U.S.C.A. Const. Amend. VIII

## Amendment VIII. Excessive **Bail**, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Vernon's Ann.Texas Const. Art. 1, § 11

## § 11. **Bail**

Currentness

Sec. 11. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent **bail** after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

## MIRANDA (MAGISTRATE'S) WARNINGS

You have the right to remain silent.

Anything you say can and will be used against you at trial.

You have the right to the presence of counsel to advise you prior to and during questioning.

If you cannot afford an attorney, one will be appointed for you.

If you begin to give a statement, you may terminate the interview at any time.

(In Texas) If you have been charged with a felony, you have the right to an examining trial prior to the time of indictment.

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# THE FAIR DEFENSE ACT AND THE ROLE OF THE MAGISTRATE

*By Jim Bethke, Executive Director, Texas Indigent Defense Commission and Dottie Carmichael, Ph.D., Research Scientist, Public Policy Research Institute (PPRI), Institute at Texas A&M University.* *A special thank you is owed Brittany Long, 3L, University of Texas School of Law for her editorial assistance.*

**Introduction**

In 2005, there were a series of articles published in *The Recorder* describing magistrates' responsibilities under the Fair Defense Act passed in 2001. Since then, the Texas Legislature has met four times and convened once again on January 13. Additionally, the U.S. Supreme Court issued an opinion directly impacting Article 15.17 hearings, as has the Texas Court of Criminal Appeals. This article is intended to serve as a refresher and highlight key changes since the last publication.

**Overview of the Fair Defense Act of 2001**

The Fair Defense Act, the original blueprint for indigent defense developed by the Texas Legislature, provides necessary structure and guidance to local officials carrying out constitutional responsibilities to ensure that all defendants have access to counsel.

Texas Code of Criminal Procedure, Article 1.051(c), provides that "an indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interests of justice require representation."[1] In 2001, the 77th Texas Legislature modified the State's statutes and codes to reform indigent defense practices through a group of amendments collectively known as "The Fair Defense Act." Prior to the Fair Defense Act, an absence of uniform standards and procedures combined with a lack of State oversight allowed indigent defense rules and the quality of representation to vary widely from county to county and even from courtroom to courtroom.[2] The accused in Texas were not uniformly assured prompt access to counsel. Furthermore, since the State did not provide funding for indigent defense, the entire financial burden was shouldered by counties. By changing the procedures for conducting magistrate hearings, determining indigence, and appointing counsel, the legislation addressed practices that had been under scrutiny both from inside and outside the state.[3]

**Fair Defense Act** *continued on pg. 22*

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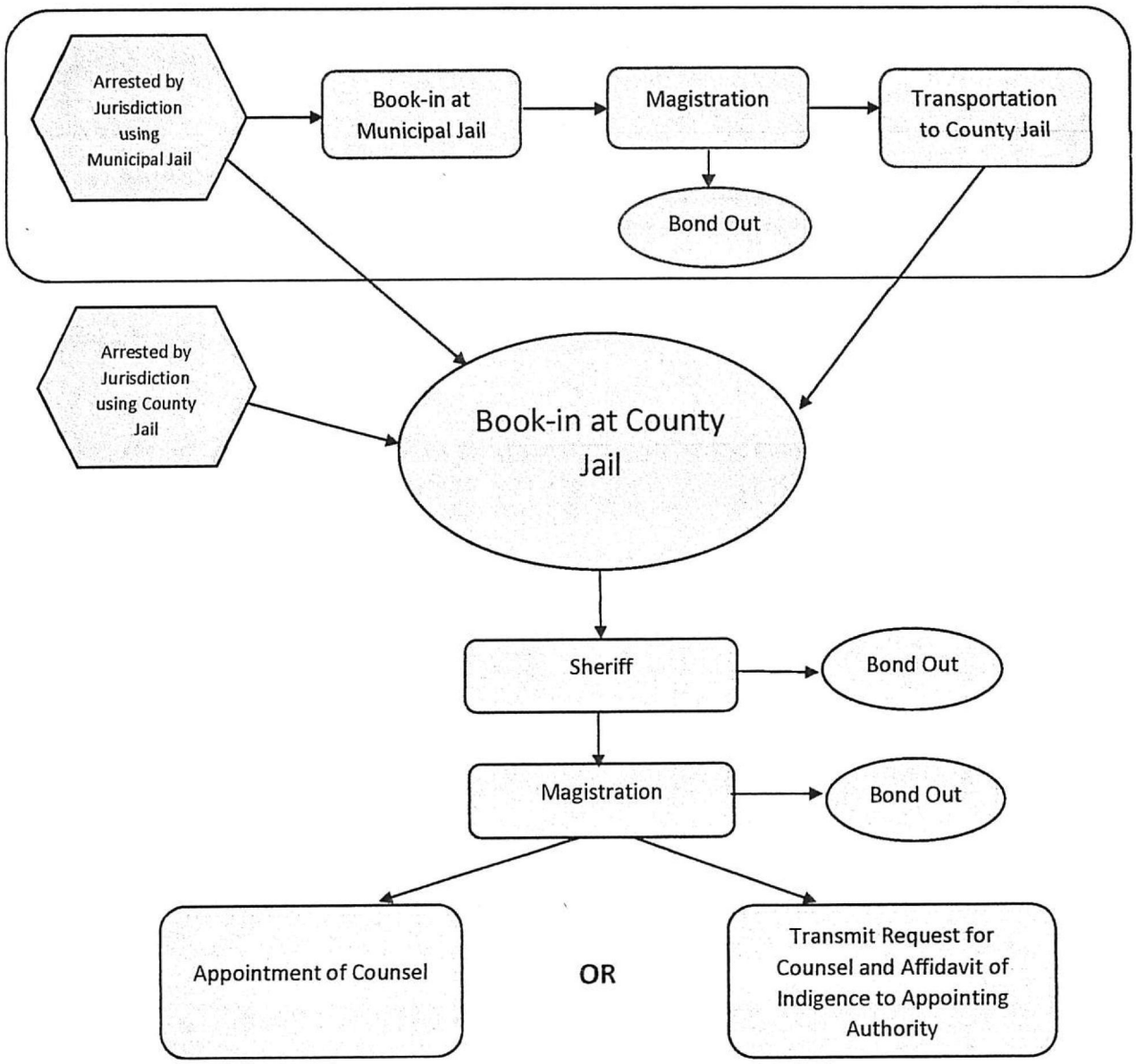
**Fair Defense Act** *continued from pg. 1*

The Fair Defense Act established the Task Force on Indigent Defense to oversee the provision of indigent defense services in Texas. The Task Force was renamed the Texas Indigent Defense Commission (Commission) in 2011. The Commission is a permanent standing committee of the Texas Judicial Council and is administratively attached to the Office of Court Administration.

