judge of a court of record. Instead of being taken before a court of record, the person may be taken before a justice of the peace, **only** if the justice of the peace:

- serves a county bordering another state; **and**
- has taken, through TJCTC, a training course that focuses on extradition law.

The judge or justice of the peace shall inform the person of:

- the demand from the other state;
- of the crime which is charged; **and**
- that the person has the right to demand and procure legal counsel.

Record of the Proceedings

Each justice of the peace who performs a duty or function under this law must ensure that the applicable proceeding is transcribed or videotaped and that the record of the proceeding is retained in the records of the court for at least 270 days.

If an accused or their counsel wishes to contest the legality of the arrest and was brought before a justice of the peace as described above, the justice of the peace shall direct the prisoner to a court of record for purposes of obtaining such a writ. *Code of Criminal Procedure Art. 51.13 § 10.*

Waiver of Extradition

A person arrested under a complaint and charged with having committed any crime in another state, or alleged to have escaped from confinement, or broken the terms of bail, probation, or parole may waive the issuance and service of a Governor's Warrant and all other procedures incidental to extradition proceedings.

This may be done by stating in writing that they consent to be returned to the demanding state. The writing must be executed in the presence of a judge of any court of record

within this state, or in the presence of a justice of the peace, **only** if the justice of the peace:

- serves a county bordering another state; **and**
- has taken, through TJCTC, a training course that focuses on extradition law.

Before such waiver shall be executed or subscribed by such person the judge or justice of the peace shall inform such person of the:

- right to the issuance and service of a warrant of extradition; **and**
- right to obtain a writ of habeas corpus.

Once the waiver is executed, it must be sent to the Governor of Texas' office. The judge or justice of the peace shall direct the officer, having such person in custody, to deliver the person to the agent or agents of the demanding state and shall deliver or cause to be delivered to such agent or agents, a copy of the waiver. *Code of Criminal Procedure Art. 51.13 § 25a.*

b. Out-of-State Probation or Parole Violation – Interstate Compact for Adult Offender Supervision (ICAOS)

The ICAOS applies to a person who is on probation or parole and subject to supervision as the result of the commission of a criminal offense and required to request transfer of supervision under the ICAOS because of travel to a different state. If a warrant is issued under the retaking procedures of the Interstate Compact for Adult Offender Supervision (ICAOS), the offender **may not be released on bond** (see the ICAOS 2020 Bench Book linked below).

KEY POINT

Ok to Deny Bail Under the ICAOS?

Note that there could be a challenge at some point to the prohibition of bail for an arrest under the ICAOS. Government Code § 510.016, which adopted the ICAOS in Texas, states that "in the event of a conflict between the compact and the Texas Constitution, as determined by the courts of this state, the Texas Constitution controls." And Article 1, § 11 of the Texas Constitution requires that a prisoner be permitted bail in most cases. TJCTC is not aware of any case that addresses or resolves this issue at this time. Pending such a decision by a Texas court, TJCTC recommends following the ICAOS if you receive notice that the defendant is subject to the retaking procedures under it.

This is different from an arrest under the Uniform Criminal Extradition Act, described above, which does allow a defendant to be released on bail in most cases (see Article 51.13, § 16). The warrant should indicate if the person was arrested under the ICAOS, and if so, it should state that the defendant is to be held without bond.

When dealing with a warrant under the ICAOS, the court should also follow the other procedures that are set out in the ICAOS 2020 Bench Book for returning an offender to the appropriate state. The Bench Book can be found at the following link:

CLICK HERE

https://www.interstatecompact.org/bench-book.

6. Arrest on Capias or Capias Pro Fine

Arrest on a Capias

KEY POINT

If the arrest is based on a capias issued following a district court indictment, Texas law requires that the defendant be presented to the judge of the court which issued the capias.

When a defendant is arrested on a capias following indictment for a felony offense, he or she **shall** be required to give new bail. *Code of Criminal Procedure Art. 23.06.* When a defendant is arrested on a capias after being formally charged with a misdemeanor offense, he or she **may** be required to give bail. *Code of Criminal Procedure Art. 23.14.*

BEST PRACTICE

Since only the trial court has jurisdiction of bond issues, TJCTC recommends that in all situations following arrest on a capias that the defendant is presented to the judge of the court which issued the capias.

However, another magistrate could take bail from the defendant in the amount set by the trial court, if the trial court was unavailable, as well as explaining the process and timeline to the defendant and checking to see if an attorney appointment is desired.

Arrest on a Capias Pro Fine

If the arrest is based on a capias pro fine, the defendant must generally be presented to the judge of the court which issued the capias pro fine. The arresting officer, sheriff, or jail staff do not have the authority to order a defendant committed to jail in order to

discharge a fine and costs. However, if the capias pro fine was issued by a justice of the peace, the defendant may be presented to any other justice of the peace located in the same county as the court that issued the capias pro fine. The defendant may also be presented to a "county criminal law magistrate court with jurisdiction over Class C misdemeanors" located in the same county as the justice court that issued the capias pro fine. *Code of Criminal Procedure Art. 45A.259(c).*

There is no authority for a justice of the peace acting as a magistrate to process a capias pro fine issued by a municipal court, or vice versa.

COMMON PITFALL

A defendant **cannot** be required to post bond after arrest on a capias pro fine. *Code of Criminal Procedure Art. 43.06.*

For more information on the procedure applicable to capias pro fines, please see Chapter 8 of the *Criminal Deskbook*.

7. Arrests for Illegal Entry or Re-Entry and Orders to Return to Foreign Country

KEY POINT

Note: *As of publication of this volume, litigation is ongoing regarding the constitutionality of this section, but the law is currently in effect. Please monitor the TJCTC website.*

In the Fourth Special Session of the 2023 Legislature, SB 4 was passed, creating new criminal offenses for illegally entering or re-entering Texas. *Penal Code §§ 51.02, 51.03.* If a person is arrested for one of these offenses, a magistrate during an appearance under Art. 14.06 or 15.17 may, after determining that probable cause exists for the arrest, order the person to be released from custody and issue a written order to return to the foreign nation from which the person entered or attempted to enter.

However, the order may **only** be issued if:

- **the person agrees to the order**;
- the person has not previously been convicted of an offense under Chapter 51 of the Penal Code or obtained a discharge of an offense on condition that they return to a foreign country;

- the person is not charged with another offense punishable as a Class A misdemeanor or higher; **and**
- before the issuance of the order, the arresting law enforcement agency collects all available identifying information of the person, including fingerprints; uses all applicable measures to identify the person; and cross-references the information with all relevant databases, lists, and classifications.

Code of Criminal Procedure Art. 5B.002

An order issued under this law must include the manner of transportation of the person to a port of entry as defined by Penal Code § 51.01, as well as the law enforcement officer or state agency responsible for monitoring compliance with the order. *Code of Criminal Procedure Art. 5B.002(e).* That officer or agency must report the issuance of the order to DPS for inclusion in its computerized criminal history system*. Code of Criminal Procedure Art. 5B.002(g).*

The order must be filed with the county clerk in which the person was arrested. *Code of Criminal Procedure Art. 5B.002(f).*

If a person fails to comply with an order to return, they commit a new offense that is a second-degree felony. *Penal Code § 51.04.*

I. Mental Illness, Intellectual Disability Issues, and Procedures

1. Mental Illness and the Jail

According to research by the Meadows Mental Health Policy Institute, Texas counties report that 20-25% of their daily jail population suffer from a recently diagnosed mental illness. That means that on average, 12,000-16,000 mentally ill Texans are confined in jail, with an annual incarceration cost of $450 million.

Additionally, research indicates that 17% of the jail population is suffering from a “serious mental illness”, meaning an illness such as schizophrenia, bipolar disorder, post-traumatic stress disorder, psychotic disorder, major depressive disorder, etc. By comparison, 5% of the general population suffers from such a mental illness.