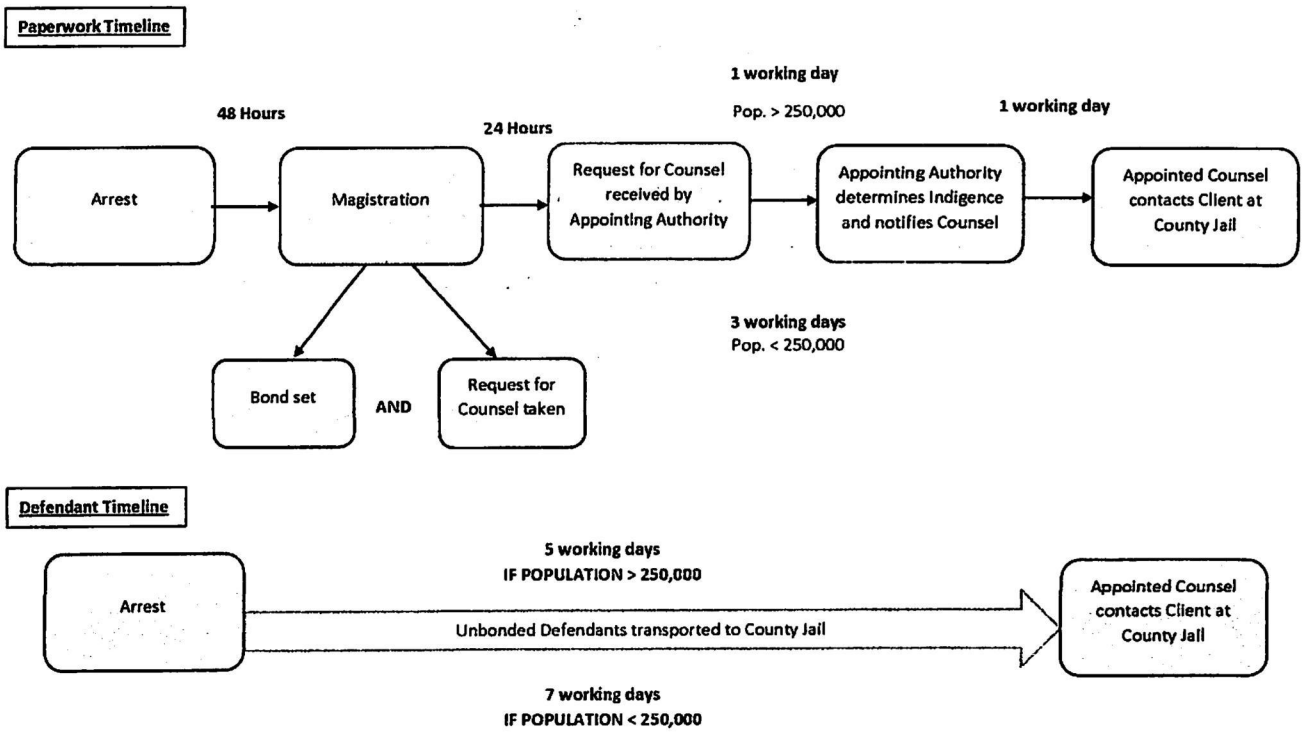
The Commission is led by the Honorable Sharon Keller, Presiding Judge, Court of Criminal Appeals and is composed of five members appointed by the Governor and eight ex officio members. The Commission's programs and policies are implemented by eleven full-time staff members.

Since 2001, the Fair Defense Act has gone through numerous revisions to improve its scope and comprehensiveness as well as the quality of indigent defense services provided throughout the state. In the 2013 Legislative Session, a few new key provisions were added, including a requirement that attorneys report to the Commission the percentage of their practice time dedicated

**Figure 1. Defendant Case Flow from Arrest to Magistration**



## Figure 2. Timeline Specified by the Fair Defense Act




to indigent defense in each county in each fiscal year.

### Caseflow and Timelines

To ensure indigent defendants receive counsel within a specified timeframe, the Fair Defense Act assigns responsibility to actors at each phase of pretrial case processing. Figure 1 illustrates defendant caseflow from arrest to the appointment of counsel. Figure 2 highlights the time available under the Fair Defense Act to complete each phase of processing. Though procedures may vary from county to county, in every instance magistrates play an essential role in meeting requirements of the law.

Pursuant to Article 14.06 of the Texas Code of Criminal Procedure, the arresting officer must ensure that the accused is brought before a magistrate no later than 48 hours after the arrest.[4] In a warrant arrest, if the magistrate signing the order is unavailable, or if it is necessary to provide the warnings described by Article 15.17 of the Code more expeditiously, the accused may be brought before a different magistrate in the county where the arrest was made or a magistrate in any county in the state. The arrested person may also be presented to the magistrate by means of an electronic broadcast system.[5]

If the arrest offense is a Class C misdemeanor, the peace officer may issue a citation instead of bringing the accused before the magistrate immediately. The citation must contain 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, and an admonishment, in boldfaced, underlined, or capital letters, stating that a conviction for a misdemeanor involving violence may make it unlawful for the defendant to possess or purchase a firearm. For Class A or B misdemeanors under Section 481.121 (b)(1) or (2) of the Health and Safety Code, if the person resides in the county where the offense occurred, a peace officer may also issue a citation containing written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, and the offense charged.[6]

In compliance with the Fifth Amendment right to interrogation counsel, arresting officers must give *Miranda* warnings before beginning any custodial questioning.[7] The Sixth Amendment right to trial counsel is triggered at judicial arraignment or magistrations.[8] As long as arresting officers first read defendants their *Miranda* rights and obtain a waiver of counsel, police can still interrogate defendants after the Sixth Amendment right to trial counsel attaches.[9]

### Article 15.17 Hearings

Though the term "magistration" is not actually found in the law, it is, however, commonly used to describe the Article 15.17 hearing. A magistration is distinct from an

"arraignment," though the expressions are sometimes incorrectly used interchangeably. Article 26.02 of the Code of Criminal Procedure specifies that an arraignment takes place for the purpose of fixing the identity of the accused and taking his or her plea. An Article 15.17 Hearing is more accurately described as an "initial appearance" or "probable cause hearing."[10]

**When Right to Counsel Attaches**

Texas law requires that any individual detained in custody be given an opportunity to appear before a magistrate promptly after arrest. Guidelines for this post-arrest proceeding are specified in Article 15.17 of the Code of Criminal Procedure—a vital component of due process for the protections it provides against unjust detention.

In 2008, the U.S. Supreme Court in *Rothgery v. Gillespie County*, held that adversarial judicial proceedings begin at the time an arrestee appears before a magistrate for a hearing pursuant to Article 15.17 of the Texas Code of Criminal Procedure even though a prosecutor may not be present at the hearing or even aware of the charges or the arrest itself. [11]

Walter Rothgery requested counsel at magistration and was released on bond shortly thereafter. In proceedings below, the U.S. Court of Appeals for the Fifth Circuit held that the right to counsel does not attach until a prosecutor becomes involved in criminal proceedings. The Supreme Court rejected the Fifth Circuit's reasoning and decided that magistration, not the filing of an indictment or some other form of prosecutorial involvement, initiates adversarial judicial proceedings.

Although the Supreme Court's opinion in *Rothgery* speaks in general terms of "the consequent state obligation to appoint counsel within a reasonable time" once the right to counsel attaches and a request for assistance is made, the Court did not specify a constitutional time frame after magistration within which counsel must be appointed. The Court left it to the lower courts to resolve whether the delay in appointing counsel to represent Mr. Rothgery was unreasonable under the specific facts of his case.

The Texas Code of Criminal Procedure provides that "if an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, a court or the courts' designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county shall appoint counsel as soon as possible," but not later than three working days in counties with populations under 250,000 or one working day in counties with populations of 250,000 or more.[12] Article 1.051(j) of the Code further states that "if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first."

**Prompt Probable Cause Determination**

Though Article 15.17 does not explicitly mention probable cause determinations, appellate courts have held that this is an essential function of the magistrate. If an arrest is by a warrant, no further inquiry is needed.[13] However, when an arrest is conducted without a warrant, the magistrate must make an independent judicial determination that there is probable cause to detain the defendant or require a bond prior to release.[14]

The magistrate's review of probable cause should be based on sworn testimony or a written affidavit presenting the facts of the case and the circumstances of the arrest.[15] A common sense approach considering all the information available should be used to determine whether there is a fair probability that the arrestee committed the offense with which she is charged.[16]

Article 17.033 of the Code of Criminal Procedure clarifies the appropriate procedure in the event that the magistrate fails to find probable cause for detention or is presented insufficient sworn evidence to make a determination. A person being held for a misdemeanor offense must be released on a bond not to exceed $5,000 within 24 hours after arrest.[17] If the offense is a felony, then the right to be released matures at 48 hours and the bond may not exceed $10,000.[18] Individuals unable to make a cash or surety bond must be released on a personal bond.[19] Furthermore, until probable cause is established, an individual cannot be held to the terms of any bond.

The only means to extend these detention timelines is if the prosecutor demonstrates sufficient reason why it has not been possible to establish probable cause. If adequate justification is presented, the magistrate may postpone release for up to 72 hours from arrest while additional evidence to detain the defendant is established.[20]

**The Warnings**

Perhaps the most important function of the magistrate is to make sure defendants are informed of and understand their rights. Though magistrate's warnings do not track verbatim the Miranda decision or Texas Code of Criminal Procedure Article 38.22 of the Texas Code of Criminal Procedure, they cover the same basic protections.[21] Arrested individuals must be informed of:

- the charges against him or her and any affidavit on file;
- the right to remain silent;
- the right not to make a statement, and that any statement made can and may be used against the individual in court;
- the right to stop any interview or questioning at any

time; and
- the right to have an examining trial (felonies only).

Specifically regarding access to legal representation, magistrates must inform arrestees of:

- the right to have an attorney present prior to and during any interview or questioning by peace officers or attorneys representing the State;
- the right to hire an attorney;
- the right to request appointment of counsel if the person cannot afford counsel; and
- procedures for requesting appointment of counsel.

In addition to informing individuals of these rights, magistrates must also provide reasonable assistance to ensure arrestees are able to complete the forms requesting appointed counsel at the Article 15.17 proceeding. This requirement was added as a provision of the Fair Defense Act.

Upon giving these warnings, the magistrate should also ask if the arrestee understands these rights. If the arrestee indicates a lack of understanding, the magistrate has a duty to clarify the meaning.

**Transfer of Requests for Court Appointed Counsel to the Appointing Authority**

Within 24 hours of the magistration hearing, a request for counsel, including information concerning the arrested person's financial resources must be received by the person(s) designated in the Local Indigent Defense Plan to determine indigence and appoint counsel.[22] In some counties this responsibility is delegated directly to the magistrate. If the magistrate is the appointing authority, the determination of indigence and assignment of legal representation occurs during the 15.17 hearing. By eliminating the need to transfer the request for counsel paperwork to a different appointing authority, first contact with an attorney is expedited by as much as two to four days (depending on county population).

If the magistrate is not authorized to appoint counsel, he or she should forward the completed paperwork to the appropriate designee without unnecessary delay, and not later than 24 hours after request for appointment. The court may authorize an indigent defense coordinator, court coordinator or, more rarely, the judges themselves to review eligibility and assign counsel. Both approaches have advantages and disadvantages.[23] Direct appointment by the magistrate provides defendants faster access to an attorney, while **transfer of requests** to an agent other than the magistrate allows counties more time to confirm defendants' eligibility by validating self-reported financial information.