Focus on this issue, in Texas and nationally, was crystallized by the case of Sandra Bland, who was found dead in her Texas jail cell on July 13, 2015. Bland was arrested on July 10 of that year, following a traffic stop which escalated into an arrest. After her arrest, she attempted to secure bond, but was not immediately able to do so. On the morning of July 13, nearly 72 hours after her arrest, she was found asphyxiated by a plastic garbage bag in her jail cell, in an apparent suicide. Bland's case raised several issues, but a huge one was the issue of mental illness in inmates, specifically how to identify, process, and protect defendants who exhibit signs and symptoms of mental illness.

2. Determination of Need for Assessment (Art. 16.22)

KEY POINT

Notification to the Magistrate of Defendant with Mental Illness or Intellectual Disability
Not later than 12 hours after receiving credible information that a defendant has a mental illness or intellectual disability; the sheriff or jailer **shall** provide written or electronic notice to the magistrate. This notice to the magistrate **must** contain all information related to the determination of a mental illness or intellectual disability, including details of the defendant's behavior and the results of any previous assessment given to the defendant. *Code of Criminal Procedure Art. 16.22(a)(1).*

What Does the Magistrate Do with This Information?

KEY POINT

On a determination that there is reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability, the magistrate **shall** order one of the following to interview the defendant, collect information regarding the defendant's mental illness or intellectual disability, and give the magistrate a written report including observations and findings regarding if the defendant is a person who has a mental illness or intellectual disability:

- The service provider that contracts with the jail to provide mental health or intellectual and developmental disability services,
- The local mental health authority,
- The local intellectual and developmental disability authority, **or**
- Another qualified mental health or intellectual and developmental disability expert.

If an interview and collection of information is ordered, it may be conducted in person in the jail, by telephone, or through a telemedicine medical service or telehealth service. *Code of Criminal Procedure Art. 16.22(a-4).*

When Not Required to Order an Interview and Information Collection

A magistrate is not required to order the interview and collection of information if:

- the defendant was only arrested or charged with an offense punishable as a Class C misdemeanor;
- the defendant is no longer in custody;
- the defendant has already been interviewed by one of the allowed providers since the defendant was arrested for the offense for which the defendant is currently in custody; **or**
- in the year preceding the date of the arrest, the defendant has been determined to have a mental illness or to be a person with an intellectual disability.

Code of Criminal Procedure Art. 16.22(a)(1)-(2).

Reimbursement for Costs of an Interview

If the magistrate orders the LMHA, the local intellectual and developmental disability authority, or another qualified expert to conduct the interview and collect information, the commissioners court for the county where the magistrate is located shall reimburse that entity or person.

The amount will be determined by a fee schedule if one is adopted by the commissioners court under Art. 16.22(a-2). If no fee schedule is adopted or the costs exceed the fee schedule amounts, the trial court judge will determine the reimbursement amount pursuant to Art. 16.22(a-3). *Code of Criminal Procedure Art. 16.22(a-1)-(a-3).*

Written Report Delivered to Magistrate

KEY POINT

The written report ordered by the magistrate must be given to the magistrate **not later than 96 hours** after the assessment was ordered if the defendant is held in custody, and within **30 days** of the order if the defendant has been released. *Code of Criminal Procedure Art. 16.22(b).*

This report must be given to:

- the prosecutor,
- the defense attorney,
- the trial court,
- the sheriff or other person responsible for the defendant's medical records while the defendant is confined in county jail, **and**
- as applicable:
  - the personal bond office established for the county where the defendant is confined; **or**
  - the director of an entity responsible for supervising the defendant while the defendant is released on bail and receiving mental health or intellectual and developmental disability services as a condition of bail.

Code of Criminal Procedure Art. 16.22(b-1).

KEY POINT

The written report is confidential and should not be disclosed except as described in this paragraph or otherwise allowed by law for mental health case records. *Code of Criminal Procedure Art. 16.22(f).* For more information regarding release of records, see Chapter 2 of the *Recordkeeping and Reporting Deskbook.*

What if the Defendant Refuses to Give Information?

If the defendant refuses to give information, the magistrate may order them to be evaluated at a jail, or in another place determined to be appropriate by the local mental health authority or local intellectual and developmental disability authority, for **up to 72 hours.** *Code of Criminal Procedure Art. 16.22(a)(3).*

Difficulties in the Process – Risk Assessment

In order to avoid another Sandra Bland situation, many jails will report defendants to magistrates as suffering from mental illness if there is any sign at all, even something as potentially small as answering "yes" to "Do you feel sad right now?"

A major issue is ensuring that individuals who are at risk receive the help they need immediately, while also making sure that there is a sufficient filter to keep defendants out of the process who do not suffer from mental illness or have an intellectual disability.

Difficulties in the Process – No Room at the Inn

Another major hurdle in many areas is a lack of facilities and a lack of beds for those who need to receive an assessment or treatment. Learn ahead of time what resources are available in your area, so that you are prepared when the need arises for a defendant to be assessed or receive treatment.

3. Release on Personal Bond for Treatment (Art. 17.032)

A magistrate **shall** release a defendant on personal bond unless good cause is shown otherwise if **all** of the following five conditions apply:

- The defendant is not charged with, and has not been previously convicted of, a **violent offense** (as listed below, which is different than the list which generally prevents release on personal bond, see ***page 23***);

- The defendant is examined under Article 16.22 as described above;

- The expert concludes that the defendant has a mental illness or intellectual disability and is nonetheless competent to stand trial and recommends mental health treatment or intellectual and developmental disability services;

- The magistrate determines, in consultation with the local mental health or intellectual and developmental disability authority, that mental health or intellectual and developmental disability services for the defendant are available; **and**

- After considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided by a prosecutor or the defendant, the magistrate determines that release on personal bond would reasonably ensure the defendant's appearance in court and the safety of the community and the victim of the alleged offense.

Code of Criminal Procedure Art. 17.032(b).

A personal bond issued for a defendant determined to have mental illness or an intellectual disability under Art. 16.22, or for a defendant released under Art. 17.032 is **not**

required to include the oath required by Code of Criminal Procedure Art. 17.04(a)(3). *Code of Criminal Procedure Art. 17.04(b).*

Violent offense means a violation of any of the following sections of the Penal Code:

- ***Section 19.02 (murder),***
- ***Section 19.03 (capital murder),***
- ***Section 20.03 (kidnapping),***
- ***Section 20.04 (aggravated kidnapping),***
- ***Section 21.11 (indecency with a child),***
- ***Section 22.01(a)(1) (assault), if the offense involved family violence as defined by § 71.004, Family Code,***
- ***Section 22.011 (sexual assault),***
- ***Section 22.02 (aggravated assault),***
- ***Section 22.021 (aggravated sexual assault),***
- ***Section 22.04 (injury to a child, elderly individual, or disabled individual),***
- ***Section 29.03 (aggravated robbery),***
- ***Section 21.02 (continuous sexual abuse of young child or disabled individual); or***
- ***Section 20A.03 (continuous trafficking of persons).***

Code of Criminal Procedure Art. 17.032(a).

KEY POINT

The magistrate, unless good cause is shown for not requiring treatment or services, **shall** require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health treatment or intellectual and developmental disability services (as recommended by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health or intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert) if the defendant's:

- mental illness or intellectual disability is chronic in nature; **or**

- ability to function independently will continue to deteriorate if the defendant does not receive the recommended treatment or services.

Code of Criminal Procedure Art. 17.032(c).

For more information on mental health as it relates to the court's magistration duties, ***download the JCMH Mental Health Bench Book***.