**Making the Record**

Next. Article 15.17 specifically requires that a magistrate record the following events: (1) the magistrate informing the person of the person's right to request appointment of counsel; (2) the magistrate asking the person whether the person wants to request appointment of counsel; and (3) whether the person requested appointment of counsel. These records are beneficial to state and local governments in monitoring conformance with timeframes specified in the Fair Defense Act.[24] Whether a magistrate is operating in court of record or not, a record must be made. Failure to do so may subject the county to loss of state indigent defense funds.

**Conclusion**

The proper implementation of the Fair Defense Act is dependent on a wide range of officials properly completing their duties. None is more important than the role of the magistrate. A magistrates' record provide a vital trail of accountability. What transpires at the initial Article 15.17 hearing has the potential to impact every aspect of the case there forward. The magistrate serves as the gatekeeper in ensuring that the statutory and constitutional right of court appointed counsel is done promptly and in a manner that promotes public trust and confidence in our justice system.

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[1] Article 1.051(c), Code of Criminal Procedure.
[2] Texas Appleseed, *The Fair Defense Report: Findings and Recommendations on Indigent Defense Practices in Texas* (2000).
[3] *Id.*
[4] Article 14.06, Code of Criminal Procedure.
[5] Article 15.17(a), Code of Criminal Procedure.
[6] Article 14.06 (b) and (c), Code of Criminal Procedure.
[7] *Pecina v. State*, 361 S.W.3d 68, 71 (Tex. Crim. App. 2012).
[8] *Id.*
[9] *Montejo v. Louisiana*, 556 U.S. 778 (2009).
[10] W. Clay Abbott, "Magistration Under Article 15.17, C.C.P.," *The Recorder*, (August 2000).
[11] *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).
[12] Art. 1.051(c), Code of Criminal Procedure.
[13] *Gerstein v. Pugh*, 420 U.S. 103 (1975).
[14] *Sanders v. City of Houston*, 543 F. Supp. 694 (S.D. Tex. 1982), aff'd 741 F. 2d 1379 (5th Cir. 1984).
[15] Article 1, Section 11, Texas Constitution.
[16] *Illinois v. Gates*, 462 U.S. 213 (1983); *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988).
[17] Art. 17.033(a), Code of Criminal Procedure.
[18] Art. 17.033(b), Code of Criminal Procedure.
[19] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).
[20] Art. 17.033(c), Code of Criminal Procedure.
[21] *Clark v. State*, 627 S.W.2d 693, 704 (Tex. Crim. App. 1982) (holding that compliance with Article 15.17 of the Texas Code of Criminal Procedure ensures compliance with Miranda requirements).
[22] *Id.*
[23] The Public Policy Research Institute, Texas A&M University, *Study to Assess the Impacts of the Fair Defense Act on Texas Counties*, 35-38 (January 2005).
[24] Article 15.17(f) of the Code of Criminal Procedure provides that a record required under this article may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under Article 26.04(a).

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# MAGISTRATION UNDER ARTICLE 15.17, C.C.P.

By W. Clay Abbott
TMCEC General Counsel

*(This article should be considered a supplement to the very inclusive and definitive treatment of 15.17 hearings found in chapter 2 of the TMCEC Bench Book, version 3)*

Many municipal courts are called on to perform the magisterial functions required under Art. 15.17 of the Texas Code of Criminal Procedure. By performing these important functions in the higher-grade misdemeanors and felony cases, the court is exposed to many new legal and non-legal issues. The municipal judge acting as a magistrate under Art. 15.17 needs a clear knowledge of the law as well as a mutually comfortable relationship with district and county judges, sheriffs, prosecutors, and defense counsel.

"Magistration" is a term not found in the Code of Criminal Procedure or elsewhere in the law. This process is also incorrectly referred to as an "arraignment." The terms "initial appearance" or "probable cause hearing" are more appropriate but are seldom used. Art. 15.17(a) requires an officer making an arrest to "without unnecessary delay take the person arrested ... before some magistrate of the county where the accused was arrested." Art. 14.06 C.C.P. requires that officers making arrests without warrants follow the dictates of Art. 15.17. Municipal judges are magistrates as defined by Art. 2.09 C.C.P.

The duties imposed on the magistrate by Art. 15.17 can be broken into three categories: finding probable cause, giving warnings, and setting bail.

## Finding Probable Cause

Texas courts have defined probable cause in much the same terms as the U.S. Supreme Court. Probable cause is a practical common sense determination after a consideration of all the facts under oath. *Illinois v. Gates*, 462 U.S. 213 (1983); *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988). It is a standard below "beyond a reasonable doubt" but constitutes more than a "hunch" or speculation. To justify a finding of probable cause, the sworn testimony or sworn affidavit must be more than merely the recitation of the elements of the offense. *Ex Parte Garza*, 547 S.W.2d 271 (Tex. Crim. App. 1977). The sworn facts set forth in testimony or by affidavit must allow the magistrate to make an independent review and determination of probable cause. Art. 1, section 11, Texas Constitution.

If a magistrate fails to find that probable cause exists from the evidence presented or is presented insufficient sworn evidence to make that finding, the magistrate should order the defendant released. In such a case, lowering the bond amount or granting a personal recognizance bond is inappropriate. Without probable cause, the defendant cannot be held or required to make or agree to the terms of a bond.

The determination of probable cause is a magisterial function similar to issuing search warrants and is *ex parte* in nature. Although Art. 15.17 does not mention probable cause determinations, appellate courts have held that the 15.17 "magistration" should include an independent judicial determination of probable cause to continue detention or require presentment of bond. *Sanders v. City of Houston*, 543 F. Supp. 694 (S.D. Tex. 1982) affirmed 741 F.2d 1379 (5th

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guilty. To the contrary, the general presumption in Chapters 37 and 45 is that the judge shall determine the punishment/sentence. This presumption, however, is not absolute. In municipal court, an election made by the defendant at either a pre-trial hearing or before the jury is empanelled (whichever occurs first) entitles the defendant to have the amount of his or her fine determined by the jury. While it is probably safe to venture that most defendants requesting a jury trial will want the jury to set the amount of the fine if they are found guilty, some may not. Either way, it is important for defendants requesting a jury trial to be informed of their statutory right to elect that the jury set the punishment.