4. Art. 16.22 and 17.032 Procedure Flowchart

Click Here to Open the Art. 16.22 and 17.032 Procedure Flowchart

J. Taking Pleas at the Jail

Although TJCTC generally discourages the practice of accepting pleas of guilty or no contest at a county jail (except in the case of a warrant on an out-of-county offense punishable by fine only as provided by Art. 15.18 of the Code of Criminal Procedure, discussed on ***page 52*** of this volume), many Texas counties encourage justices of the peace to request and accept such pleas.

KEY POINT

Please note that a justice of the peace has two separate roles in the criminal justice system. A justice of the peace may perform duties associated with their status as a magistrate, and a justice of the peace may also perform duties associated with their role as the judge of a trial court. *Code of Criminal Procedure Arts. 2A.151, 4.11.*

Both roles are involved in the process of accepting a guilty plea from a criminal defendant confined in a county jail, although they are often played by a single justice of the peace in this scenario.

Ability of a Magistrate to Take a Plea

COMMON PITFALL

When a defendant is presented to a justice of the peace following an arrest, the justice of the peace initially acts as a magistrate. *Code of Criminal Procedure Article 15.17*. **Never** ask for or accept a plea prior to administering the warnings contained in Article 15.17 of the Code of Criminal Procedure. A magistrate only has authority to accept a plea in their role as a magistrate on fine-only misdemeanor warrants issued by an out-of-county judge and may **never** accept a plea on a jailable offense. *Code of Criminal Procedure Art. 15.18.*

Any other plea taken **must** be in the justice of the peace's capacity of trial judge.

Taking a Plea at the Jail as the "Trial Judge"

At the time that a justice of the peace accepts a plea of guilty, or no contest, the justice of the peace acts as the judge of a trial court. *Code of Criminal Procedure Art. 45A.151.*

Before the judge of a trial court may convict a criminal defendant based on a plea of guilty, or no contest, given in a county jail, **each** of the following steps **must** occur:

- If the arrest was not based on a warrant, a magistrate determines whether probable cause exists to believe the person arrested committed the offense of which he or she is accused, unless the individual freely and voluntarily waives such a finding; ***County of Riverside v. McLaughlin***.

- A magistrate performs an Article 15.17 hearing;

- A prosecutor or peace officer files a valid charging instrument, which vests the trial court in which the charging instrument is filed with **personal jurisdiction** over the defendant; ***Trejo v. State***.

- The defendant freely and voluntarily waives his or her right to trial by jury in the trial court in which the citation or complaint has been filed; *Code of Criminal Procedure Art. 26.13(b),* ***Brady v. United States***.

- The defendant freely and voluntarily enters a plea of guilty, or no contest, in the trial court in which the citation or complaint has been filed. ***North Carolina v. Alford***.

Taking Pleas in a Case Involving Family Violence

Before accepting a plea of guilty or nolo by a defendant charged with a misdemeanor involving family violence, as defined by § 71.004 of the Family Code, the court shall provide the following admonishment either orally or in writing:

REQUIRED LANGUAGE

"If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. Section 922(g)(9) or Section

46.04(b), Texas Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney." *Code of Criminal Procedure Art. 27.14(c).*

For information on additional requirements when the trial court (and not the magistrate) takes a plea in a family violence case, see Chapter 4 of the *Criminal Deskbook*. For information on reporting requirements related to family violence cases, see Chapter 3 of the *Recordkeeping and Reporting Deskbook*.

KEY POINT

Creation of Judgment

A judgment complying with Art. 45A.251 of the Code of Criminal Procedure **must** be generated when accepting a plea of guilty or nolo at the jail.

Alternative Satisfaction of Fine and Costs

Note that during or immediately after imposing the sentence, the judge is **required** to inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. This would apply to pleas taken at the jail, either as a magistrate or as a trial court. For more information on alternative satisfaction of criminal judgments, please see Chapter 8 of the *Criminal Deskbook.*

BEST PRACTICE

Requirement of a Public Trial and Pleas at the Jail

TJCTC recommends that judges who accept pleas at the county jail read a Court of Criminal Appeals case that questions whether the acceptance of guilty pleas at the county jail violates the defendant's right to a public trial. ***Lilly v. State***. In that case, the defendant sought to have his case heard at the Jones County Courthouse. His request was denied, and his case was heard at the prison chapel at TDCJ's Robertson Unit, which had been designated as a branch courthouse for Jones County.

Personal Jurisdiction

Note that for a justice of the peace acting as a trial court to have **personal jurisdiction** over a defendant, the **charging instrument must either be filed in that court, or a court which the justice of the peace has a bench exchange agreement with.** *Government Code § 27.054.*

This means that a JP may **never** take a plea on a case in a municipal court, since there is no authority for a bench exchange between justice and municipal courts. Additionally, a justice of the peace of course **cannot** take a plea on a jailable misdemeanor or a felony.

The defendant pleaded guilty but appealed his conviction and asserted that his 6th Amendment right to a public trial was violated. The Court of Criminal Appeals held that "Appellant showed that his trial was closed to the public, and because that closure was not justified, we reverse the judgments of the court of appeals and trial court." The fact that the defendant entered a plea of guilty did not impact the court's decision, as "a plea-bargain proceeding is still a trial" under Texas law. ***Murray v. State***.

Voluntariness of Pleas at the Jail

KEY POINT

A plea of guilty or nolo is **only** valid if it is made freely and voluntarily. Often, pleas made at the jail fall short of that requirement. If a defendant with a regular job is told on Sunday evening, "fill out this plea sheet. If you say guilty, you can go now, and you will have to pay the fine to the court. If you say not guilty, you will have to see the magistrate, who will be here Monday afternoon", the defendant will likely sign the sheet, not voluntarily, but simply because they have been promised an earlier release to do so.

Right to New Trial Following Plea at the Jail

A defendant who entered a plea of guilty or nolo at the jail may make a motion for new trial within **10 days** of the rendition of judgment and sentence, and the justice court **shall** grant the defendant's motion for new trial. *Code of Criminal Procedure Art. 45A.124(b).*

COMMON PITFALL

BEST PRACTICE

Some counties which currently accept pleas at the county jail "get around" this requirement by creating pre-printed plea forms which require a defendant to waive the right to a new trial granted by Article 45A.124. TJCTC strongly discourages this practice. Presenting a form which requires a defendant to waive a right as a precursor to entering a guilty plea—without pointing out the waiver or ensuring that the defendant understands the right he or she is waiving—negates the voluntariness of the defendant's plea. Instead, TJCTC recommends simply explaining the defendant's right to request a new trial before he or she enters a plea of guilty or no contest. A defendant may also appeal his conviction to a county court in accordance with Article 45A.202 of the Code of Criminal Procedure.

K. Examining Trials

An **examining trial** is a proceeding, applicable to felonies only, where the state puts on evidence for a magistrate to determine if probable cause exists that the defendant committed the offense, and to determine the amount and sufficiency of bail. The

defendant must have counsel appointed, if requested. *Code of Criminal Procedure Art. 16.01.*

No Right to Examining Trial After Indictment

The purpose of the trial is to ensure that the continued detention (either in custody or on bail) of the defendant is lawful. Therefore, if an indictment issues, the right to an examining trial no longer exists, since the neutral grand jury has explicitly determined that probable cause does exist to charge the defendant with the felony offense. *Code of Criminal Procedure Art. 16.01.*

Examining Trial Procedure – Jurisdiction

The answer to the question of which magistrate has jurisdiction over an examining trial is not clear. Certainly, the court before whom the prosecution is pending has jurisdiction. ***Ex parte Clear***. However, Art. 16.01 uses the term "a magistrate", rather than "the magistrate" or "the court or magistrate before whom the prosecution is pending", as other statutes which require a specific magistrate to perform functions do.