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1 For the uninitiated, Chapter 45 contains procedures specific to municipal and justice courts.

2 *Washington v. State*, 677 S.W.2d 524, 527 (Tex. Crim. App. 1984); *Tinney v. State*, 578 S.W.2d 137 (Tex. Crim. App. 1979); *Ex parte Giles*, 502 S.W.2d 774, 782 (Tex. Crim. App. 1973).

3 Dix & Dawson, *Texas Practice* § 38.11 (Vol. 42, 1995).

4 *Id.* (Referring to Code of Criminal Procedure art. 37.07 § 2(b)).

5 Code of Criminal Procedure art. 37.07 § 2(b) (emphasis added).

6 In terms of determining punishment, the primary distinction between municipal and justice courts and county and district courts is that article 37.07 § 2(a) does not authorize municipal and justice courts to bifurcate the trial (*i.e.*, have a separate trial proceeding to determine the proper punishment in the event the defendant is found guilty).

7 Code of Criminal Procedure art. 28.01 § 2.

8 Code of Criminal Procedure art. 28.01 § 1(2).

9 Code of Criminal Procedure art. 27.02 § 7.

10 693 S.W.2d 462, 464-65 (Tex. Crim. App. 1985).

11 Code of Criminal Procedure art. 37.07 § 2(b)

12 *Caro v. State*, 771 S.W.2d 610, 619 (Tex. App.-Dallas 1989); *Teubner v. State*, 742 S.W.2d 57 (Tex. App.-Houston [14th Dist], pet.ref'd).

# PREJUDGMENT JAIL CREDIT

**By W. Clay Abbott**
**TMCEC General Counsel**

Special instructions are given in Chapter 45 of the Code of Criminal Procedure to municipal courts concerning entry of judgment. Art.45.041(c), C.C.P. mandates the judge give the defendant credit for time served in jail. Art. 45.041(c), C.C.P. specifically directs the municipal court to Art. 42.03 C.C.P. for the procedure for calculation of jail credit. The defendant is entitled to "credit on his sentence for the time that the defendant has spent in jail **in said cause**...from the time of his arrest and confinement until his sentence by the trial court" (emphasis added). Art. 42.03, Sec.2(a), C.C.P.

In *Hannington v. State*, 832 S.W.2d 355 (Tex. Crim. App. 1992), the Texas Court of Criminal Appeals detailed the effect of Art. 42.03, Sec.2(a), C.C.P. on "stacked" sentences. The Court of Criminal Appeals in *Hannington*, granted *Habeas* relief on consideration of the whole court without dissent. In that case, the defendant was sentenced to three "stacked" terms of years under Art. 42.08, C.C.P. The defendant served 173 days before sentence on all three cases, and the trial court divided those days between the three cases when entering judgment. The Court of Criminal Appeals ruled that the defendant was entitled to 173 days credit in each case under Art. 42.03, Sec.2(a), C.C.P. The Court recognized that such an application granted "double credit."

Application of this doctrine has a much greater impact since the large increase by the 76th Legislature in 1999 in the minimum required daily jail credit. Art. 45.041(c), C.C.P. also specifically refers municipal courts to Art. 45.048, C.C.P. on the issue of the jail credit rate. Art. 45.048, C.C.P. requires that the court credit the defendant "at the rate of not less than $100 for each day or part of a day."

The Court of Criminal Appeals made clear that its holding and the mandates of Art. 42.03, Sec. 2(a) C.C.P. applied only to jail time the defendant served before a judgment was entered. No "double credit" is necessary for periods subsequent to sentencing. This ruling is consistent with the ruling in *Ex Parte Minjares*, 582 S.W.2d 105 (Tex. Crim. App. 1978). In that case the Court of Criminal Appeals found that in cases of incarceration resulting from *capias pro fines*, sentences would be served consecutively or were "stacked." In fine-only offenses, a *capias pro fine* no stacking order under Art. 42.08(a), C.C.P. was necessary for cases to be calculated as consecutive. Under Art. 42.08(a), C.C.P., a court may order sentences on separate cases to be served consecutively with a proper inclusion of such an order in the judgment, as was done in *Hannington, supra. Minjares, supra.* only involved post-judgment jail credit and still has the same effect when read with *Hannington, supra.* Even if the court orders offenses be served consecutively, or "stacked", the court must give credit for prejudgment incarceration in each cause for which the defendant was held.

***MAGISTRATION continued from Page 1***

Cir. 1984). Art. 15.17 does not allow for an adversarial proceeding like trial or an examining trial (discussed hereinafter). Since the hearing is not adversarial, generally no right to appointed counsel attaches at this

stage of proceedings. *Green v. State*, 872 S.W.2d 717 (Tex. Crim. App. 1994). The magistrate is not required to, nor probably should, listen to the defendant's side of the story.

If the defendant is arrested pursuant to a warrant, usually no independent inquiry of probable cause is necessary. Valid warrants contain a previous judicial determination of probable cause. The magistrate may rely on that finding but must proceed with the other requirements of Art. 15.17.

### Giving Warnings

Before proper warnings can be made, a magistrate must determine that the warnings can be understood. Interpreters for the hearing impaired are provided for in the law, see Art. 15.17 (c) C.C.P. Interpreters for those who do not speak English are not addressed in Art. 15.17. Art. 38.30 C.C.P., which deals with language interpreters, does not seem to speak to 15.17 appearances. Some effort should still be made, when possible, to assure understanding.

The magistrate must make the warnings in "clear language." Probably no one short of appellate courts knows what that means. A good bet is to stick to the script found in Art. 15.17 itself and outlined as it appears in the statute below.

The magistrate must first inform the defendant of the "accusation against him and of any affidavit filed therewith." This is simply notice of the charges against the defendant on which the magistrate found probable cause. The main purpose is to inform the defendant of the appropriate seriousness of his or her charges. The language concerning affidavits also suggests the limited right to know that an affidavit has been filed, and perhaps some right to inspection. It is still important to note that a magistrate is required to give notice, not to conduct an adversarial hearing.