BEST PRACTICE

TJCTC recommends that the court or magistrate before whom the prosecution is pending perform the examining trial where possible, but otherwise any magistrate would be able to do so. For more information on determining "the court or magistrate before whom the prosecution is pending", please see ***page 42***.

Examining Trial Procedure – Rights of the Accused

Before the examination of the witnesses, the magistrate **shall** inform the accused that it is his right to make a statement, but also that he has the right **not** to make a statement, and that if he does make such a statement, it may be used in evidence against him. *Code of Criminal Procedure Art. 16.03.*

If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. The statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused. The magistrate **shall** attest by his own certificate and signature to the execution and signing of the statement. *Code of Criminal Procedure Art. 16.04.*

Examining Trial Procedure – Role of the Prosecutor

The prosecutor should be notified of the time and place of the examining trial. The prosecutor and the defendant or the defendant's attorney may question any witnesses. If there is no prosecutor, the magistrate may question the witnesses. *Code of Criminal Procedure Art. 16.06.*

Examining Trial Procedure

The rules of evidence apply to examining trials. *Code of Criminal Procedure Art. 16.07.* The defendant shall be present during the examination of each witness. *Code of Criminal Procedure Art. 16.08.*

The testimony of each witness shall be reduced to writing by or under the direction of the magistrate, and shall then be read to the witness, or the witness may read it over. The witness then directs any corrections and signs the testimony, which is then certified to by the magistrate.

Alternatively, a statement of facts authenticated by state and defense counsel and approved by the presiding magistrate may be used to preserve the testimony of witnesses. *Code of Criminal Procedure Art. 16.09.*

Examining Trial Procedure – Witnesses

The magistrate has the power to issue an attachment to enforce testimony of any witness residing or located in the county where the prosecution is pending. *Code of Criminal Procedure Art. 16.10.*

For out of county witnesses, the magistrate may issue an attachment only after the requesting party submits an affidavit stating that the testimony of the witness is material to the prosecution or the defense, as well as the facts which it is expected will be proved by the witness. If the opposing party admits to those facts, or the magistrate finds the testimony is not material, the attachment **must not** issue. *Code of Criminal Procedure Art. 16.11.*

Examining Trial vs. Regular Trial

Note that the role of the justice of the peace is much different in an examining trial as compared to a regular criminal trial, where questioning the witnesses would be inappropriate.

Examining Trial Procedure – Ruling

After the examining trial has been had, the judge shall make an order either:

- committing the defendant to the jail of the proper county,
- discharging the defendant, **or**
- admitting the defendant to bail, as the law and facts of the case may require.

KEY POINT

Failure of the judge to make or enter an order within **48 hours** after the examining trial has been completed operates as a finding of no probable cause and the accused **shall** be discharged. *Code of Criminal Procedure Art. 16.17.*

L. ICE Detainer Requests

An immigration detainer or hold request, sometimes referred to as an ICE detainer, ICE hold, or ICE warrant, is a request from U.S. Immigration and Customs Enforcement (ICE) to state or local law enforcement to hold someone until they can be taken into federal custody. These generally ask that the person be held for up to **48 hours** beyond the time they would otherwise be released.

State law requires law enforcement to:

- "comply with, honor, and fulfill" all ICE detainer requests; **and**
- inform a defendant who is the subject of a request that "they are being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement."

A law enforcement agency is not required to comply with an ICE detainer request with respect to a person who has provided proof that the person is a citizen of the United States or that the person has lawful immigration status. Proof could include, but is not limited to, a Texas driver's license or similar government-issued identification. *Code of Criminal Procedure Art. 2A.060; **City of El Cenizo, Texas v. Texas**.*

KEY POINT

Note that if an ICE detainer request is received, all magistration duties **must** still be performed with respect to the defendant, including setting bail and any bond conditions. Once the timeframe on the detainer request is over, the defendant must be released if they have not been taken into federal custody.

M. Magistration Bench Cards and Forms

Click Here for the TJCTC Magistration Bench Cards

Forms

Forms may be found under the Magistration tab on the TJCTC forms page.

Chapter 3: Issuance of Warrants

A. Arrest Warrants

1. The Warrant of Arrest

A **"warrant of arrest"** is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law. *Code of Criminal Procedure Art. 15.01.* The warrant issues in the name of "The State of Texas", and its form is sufficient if it meets these three requirements:

- It must specify the name of the person whose arrest is ordered if it is known. If the name is unknown, then some reasonably definite description must be given of the person.

- It must state that the person is accused of some offense against the laws of the state, naming the offense.

- It must be signed by the magistrate, and the magistrate's office must be named in the body of the warrant, or in connection with the magistrate's signature.

Code of Criminal Procedure Art. 15.02.

Note that any signed order issued by a magistrate under the Code of Criminal Procedure or pertaining to any criminal case must include, in addition to the magistrate's signature, the magistrate's name in legible handwriting, legible typewritten form, or legible stamp print. *Code of Criminal Procedure Art. 2A.1521.*

KEY POINT

A warrant of arrest shall extend to any part of the state, and any peace officer to whom said warrant is directed, or to whom it has been transferred, shall be authorized to execute the warrant in any county in this state. *Code of Criminal Procedure Art. 15.06.*

A warrant of arrest may be forwarded to a peace officer by any method that ensures the transmission of a duplicate of the original warrant, including secure facsimile transmission or other secure electronic means. *Code of Criminal Procedure Art. 15.08.* After the warrant

has been delivered to the officer to serve, it cannot be altered to change the name of the accused. ***Newburn v. Durham***.

A summons may be issued in any case where a warrant may be issued and shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place instead of ordering a peace officer to arrest them. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his house or usual place of abode with some person of suitable age and discretion residing at the place, or by mailing it to the defendant's last known address. If a defendant fails to appear in response to the summons a warrant shall be issued. Code of Criminal Procedure Art. 15.03.

Release of Arrest Warrant as Public Record

COMMON PITFALL

The arrest warrant and any affidavit presented to the magistrate is public information, and beginning immediately when the warrant is **executed**, the clerk shall make a copy of the warrant and affidavit available for public inspection in the clerk's office during normal business hours. *Code of Criminal Procedure Art. 15.26.*

Redaction of Identifying Information of Child Sex Abuse Victim

Warrants of arrest and all supporting affidavits are generally open to inspection by the public. *Code of Criminal Procedure Art. 15.26.* However, disclosure of identifying information of victims of sexual offenses who are under 17 years of age is prohibited by Art. 57.02(h), unless it is required or permitted by law. The Attorney General issued an opinion that Art. 15.26 does not specifically require or permit such disclosure. Therefore, courts should redact any identifying information of child sex abuse victims before releasing such documents to the public. ***Attorney General Opinion KP-0275***.

2. The Complaint and Probable Cause

KEY POINT

An arrest warrant shall be issued only upon a sworn complaint setting forth essential facts constituting the offense charged and showing there is probable cause to believe that such an offense has been committed and that the defendant committed it. ***Whiteley v. Warden, Wyoming State Penitentiary***; ***Giordenllo v. U.S.***; ***Barnes v. State***.

Probable cause exists if a reasonable, "prudent man" would have grounds for belief in the defendant's guilt. ***U.S. v. Jacquillon***; ***U.S. v. Wysocki***. "Certainty" is not needed for probable cause, just "probability" that the accused committed the offense. ***U.S. v. Bowers***; ***U.S. v. Atkinson***.

Arrest Warrant Based on Sworn Statement

When any person shall make oath before the magistrate that another has committed some offense against the laws of the state, either before the magistrate in person or through an electronic broadcast system, the magistrate may issue a warrant of arrest. *Code of Criminal Procedure Art. 15.03(c).*

A recording of the communication between the person and the magistrate must be made if it is done through an electronic broadcast system. If the defendant is charged with the offense, the recording must be preserved until:

- the defendant is acquitted of the offense; **or**
- all appeals relating to the offense have been exhausted.