Next comes a laundry list of set warnings or notification of rights that include:

- right to retain counsel,
- right to remain silent,
- right to have an attorney present during any interview with peace officers or attorneys representing the state,
- right to terminate the interview at any time,
- right to request the appointment of counsel if he is indigent and cannot afford counsel,
- right to have an examining trial.

Art. 15.17 then sets out that the magistrate must inform the defendant that "he is not required to make a statement and that any statement made by him may be used against him." These warnings do not track verbatim the *Miranda* decision or Art. 38.22 but cover the same basic rights. Many magistrates also use this opportunity to cover warnings concerning deportation on felony conviction and the rights under the *Vienna Convention* (addressed in previous issues of *The Recorder).*

Every effort should be made to make the notice and warnings as accurate and complete as possible. However, minor failures or omissions may not result in suppression of later confessions and will not entitle the defendant to release. *Shadrick v. State*, 491 S.W.2d 681 (Tex. Crim. App. 1973).

### Setting Bail

The Texas Constitution provides a general right to bail in Art. 1, section 11. The Art. 15.17 hearing must be prompt because it is the stage where bond amounts and conditions are set. Art. 1, section 13 of the Texas Constitution further provides that "excessive bail shall not be required." The general policy of Texas criminal jurisprudence is that persons should not be incarcerated prior to trial.

The purpose of bail is to ensure appearance of the defendant for trial. Art. 17.01 C.C.P. The Code of Criminal Procedure leaves determination of the amount of bond to the magistrate's discretion, subject to five rules or considerations. Art. 17.15 C.C.P. Bond should be "sufficiently high to give reasonable assurance" of later court appearance. Art. 17.15(1) C.C.P. Bond cannot be used as a form of oppression or punishment. Art. 17.15(2) C.C.P. The nature and degree of the charge as well as the circumstances of the offense itself should be considered. Art. 17.15(3) C.C.P. The specific defendant's ability or inability to make bail should be considered. Art. 17.15(4) C.C.P. Finally, the code now provides that the magistrate must consider the safety of the specific victim and the safety of the community as a whole. Art. 17.15(5) C.C.P. Denial of bail is appropriate only in capital cases and very specific circumstances listed in the Texas Constitution. Those situations are properly addressed by motion by the State in district court. Art. 1, sect. 11(a), Texas Constitution.

No more specific or amount guidelines exist. The Court of Criminal Appeals in opinions from a sharply divided Court has made a general declaration that seven figure bonds cannot be condoned. *Ludwig v. State*, 812 S.W.2d 323 (Tex. Crim. App. 1991). The lower courts seem to ignore this less than solid precedent. *Ex Parte Brown*, 959 S.W.2d 369 (Tex. App.-Fort Worth 1998). In determining a proper bond amount the Code of Criminal Procedure and courts provide great

amounts of policy guidance and little practical assistance. Broad discretion seems to be accorded the magistrate and few tangible mandates seem to exist.

Personal bonds are bonds that do not require a surety or bail bond company. The magistrate, as a "low end" alternative, should consider personal bonds. The magistrate and the system often overlook the personal bond. There are, however, limits on personal bonds for the higher level offenses. Art. 17.03(b) C.C.P. Since the ability to make bond is a major consideration, personal bonds seem essential in providing equal protection of the indigent. The magistrate should make inquiry into indigence and the ability to make bond. Every defendant is not entitled to a bond they can make, but every defendant is entitled to consideration of their ability to make bond.

Bonds should be designated as personal or surety bonds. The magistrate, except in the limited circumstances of capias after bond forfeiture under Art. 23.05 C.C.P., cannot designate a bond as cash or surety only. *Ex Parte Deaton*, 582 S.W.2d 151 (Tex. Crim. App. 1979). The magistrate is also prohibited from setting differing amounts of bond for surety or cash. *Professional Bail Bondsman of Texas v. Carey*, 762 S.W.2d 691 (Tex. App.-Amarillo 1988).

Setting bail in fine-only offenses involves separate consideration. Art. 15.17(b) C.C.P. provides in fine-only misdemeanors for the outright release without bail of defendants with orders to appear at a later time for arraignment. This release is made after a determination that probable cause exists. The magistrate may not order release without bond if the defendant has previously been convicted of a non-fine-only offense or if the defendant is not identified with certainty. The last part of Art. 15.17(b) is a potential roadblock; it provides that later appearance be in county court. Many argue that this makes the provision inapplicable to offenses within the jurisdiction of the municipal court. This grant of a reasonable power should not be terminated where the magistrate has the ability to order the later appearance in his or her own court. Lastly, if the defendant fails to appear the magistrate should set bond at twice the fine amount. This last section seems to provide very concrete guidance for bond amounts in fine-only offenses.

Recent expansion in the law of bonds has been in the area of bond conditions. Although a comprehensive treatment of these developments will be saved for another newsletter article, magistrates who regularly set bonds should read Code of Criminal Procedure Arts. 17.40-17.46.

### Continuing Obligations of 15.17 Magistrate

Jail population is becoming a hot topic in this age of jail standards lawsuits, close criminal justice media scrutiny, and general calls for local government to decrease expenditures. A district judge took it on himself to review and alter the bonds set by magistrates on behalf of the jail population who were waiting for formal charges in courts with jurisdiction. The judge changed bonds from surety bonds to personal bonds. The district attorney applied for writs of mandamus and prohibition from the Court of Criminal Appeals. In *Guerra v. Garza*, 987 S.W.2d 593 (Tex. Crim. App. 1999) the Court of Criminal Appeals granted the writs and made a finding that the magistrate setting the bond has exclusive jurisdiction over the complaint until filing of formal charges in a court with jurisdiction.

One obvious implication of this case is that the magistrate setting bond at the Art. 15.17 hearing must carry out an examining trial under Chapter 16 of the Code of Criminal Procedure. This might appear to be a bit difficult for the part-time night magistrate. Nothing in the case speaks to exchange of bench or other case management structures. Since "courts" are usually considered more broadly than individual judges, this case should not prohibit a local municipal court from delegating the court's responsibility among its judges as it sees fit. Movement from jurisdiction to jurisdiction seems to be prohibited.

The examining trial is an adversarial hearing before the magistrate to determine probable cause in felony cases. Art. 16.01 C.C.P. Examining trials can also be used to contest the amount of bond. The rules of evidence; the right to call witnesses, examine witnesses, and summon witnesses; and in the proper case the right to counsel all apply in examining trials. Art. 16.01, 16.06, 16.07 C.C.P. The presentment of an indictment will determine the issue of probable cause and render an examining trial moot. Return of an indictment also divests the magistrate of jurisdiction. *Harris v. State*, 457 S.W.2d 903 (Tex. Crim. App. 1970). A magistrate is powerless to prevent an indictment in order to provide an examining trial. *State ex rel Holmes v. Salinas*, 784 S.W.2d 421 (Tex. Crim. App. 1990).

It is also important to note that there is nothing in the Court of Criminal Appeals opinion involving *Habeas Corpus*. A defendant contesting probable cause or excessive bail in a felony or a misdemeanor could still seek redress in a district court by way of a writ of *Habeas Corpus*. Lastly, bond issues could be raised in the trial court after the formal presentment of charges.

### Conclusion

While it may initially seem Art. 15.17 sets out a rather simple and needless

procedure, it becomes clear it is the sole limit on very broad powers to arrest given Texas peace officers. The Art. 15.17 procedure is also a very important one for both the defendant and the State of Texas. Wrong doers that do not return to court to face prosecution may escape justice entirely. Violent criminals once apprehended should not be allowed to repeatedly prey on their victims before the imposition of punishment. Yet, those individuals who cannot be successfully prosecuted should not be forced to wait in jail for prosecutorial decision-making or bear the cost of bond and accusation. Presumed innocent citizens should not pay their penalty before the right to trial is available.

There is close public scrutiny at the arrest stage of sensational offenses; this further complicates the issues before the magistrate. The vital first stage of most prosecutions rests in the hands of the Art. 15.17 magistrate.

It is a simple truth; with much power comes much responsibility. Art. 15.17 of the Code of Criminal Procedure gives a magistrate a great deal of power.

## COMPANION FORMS

Two form documents are included on the following pages to be used in connection to Art. 15.17 C.C.P. hearings.

The first form, Magistrate's Commitment Form, is a commitment form that shows the magistrate found probable cause, gave warnings and set bond. One commitment should be filled out for each charge. Name of the offense, bail amount, signature and date must be filled out every time. Other options are self-explanatory and reference the articles that provide the magistrate with authority to perform the function of the paragraph.

The second form, Article 15.17(b) Form, can be used to release a defendant under Art. 15.17 (b) C.C.P. in fine-only on-view arrests. It does not have a bond amount, but does include spaces for the Court, time and place for appearance.

# RULE 12 AND ACCESS TO COURT RECORDS

**By Margaret McGloin Bennett**
**General Counsel**
**Office of Court Administration**

*Which records of the judiciary are open to the public?* In 1999, the Supreme Court of Texas promulgated Rule 12 of the Texas Rules Judicial Administration to shed light on this issue. In part, Rule 12 was promulgated because the "Public Information Act," formerly the "Open Records Act," does not apply to records of the judiciary. The purpose of Rule 12 is to provide public access to information in the judiciary consistent with the mandates of the Texas Constitution and other state law which recognize that public interests are best served by open courts and by an independent judiciary.

Rule 12 of the Rules of Judicial Administration governs access to "judicial records," which are records *not* pertaining to the *adjudicative function* of the court or judicial agency. As Rule 12 states, "A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record." In other words, Rule 12 governs access primarily to administrative records of a court or judicial agency, but does not govern access to case records. Access to case records is governed by common law and other statutory law. The custodian of *case records* is always the clerk of the court in which the case was pending; the custodian of *judicial records* (*i.e.*, the administrative records of the court) is the judge.

Petitions for review of denial of access to judicial records are filed with the Office of Court Administration, and are then forwarded to the committee of presiding judges who write the Rule 12 opinions. However, neither OCA nor the presiding judges have enforcement powers under Rule 12. That is reserved by Rule 12 to mandamus relief through the court system or to sanctions by the Judicial Conduct Commission under the Code of Judicial Conduct.

Rule 12 Appeal Number 00-001 addressed whether "traffic citation records" in possession of a municipal court were subject to release under Rule 12. The committee of presiding judges opined that "traffic citation records pertain to the municipal court's *adjudicative function* and are created, produced, and filed in connection with matters that are or have been before the municipal court. Thus, they are not *judicial records* within the meaning of Rule 12, and we cannot decide the question of whether they are exempt from disclosure." Even though "traffic citation records" were determined not to be *judicial records*, the opinion went on to explain the duties of a court in relation to public access to non-judicial records (*i.e.*, adjudicative or case records). Case records of the court are presumed to be open to inspection by the press and public. The reason for closing or denying access to criminal case records must be clearly articulated. Wrongful denial of access to case records is remedied through the court system, primarily by mandamus relief.

*Rule 12 continued on Page 10*

State of Texas
vs.

Name: _____

Cause # _____
(One form per cause#/charge)

PT # _____

## ORDER SETTING CONDITIONS OF PERSONAL BOND OR CASH DEPOSIT BOND RELEASE

As a condition of his/her release on Personal Bond or Cash Deposit Bond in the above styled cause, this Court finds that the interest of justice and the safety of the community require that the defendant shall be subject to and shall comply with the following conditions as ordered by the Court:

**Substance Abuse Counseling Conditions**

| | |
|---|---|
| | **TCCES Misdemeanor Drug Evaluation** – Submit to an assessment by TCCES & follow treatment recommendations |
| | **TCCES Felony Drug Evaluation** – Submit to an assessment by TCCES & follow treatment recommendations |
| | **TCCES Alcohol Evaluation** – Submit to an assessment by TCCES & follow treatment recommendations |
| | **Drug Court Screening**– Review information related to participation in a Drug Diversion Court |