Code of Criminal Procedure Art. 15.03(d).

The counsel for the defendant may obtain a copy of the recording on payment of an amount reasonably necessary to cover the costs of reproducing the recording. *Code of Criminal Procedure Art. 15.03(c).*

The complaint shall be sufficient, without regard to form, if it has these substantial requisites:

- It must state the name of the accused, if known, and if not known, must give some reasonably definite description of him.
- It must show that the accused has committed some offense against the laws of the state, either directly or by stating that the affiant has good reason to believe, and does believe, that the accused has committed such offense.
- It must state the time and place of the commission of the offense, as definitely as can be done by the affiant.
- It must be signed by the affiant by writing his name or affixing his mark.

Code of Criminal Procedure Art. 15.05.

The **complaint is sufficient** if it is based on information given to the complainant by identified (named) eyewitnesses or the identified victim of a crime and sets forth a brief statement of the basic facts furnished by the eyewitnesses or victim showing that the accused committed the crime. ***U.S. v. Bell***; ***Jackson v. State***; ***Frazier v. State***.

A **complaint is deficient** if it lacks:

- an affirmative allegation that the affiant has personal knowledge of the matters contained therein;
- the source or sources for complainant's belief; **or**
- any other sufficient basis upon which a finding or probable cause could be made.

Giordenello v. U.S..

It is not required that each and every fact on which the complainant bases the belief of guilt to be spelled out in the complaint. ***Jaben v. U.S.***.

Anonymous Informants and Hearsay

If a complaint is based on information from an unidentified, unnamed informant:

- the complaint must contain facts that show credibility of the informant and the reliability of the information;

- it must show how the informant knows that the accused committed the crime and why complainant believes that the informant is reliable and trustworthy;

- a magistrate may consider the informant's veracity, reliability, and basis of knowledge;

- it is not necessary to state why complainant believes that an identified informant is reliable and trustworthy, but must show how the informant knows that the accused committed the crime;

- if the informant is an eyewitness, that fact must be stated in the complaint.

Lowery v. State.

KEY POINT

If the complaint is based on informant hearsay, the affiant must state how the affiant acquired the information, and either the name of the informant, or that an unnamed informant gave the information to the affiant. Hearsay may be accepted by the magistrate, "so long as a substantial basis for crediting the hearsay is presented." ***Illinois v. Gates***.

This gives the magistrate broad discretion to accept or reject complaints based on this hearsay, and the magistrate should consider all factors to determine the reliability of the information.

B. Search Warrants

A **"search warrant"** is a written order issued by a magistrate and directed to a peace officer commanding the officer to search for and seize designated property or things and to bring them before the magistrate. *Code of Criminal Procedure Art. 18.01(a).*

1. Application for Search Warrant

KEY POINT

No search warrant shall issue unless facts are presented to a magistrate establishing probable cause for its issuance. A sworn probable cause affidavit shall be filed in **every** instance in which a search warrant is requested. Code of Criminal Procedure Art. 18.01(b).

Electronic Application for Search Warrant

A magistrate **may** consider information communicated by telephone or other reliable electronic means in determining whether to issue a search warrant. An applicant communicating via electronic means shall:

- Prepare a **"proposed duplicate original"** copy of the warrant (just means they need to prepare the warrant that will be used)

- Read or transmit its contents verbatim to the magistrate.

The magistrate **shall**:

- Use the copy of the warrant provided by the applicant (what was sent to the magistrate, or what the magistrate transcribed if it was read verbatim).

- If the magistrate modifies the warrant:
  - Send the modified version to the applicant by reliable electronic means; **or**
  - File the modified original and direct the applicant to modify their copy accordingly.
- Acknowledge the applicant's attestation (if made) to the contents of the search warrant in writing on the affidavit.
- Sign all original documents.
- Enter the date and time of issuance on the warrant.
- Transmit the warrant by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on their copy of the search warrant.

Jurisdiction for Search Warrants

For any search warrant, the justice of the peace signing the warrant should have jurisdiction over the geographic area to be searched. ***Gilbert v. State***.

KEY POINT

The magistrate **may** question under oath the applicant or any who gave statements supporting the application and consider "additional testimony or exhibits." But if so, the magistrate **must**:

- Record the testimony (recorder, written verbatim, or court reporter).
- Make sure any transcription is certified as accurate and is preserved.
- Sign, certify the accuracy of, and preserve any other written record.
- Ensure that the exhibits are preserved.

Code of Criminal Procedure Art. 18.01(b-1).

2. Issuance of Search Warrant

Form of the Search Warrant

The search warrant must:

- Be issued in the name of "The State of Texas";
- Identify, as near as may be, that which is to be seized, and name or describe, as near as may be, the person, place, or thing to be searched;
- Command any peace officer of the proper county to search forthwith the person, place, or thing named;
- Be dated and signed by the magistrate; **and**

- Have the magistrate's name appear in clearly legible handwriting or in typewritten form with the magistrate's signature.

Code of Criminal Procedure Art. 18.04.

Description of Location or Person to be Searched

The warrant should contain the specific street address, or a full description of the building and surrounding areas if no address is provided. ***Ex parte Flores***. If a person is to be searched, the warrant should describe the person to be searched, including any or all of the following, although all need not be present:

- proper name, nickname, or street name,
- age,
- gender,
- height and weight,
- identifying marks, **or**
- ethnic origin.

Objects of the Search Warrant

The search warrant can be for:

- Property acquired by theft or in any other illegal manner;
- Property specially designed, made, or adapted for or commonly used in the commission of an offense;
- Arms and munitions kept or prepared for the purposes of insurrection or riot;
- Weapons prohibited by the Penal Code;
- Gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;
- Obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;
- A drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;
- Any property the possession of which is prohibited by law;
- Implements or instruments used in the commission of a crime;
- 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 **(Note: Evidentiary Warrant – Additional Requirements Apply, see *page 87*)**;

- Persons **(may not be seized)**;
- Contraband subject to forfeiture under Chapter 59 of this code **(Note: Contraband Warrant – Additional Requirements Apply, see *page 86*)**;
- Electronic customer data held in electronic storage, including the contents of, records, and other information related to a wire communication or electronic communication held in electronic storage **(may not be seized)**; **or**
- A cellular telephone or other wireless communications device, subject to Article 18.0215 **(may not be seized)**.

Code of Criminal Procedure Art. 18.02(a).

Return of the Search Warrant

The time allowed for the execution of a search warrant; **exclusive** of the day of its issuance and of the day of its execution, is **three whole days**, except that it is 15 whole days if the warrant is issued solely to search for and seize specimens from a specific person for DNA analysis and comparison, including blood and saliva samples. The magistrate can indicate within the warrant a shorter period of time for execution, if desired. *Code of Criminal Procedure Art. 18.07(a).*

The magistrate issuing a search warrant **shall** endorse on the search warrant the date and hour of its issuance. *Code of Criminal Procedure Art. 18.07(b).*

When the property to be searched for and seized is found, the officer shall take possession and bring it to the magistrate. *Code of Criminal Procedure Art. 18.09.*

Release of Probable Cause Affidavit as Public Record

Except as provided by Article 18.011, which provides for the sealing of records, the affidavit establishing probable cause becomes public information when the search warrant for which the affidavit was presented is **executed**, and the magistrate's clerk **shall** make a copy of the affidavit available for public inspection in the clerk's office during normal business hours. *Code of Criminal Procedure Art. 18.01(b).*

The magistrate should review the search warrant return filed and determine if the warrant was executed, the manner of execution, and if any articles were seized. *Code of Criminal Procedure Art. 18.10.*