**Violence Counseling Conditions**

| | |
|---|---|
| | **TCCES Family Violence Evaluation** *(for Intimate Partner Violence Cases)* – Submit to an assessment by TCCES & follow counseling recommendations |
| | **TCCES Violence Evaluation** *(for Non-Intimate Partner Violence Cases)* – Submit to an assessment by TCCES & follow counseling recommendations |
| | **Anger Management** *(for Non-Intimate Partner Violence Cases)* – Enroll in & complete an 8hr Anger Management program as directed by Pretrial Services |

**Safety-Related Conditions**

| | |
|---|---|
| | **No Contact with Complaining Witness** – Do not make contact with complaining witness by phone, written, digital communication or in person |
| | **200 Yard Stay Away from Complaining Witness** – Do not go within 200 yards of the complaining witness |
| | **No Contact with Co-Defendants** – Do not contact co-defendant(s) by phone, written communication or in person |
| | **Stay Away from** _____ (insert specific address) |

**Supervision/Case Management Conditions**

| | |
|---|---|
| | **Supervision** – Report to Pretrial Services as directed & follow rules of program |
| | **Mental Health Supervision** – Report to Pretrial Services as directed & follow rules of program |

**Surveillance Conditions**

| | |
|---|---|
| | **EM (Electronic Monitoring)** – Install RF monitoring device, report to Pretrial Services as directed & follow rules of program |
| | **EM - IN JAIL INSTALL** – Install RF monitoring device, report to Pretrial Services as directed and follow rules of program |
| | **GPS (Global Position System)** – Pay for services to install and maintain operations of GPS monitoring device, report to Pretrial Services as directed and follow rules of program |
| | **GPS - IN JAIL INSTALL** – Pay for services to install and maintain operations of GPS monitoring device, report to Pretrial Services as directed and follow rules of program |
| | **SCRAM (Secure Continuous Remote Alcohol Monitoring )** – Pay for services to install and maintain operation of transdermal alcohol monitoring device and follow rules of the program |
| | **SCRAM - IN JAIL INSTALL** – Pay for services to install and maintain operation of transdermal alcohol monitoring device and follow rules of the program |
| | **IID (Ignition Interlock Device)** – Pay for services to install within 21 days and maintain operation of Ignition Interlock device, report to Pretrial Services as directed and follow rules of the program |
| | **PAM (Portable Alcohol Monitoring) Device** – Pay for services to obtain Portable Alcohol Monitoring device, provide breath samples as directed, report to Pretrial Services as directed and follow rules of the program |

**Other Conditions**

| | |
|---|---|
| | **Random Urinalysis** – Submit to urinalysis (UA) as directed by Pretrial Services |
| | **No Driving without Valid Driver's License** – Do not operate a motor vehicle without a valid driver's license |
| | **Curfew** – You must be home by _____, and you may not leave home before _____. |

**Other Conditions** ***(Write-in legibly — PLEASE PRINT )***

| | |
|---|---|
| | |

Ordered, this _____ day of _____, 20____.

_____
Magistrate/Judge



White – Original Yellow – Defendant Copy Pink – Pretrial Services Copy

Master# | MNI# | Booking# | F / M

Name | Date

| | |
|---|---|
| Last First Middle | Cause No. / |
| Address | Charge |
| City/State Zip | Bond |
| Phone Type Phone 2 Type | DOB POB CZ |
| How Long: County: | Race Sex Age |
| Mailing Address City/State/Zip | Hair Eyes |
| Nearest Relative Relationship Phone | Height Weight |
| Address City/State/Zip | SS No. |
| Employer Position How Long: | DL No. St. |
| Address City/State/Zip | Record No. / |
| Phone Cellular | Bkg Date: |
| Interviewed by Recommendation | Other Charges |
| Attorney of Record Phone | |

# TRAVIS COUNTY PRETRIAL SERVICES

P.O. BOX 1748
AUSTIN, TX 78767
(512)854-9381

## PERSONAL BOND

THE STATE OF TEXAS
COUNTY OF TRAVIS

KNOWN ALL MEN BY THESE PRESENTS

CAUSE NO. _____ /

THAT I, _____ charged with the offense of a (Misdemeanor) (Felony), to wit,

am held and firmly bound unto the State of Texas in the penal sum stated below for the payment of which sum well and truly to be made, and in addition all necessary and reasonable fees and expenses that may be incurred by peace officers in rearresting me in the event the conditions of this bond are violated, I do bind myself, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is that I swear that I will appear before the _____ at the

Blackwell - Thurman Criminal Justice Center, 509 W. 11th Street, Austin, Travis County, Texas, on the _____ day of _____,

20____, at_____ M, or pay to the Court the principal sum of $_____ plus all necessary and reasonable expenses incurred in any arrest for failure to appear.

I further swear that I will appear before any court or magistrate court before whom this cause may hereinafter be pending at any time and place as may be required.

Now if I shall well and truly make said appearance before the said Court, and there remain from day to day and term to term of said Court, until discharged by due course of law, then and there to answer said accusation against me, and further shall well and truly make my personal appearance in any and all subsequent proceedings that may be had relative to said charge in the course of the criminal action based on said charges, this obligation shall become void; Otherwise to remain in full force and effect.

I further understand that all or part of the information collected in the Pretrial Services Report is available to persons associated with law enforcement, criminal justice, and other agencies including, but not limited to, the Judge or Magistrate hearing the case, the District Attorney's Office, and the defense attorney of record in this case.

Fee=S20/$_____(3% of bond fee if Ignition Interlock Required)

☐ See attached Conditions Order form

_____
Signature of Defendant

SWORN TO AND SUBSCRIBED BEFORE ME,

this_____day of_____,20_____

_____
NOTARY PUBLIC IN AND FOR TRAVIS COUNTY, TEXAS

THIS PERSONAL BOND IS APPROVED, effective only after arresting agency has completed its booking process, and the defendant at such time is ordered released on the conditions of this bond.

***I certify that I am the attorney of record representing this defendant in this matter:***

APPROVED this_____day of_____,20_____

_____ _____
***Signature / Print*** ***SBN*** **Magistrate/Judge**

Revised 8/2013 White – Original Yellow – Defendant Copy Pink – Pretrial Services Copy