The officer shall retain custody of the seized property until the magistrate enters an order directing the manner of safekeeping the property. *Code of Criminal Procedure Art. 18.10.*

The magistrate **shall** file the search warrant and return and record of any proceedings with the clerk of the court having jurisdiction of the case including the schedule of the property seized. *Code of Criminal Procedure Art. 18.15.*

3. Special Search Warrants

a. Combination Search and Arrest Warrant

If the facts presented for the issuance of a search warrant also establish probable cause that a person has committed an offense, the search warrant may also order the arrest of the person. *Code of Criminal Procedure Art. 18.03.*

b. Cell Phone Warrants

A "cellular phone or other communication device" may be the subject of a search warrant. Law enforcement must get a warrant before searching a cell phone. Such a warrant can only be issued by a judge in the judicial district of the law enforcement agency that has possession of the phone or where the cell phone is likely located. *Code of Criminal Procedure Art. 18.0215.*

KEY POINT

Various other types of warrants related to tracking a person's location or intercepting data may be issued, but **not by justices of the peace**. See Chapters 18A and 18B of the Code of Criminal Procedure for information.

c. Contraband Warrants

Warrants to seize contraband as defined in Code of Criminal Procedure Art. 59.01 can only be issued by certain justices of the peace. A justice of the peace may only issue contraband search warrants if their county does not have:

- a county court-at law,

- a county judge who is a licensed attorney, **or**

- a municipal court of record with a courtroom located in the county and a judge who is a licensed attorney.

Code of Criminal Procedure Art. 18.01(i).

The probable cause affidavit for a contraband warrant must include:

- sufficient facts to establish probable cause that a specific felony offense has been committed;
- that the specifically described property or items that are to be searched for or seized constitute contraband as defined in Article 59.01 of this code; **and**
- that the property or items are located at or on the particular person, place, or thing to be searched.

Code of Criminal Procedure Art. 18.01(g).

d. Evidentiary Search Warrants

KEY POINT

Most items that can be searched for and seized with a search warrant are unlawful for a person to possess. However, under Art. 18.02(a)(10) of the Code of Criminal Procedure, a search warrant may be issued for something that is not specifically included in the above list of items and may be lawful to possess but is evidence that a specific person did (or did not) commit a specific crime.

A warrant for this type of item is called an **evidentiary search warrant.** The most common example is a warrant to take the blood of someone suspected of DWI and test it for its alcohol content. These "blood warrants" are discussed in more detail below.

A justice of the peace may only issue evidentiary search warrants if their county does not have:

- a county court-at law,
- a county judge who is a licensed attorney, **or**
- a municipal court of record with a courtroom located in the county and a judge who is a licensed attorney.

Code of Criminal Procedure Art. 18.01(i).

A subsequent evidentiary search warrant issued to search the same person, place, or thing subjected to a prior search may only be signed by a:

- statutory county court judge,
- district court judge,
- court of appeals judge,
- court of criminal appeals judge, **or**
- Supreme Court of Texas justice.

Code of Criminal Procedure Art. 18.01(d).

A probable cause affidavit for an evidentiary search warrant must state:

- that a specific offense has been committed;

- that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense; **and**

- that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Code of Criminal Procedure Art. 18.01(c).

KEY POINT

An evidentiary search warrant **may not** be issued to search for and seize property or items that are located in an office of a newspaper, news magazine, television station, or radio station. *Code of Criminal Procedure Art. 18.01(c).*

e. Blood Search Warrants

COMMON PITFALL

Under the Transportation Code, every driver in Texas gives their implied consent to give a breath or blood sample upon request, by the mere act of driving on Texas roadways. If a driver then attempts to withhold consent, under certain circumstances a peace officer may seek a warrant to forcibly take a sample of the individual's blood for alcohol testing.

These warrants may be executed in counties adjacent to the county where the warrant was executed and may be executed by any law enforcement officer located in the county of issuance or any adjacent county. *Code of Criminal Procedure Art. 18.067.*

If the warrant is executed in an adjacent county, no court order is necessary to return the sample to the county where the warrant was issued. *Code of Criminal Procedure Art. 18.10(b).*

It is important to keep in mind that these are considered evidentiary search warrants, and therefore **only** justices of the peace in **certain counties** may issue these warrants, as discussed above.

Blood Search Warrants and Attorney Judges

KEY POINT

However, **any** justice of the peace, in any county, who is a licensed attorney, **may** issue a search warrant to collect a blood specimen from a person who is arrested for an intoxication-related offense and refuses to provide a sample of his or her breath or blood. **However, this authority does not extend to other evidentiary search warrants.** *Code of Criminal Procedure Art. 18.01(j).*

f. Administrative Search Warrants for Health or Safety Hazards

An **administrative search warrant** may be issued to a fire marshal, health officer, or code enforcement official of the state or of any county, city, or other political subdivision for the purpose of allowing the inspection of any specified premises to determine the presence of a fire, or health hazard, or unsafe building condition, or a violation of any fire, health, or building regulation, statute, or ordinance. *Code of Criminal Procedure Art. 18.05.*

g. Search Warrant to Photograph Injured Child

A search warrant may be issued to search for and photograph a child who is alleged to be the victim of the offenses of injury to a child as prohibited by Penal Code § 22.04; sexual assault of a child as prohibited by Penal Code § 22.011(a); aggravated sexual assault

Same-Sex Officer for Photographing Child

A search warrant under this section shall be executed by a peace officer of the same sex as the alleged victim or, if the officer is not of the same sex as the alleged victim, the peace officer must be assisted by a person of the same sex as the alleged victim. The person assisting an officer under this subsection must be acting under the direction of the officer and must be with the alleged victim during the taking of the photographs. *Code of Criminal Procedure Art. 18.021(e).*

of a child as prohibited by Penal Code § 22.021; or continuous sexual abuse of young child or disabled individual as prohibited by Penal Code § 21.02. *Code of Criminal Procedure Art. 18.021(a).*

A warrant issued under this article **shall** identify, as near as may be, the child to be located and photographed, shall name, or describe, as near as may be, the place or thing to be searched, and shall command any peace officer of the proper county to search for and cause the child to be photographed. *Code of Criminal Procedure Art. 18.021(c).*

The officer executing the warrant may be accompanied by a photographer who is employed by a law enforcement agency and who acts under the direction of the officer executing the warrant. The photographer is entitled to access the child in the same manner as the officer executing the warrant. *Code of Criminal Procedure Art. 18.021(b).*

After having located and photographed the child, the peace officer executing the warrant shall take possession of the exposed film and deliver it forthwith to the magistrate. *Code of Criminal Procedure Art. 18.021(d).*

4. When a JP Can Issue a Search Warrant (Including a Blood Search Warrant) Flowchart

Click Here to Open the Search Warrant Flowchart

C. Emergency Mental Health Warrants

A justice of the peace, sitting as magistrate, may issue warrants for emergency apprehension and detention of mentally ill persons and chemically dependent persons. The purpose of these warrants is to keep a person from doing harm to themselves or others and to get them immediately to a facility that can provide the treatment that is needed.

Note that a peace officer can take a person into custody without a warrant and transport them to a local mental health authority for evaluation.

Application for an Emergency Mental Health Warrant

An adult may file a written application for the emergency detention of another person (who can be an adult or a child). *Health and Safety Code § 573.011(a).*

The application must state:

- that the applicant has reason to believe and does believe that the person evidences mental illness;
- that the applicant has reason to believe and does believe that the person evidences a substantial risk of serious harm to himself or others;
- a specific description of the risk of harm;
- that the applicant has reason to believe and does believe that the risk of harm is imminent unless the person is immediately restrained;
- that the applicant's beliefs are derived from specific recent behavior, overt acts, attempts, or threats;
- a detailed description of the specific behavior, acts, attempts, or threats; **and**
- a detailed description of the applicant's relationship to the person whose detention is sought.

Health and Safety Code § 573.011(a).

The application may be accompanied by any relevant information, and must be made in person, except by physicians or mental health professionals in certain circumstances ***(see page 93)***. *Health and Safety Code §§ 573.011(c), 573.012(h).*

The magistrate **shall deny the application unless** the magistrate finds that there is reasonable cause to believe that the person evidences mental illness and because of that mental illness the person evidences either:

- a substantial risk of serious harm to himself or others;
- Severe emotional distress and deterioration in the person's mental condition; **or**

- An inability to recognize symptoms or appreciate the risks and benefits of treatment.

Also, the magistrate must find that the person is likely without immediate detention to suffer serious risk of harm or to inflict serious harm on another person, the risk of harm is imminent unless the person is immediately restrained, **and** the necessary restraint cannot be accomplished without emergency detention. *Health and Safety Code § 573.012(b).*

A substantial risk of serious harm to the person or others may be demonstrated by the person's behavior or evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty.

What is a Mental Illness?

For purposes of an emergency mental health warrant, a mental illness is "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that… substantially impairs a person's thought, perception of reality, emotional process, or judgment; or…grossly impairs behavior as shown by recent disturbed behavior." *Health and Safety Code § 571.003(14)*.

Issuance and Execution of the Warrant

The magistrate **shall** issue to an on-duty peace officer a warrant for the person's immediate apprehension if the magistrate finds that the criteria described above are satisfied.

An apprehended person who is not physically located in a mental health facility when the warrant is issued shall be transported in accordance with § 573.001(d) for a preliminary examination.

The warrant serves as an order for detention in the facility or, if the person is already in the facility, for a preliminary examination as provided by § 573.021. The warrant and a copy of the application for the warrant shall be immediately transmitted to the facility, and can be transmitted to the applicant electronically or by email with the warrant attached as a secure PDF. *Health and Safety Code §§ 573.012(h-1),(h-2).*

KEY POINT

Section 573.021 of the Health and Safety Code governs the evaluation of the person once the warrant has issued (or they are transported without warrant by a peace officer pursuant to § 573.001 or by a guardian pursuant to § 573.003). Once the warrant has issued, the case is out of your hands.

Procedure for Electronic Application by Physician or Licensed Mental Health Professional
A judge or magistrate shall permit an applicant who is a physician, or a licensed mental health professional employed by a local mental health authority, to present an application for an emergency mental health warrant by:

- e-mail with the application attached as a secure document in a portable document format (PDF), **or**

- another secure electronic means, including satellite transmission, closed-circuit television transmission, or any other method of two-way electronic communication that:
  - is secure,
  - is available to the judge or magistrate, **and**
  - provides for a simultaneous, compressed full-motion video and interactive communication of image and sound between the judge or magistrate and the applicant.

Health and Safety Code § 573.012(h).

After the presentation of an electronic application, the judge or magistrate may transmit a warrant to the applicant electronically, if a digital signature is transmitted with the document, or by e-mail with the warrant attached as a secure document in a portable document format (PDF), if the identifiable legal signature of the judge or magistrate is transmitted with the document. *Health and Safety Code § 573.012(h-1).*

The judge or magistrate shall provide for a recording of the presentation of an electronic application to be made and preserved until the patient or proposed patient has been released or discharged. The patient or proposed patient may obtain a copy of the recording on payment of a reasonable amount to cover the costs of reproduction or, if the patient or proposed patient is indigent, the court shall provide a copy on the request of the patient or proposed patient without charging a cost for the copy. *Health and Safety Code § 573.012(i).*

BEST PRACTICE

Emergency Detention of Minors

From time to time, an application for an emergency mental health warrant is made for a person under the age of 17. There is nothing prohibiting an emergency detention order from being issued on a child. TJCTC recommends notifying the transporting officer that the order is for a child so the officer can follow any applicable procedures during transport.

Emergency Detention of Chemically Dependent Persons

Similar procedures exist for the detention and treatment of chemically dependent persons. *Health and Safety Code §§ 462.042, 462.043.*

Transportation of Persons Subject to Emergency Detention Order

A peace officer who transports a person to a facility under an emergency detention order is not required to remain at the facility while the person is screened or treated or while their insurance coverage is verified.

The officer may leave the facility immediately after the person is taken into custody by the facility staff and the officer provides the required documentation to the facility. *Health and Safety Code § 573.012(d-1).*

Many other issues that have arisen over law enforcement's responsibility to transport persons subject to an Emergency Detention Order were addressed by the Attorney General in Opinion KP-0206. These issues include the following:

- *Does a magistrate have authority to require a specific law enforcement agency to execute a warrant?*
    - **Yes.** Any peace officer or agency can be designated to apprehend and transport the individual, regardless of where the individual is found within the county. So, a magistrate may order a city peace officer or police department to apprehend and transport someone not currently located in the city which they serve.

- *Must the responding officer/agency "respond and transport the person?"*
    - **Yes.** The officer/agency that apprehends the person is also responsible for transporting them to the nearest mental health facility for evaluation.

- *May an officer or agency refuse to transport an individual under an emergency mental health warrant?*
    - **No.** Health and Safety Code § 573.012, says that a person apprehended "shall be transported" to the nearest mental health facility. The word "shall" imposes a duty, and not something left to the discretion of the officer or agency.

Chapter 4: Juvenile Magistration

Juvenile magistration is similar to the magistration process for adults, and its purpose is the same. However, there are certain procedures designed to further safeguard the rights of the juvenile in light of their age, and to ensure their understanding of their rights.

Additionally, a magistrate must ensure that the rights of the juvenile are protected to allow a statement given to be admissible in further proceedings. The below procedures apply to a "child", defined as a person who is at least 10 and less than 17 years old; or who is 17 years of age and is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17. *Family Code § 51.02(2).*

A. Warning Juveniles of Rights

A juvenile brought before a magistrate must receive a warning of the rights set out below:

- The child may remain silent and not make any statement at all and any statement that the child makes may be used in evidence against the child;

- The child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

- If the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; **and**

- The child has the right to terminate the interview at any time.

Family Code § 51.095

B. Admissibility of Juvenile Statements

The statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if any of the following criteria are met:

- The statement is made in writing:

- while the child is in a detention facility or other place of confinement, while the child is in custody of an officer, or during or after the interrogation of the child by an officer if the child is in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state; **and**

- The statement shows that the child has at some time before the making of the statement received from a magistrate the warning of rights described above, **and**

- The magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights. The magistrate's certification that no law enforcement personnel or prosecuting attorney was present includes an exception for the need to ensure the personal safety of the magistrate or other court personnel. The magistrate may require a bailiff or law enforcement official (if a bailiff is not available) to be present if the magistrate determines that this is necessary, but the law enforcement officer or bailiff may not carry a weapon in the presence of the child. *Family Code § 51.095(a)(1)(B)(i).*

- The statement is made orally, and the child makes a statement of facts or circumstances that are found to be true, and tend to establish the child's guilt, such as the finding of hidden or stolen property, or the instrument with which the child states the offense was committed.

- The statement was **res gestae** of the delinquent conduct or the conduct indicating a need for supervision or the arrest.

- The statement is made:

Res Gestae

"Res gestae" means a spontaneous remark made concurrently with an incident so that it carries a certain degree of credibility and is admissible because of its spontaneity. For example, when arrested a defendant blurts out "This was all Billy's idea!"

- in open court at the child's adjudication hearing,

- before a grand jury considering a petition that the child engaged in delinquent conduct, **or**

- at a preliminary hearing concerning the child held in compliance with the Family Code, other than at a detention hearing under § 54.01.

- The statement is made orally:
  - while the child is in a detention facility or other place of confinement, while the child is in the custody of an officer, or during or after the interrogation of the child by an officer if the child is in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state, **and**

  - The statement is recorded by an electronic recording device, including a device that records images, **and**

  - Before making the statement, the child is given the warning described above by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning, **and**

  - Each voice on the recording is identified, **and**

  - Not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child.

Family Code § 51.095.

Juvenile Detention Hearings

Magistrates can be appointed by juvenile court judges to hold juvenile detention hearings under the Family Code. For more information on these proceedings, please see Chapter 10 of the *Juvenile Deskbook.*

Chapter 5: Peace Bonds

A. Peace Bond Procedure

Whenever a magistrate is informed upon oath that an offense against the person or property of the informant or of another is about to be committed, the magistrate may issue a peace bond to prevent the offense.

The types of alleged offenses to which peace bond proceedings apply are those against a person or property or the threat to commit an offense against a person or property. ***Ex parte Muckenfuss***.

"Good Reason to Believe"

A complaint based upon an oath that the informant merely has "good reason to believe" that an offense is about to be committed is **insufficient**. ***Ex parte Glass***.

BEST PRACTICE

When a proper complaint is presented to the magistrate, the magistrate shall immediately issue a warrant for the arrest of the accused. *Code of Criminal Procedure Art. 7.01.* TJCTC recommends substituting a summons for the warrant if reasonable to do so. *Code of Criminal Procedure Art. 15.03.*

Peace Bond Hearing

When the accused is brought before the magistrate, the magistrate shall hear proof as to the accusation. The accused is not entitled to a jury trial in a peace bond hearing. It is not necessary to appoint an attorney for the accused at the initial peace bond hearing. *Code of Criminal Procedure Art. 7.03; **Ex parte Johnson**; **Attorney General Opinion JM–977***.

If the Complaint is Insufficient

If the magistrate believes from the evidence that there is no good reason to believe that the offense was intended, or will be committed, or no serious threat was made, the accused shall be discharged, and costs may be taxed against the party who made the complaint. *Code of Criminal Procedure Art. 7.10.*

Often, the behavior the complainant wants stopped is not an actual or threatened offense against the person or property of any person, and therefore a peace bond is **not** appropriate. For example, TJCTC has received peace bond questions where the

KEY POINT

complainant wants the accused to be ordered to not post mean things about them on Facebook, or where the landlord of a manufactured home community stands in common areas and "stares" at the complainant's trailer. Neither of these situations support the requirement of a peace bond and are good examples of why TJCTC recommends a summons over a warrant in many instances.

If the Magistrate Determines Peace Bond is Necessary

If satisfied that the offense was intended to be committed, or that the threat was seriously made, the magistrate shall order that the accused enter into a bond in such amount as he may in his discretion require and adjudge the costs of the proceeding against the accused. *Code of Criminal Procedure Arts. 7.03, 7.14.*

The bond is conditioned on the accused not committing the offense and keeping the peace toward the person threatened or about to be injured and all other persons named in the bond for a period of time up to one year. The magistrate shall admonish the accused that if he violates the terms of the bond the court may order forfeiture of the bond and may also punish the accused for contempt.

Determining the Amount of Bond

The amount of the bond is within the discretion of the magistrate, but the magistrate shall consider the financial circumstances of the accused and the nature of the offense threatened or about to be committed. *Code of Criminal Procedure Arts. 7.03, 7.06.*

The bond must comply with the requirements of Art. 17.04 of the Code of Criminal Procedure, and must be payable to the State of Texas, signed and dated by the defendant and any sureties, and must be filed with the county clerk. The defendant may post cash if desired, but a cash bond may not be required.

Can a Peace Bond Order be Appealed?

Defendant has no right of appeal from a magistrate's order requiring a bond. The defendant's only remedy is to seek a writ of habeas corpus in the county or district court. ***Ex parte Salamy***; ***Ex parte Wilkinson***.

Failure to Give Peace Bond

If the defendant fails to give the required bond, he shall be committed to jail for one year from the date of the first order requiring such bond. Before a defendant is committed to

KEY POINT

jail, counsel should be appointed in order that a determination may be made as to whether the defendant is financially able to post the required security. *Code of Criminal Procedure Art. 7.08, **Attorney General Opinion JM-977**.*

Violation of Peace Bond

If it comes to the court's attention that a condition of a peace bond may have been violated, the magistrate may issue a summons for the defendant to appear at a hearing where the court will determine if there was a violation.

If the court determines that a condition of a peace bond has been violated, there are three options for punishment:

- forfeiture of the bond;
- imposition of the fine and jail time for contempt under Government Code § 21.002(c); **or**
- both forfeiture of the bond and imposition of the fine and confinement.

KEY POINT

Note, however, that a justice of the peace only has the authority to order the imposition of the fine and jail time for contempt. The matter would need to be referred to a district or county attorney for bond forfeiture to be pursued.

This is because a justice of the peace may not try a suit to forfeit a peace bond. District courts have exclusive jurisdiction to try a suit to forfeit a peace bond regardless of the amount of the bond. A forfeiture suit must be brought by the district or county attorney in district court within two years from the date of the violation of the bond. *Code of Criminal Procedure Art. 7.16; Tex. Const. Art. V, § 8; Government Code § 27.031(b)(1).*

B. Peace Bond Flowchart

Click Here to Open the Peace Bond Flowchart

Chapter 6: Resources

The primary resources a justice court needs for performing magistrate duties are Chapters 14, 15, and 17 of the Texas Code of Criminal Procedure. These chapters lay out the specific procedures for notifying an arrested defendant of applicable rights and releasing the defendant on bail. Additionally, Chapter 18 governs issuance of search warrants.

A directory of all community supervision and corrections department offices may be found at: ***http://tdcj.state.tx.us/documents/CSCD_directory.pdf***.

Bench Cards

Download the Magistration Bench Cards. Laminated copies of these bench cards will be provided upon request to assist you in magistrating at the jail or by videoconference.

Forms

Forms may be found under the Magistration tab at ***http://www.tjctc.org/tjctc-resources/forms.html***.

Interpreters

Additional resources and information about court interpreters and translators are available in the TJCTC Self-Paced Module on Interpreters and Spanish Legal Terminology, which may be accessed at ***https://www.tjctc.org/onlinelearning/selfpacedmodules.html***.

Consular Notification

Download consular notification contact information at ***this State Department contact info page***.

Download the consular notification guide at **this State Department page**.
Questions: Law Enforcement Liaison at the Office of the Attorney General, Criminal Investigations Division, (512) 463-9570.

Attorney Appointment List for Other Counties

Texas Indigent Defense Commission, (512) 936-6994
http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx

Out-of-State Probation Violation Warrant Procedures
https://www.interstatecompact.org/bench-book

JCMH Mental Health Bench Book
https://www.texasjcmh.gov/publications/bench-books/

Appendix: List of Case Law References

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Attorney General Opinion KP-0275 (2019).
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Barnes v. State, 390 S.W. 2d 266, 270 (Tex. Crim. App. 1965).
U.S. v. Jacquillon, 469 F. 2d 380 (5th Cir. 1972) cert. den., 410 U.S. 938 (1973).
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U.S. v. Bowers, 458 F. 2d 1045, 1048 (5th Cir. 1972), cert. den., 409 U.S. 868.

U.S. v. Atkinson, 450 F. 2d 835, 838 (5th Cir. 1971), cert. den., 406 U.S. 923 (1972).
U.S. v. Bell, 457 F. 2d 1231 (5th Cir. 1972).
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Frazier v. State, 480 S.W. 2d 375, 378 (Tex. Crim. App. 1972).
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