THE HARRIS COUNTY, TEXAS
BAIL MANUAL

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Public Defender's Office
Harris County, Texas

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NACDL FOUNDATION FOR CRIMINAL JUSTICE

"Pretrial decisions determine mostly everything."

– PROFESSOR CALEB FOOTE, JOHN JAY COLLEGE OF CRIMINAL JUSTICE AND GRADUATE CENTER, CITY UNIVERSITY OF NEW YORK

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The Harris County Public Defender's Office and NACDL joined together to craft this manual, The Harris County Bail Manual, to support attorneys as they work to end pretrial injustice. It is our hope that all defenders, both public and private, use this resource to aggressively and consistently challenge the bail system that punishes the accused before conviction, forces guilty pleas to obtain release, and incarcerates the poor simply because they cannot afford to post a money bond.

At the time of the publication of this manual, NACDL has a Task Force on Risk Assessment Instruments, which is conducting an exhaustive inquiry into the potential benefits and harms of reliance upon risk assessment instruments. Irrespective of whatever conclusions and policies arise from the work of that task force, risk assessments are being used in the context of pretrial release decisions. As a result, counsel must understand them to effectively advocate for the best interests of their clients.

We attempted to be as comprehensive as possible, outlining both law and research while providing practical pointers for the courtroom lawyer. We encourage all to use our work to give voice to the incarcerated accused, who deserve dedicated and robust legal representation from the moment their liberty is at stake.

ALEXANDER BUNIN

Chief Public Defender
Harris County Public Defender's Office

JANI MASELLI

Assistant Public Defender
Harris County Public Defender's Office

BONNIE HOFFMAN

Director of Public Defense Reform and Training
National Association of Criminal Defense Lawyers

RENEE SPENCE

Public Defense Reform and Training Counsel
National Association of Criminal Defense Lawyers

Public Defender's Office
Harris County, Texas

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NACDL FOUNDATION FOR CRIMINAL JUSTICE

"As we speak, close to three quarters of a million people reside in America's jail system . . . . Across the country, nearly two-thirds of all inmates who crowd our county jails—at an annual cost of roughly nine billion taxpayer dollars—are defendants awaiting trial. . . . Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody . . . because they simply cannot afford to post the bail required . . . ."

– FORMER U.S. ATTORNEY GENERAL ERIC HOLDER AT THE NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE, JUNE 1, 2011

"Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to reoffend. And if all this weren't bad enough, taxpayers must shoulder the cost—a staggering $1 billion per year."

– CHIEF JUSTICE NATHAN HECHT, TEXAS SUPREME COURT, STATE OF THE JUDICIARY ADDRESS TO THE TEXAS LEGISLATURE, FEBRUARY 1, 2017

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I. INTRODUCTION

Pretrial detention causes lost employment and housing, disruption in education, and damage to family relationships. Defendants detained in jail awaiting trial plead guilty, are convicted, and sent to jail and prison more often than those who are not detained pretrial. Additionally, they are prone to receive longer jail and prison sentences than those who are similarly situated but are released during the pretrial period.[1]

Avoiding unnecessary pretrial confinement should be of paramount importance to everyone involved in the criminal justice system. Because having money to post bond is not a predictor of compliance with court requirements, courts must move away from reliance on money bail set through an arbitrary schedule and instead make individualized determinations.

Obtaining pretrial release is an essential part of the promise the U.S. Constitution made to every person who stands accused and one that defense lawyers are dedicated to fulfilling. This manual is designed to give practitioners the guidance needed to achieve pretrial release for clients. It tells the story of how Harris County came to reform its system of pretrial release and detention. It also presents the new risk assessment instrument and the revised Harris County bond schedules. Because litigating pretrial release has such a critical impact on outcomes in criminal cases, the manual provides a series of tools to help defense attorneys successfully pursue release, including: release-oriented initial client interviewing, materials to help attorneys better understand and utilize the risk assessment tool, and guidance on how to apply relevant statutes, constitutional protections, and Texas case law to bail issues. The manual also provides advice on how to advocate on behalf of a client at bail hearings, as well as how to address some problem areas, such as onerous conditions of release and the costs of supervision. Finally, the manual reviews the steps a practitioner must take to challenge and review adverse bail decisions.

[1] Pretrial Justice Institute (PJI), Effective Pretrial Justice Communication, Guidelines for Champions & Spokespeople (2014), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b966a5fa-6c1b-ecc9-9313-fe5abb7bc7c4&forceDialog=0.

II. THE HARRIS COUNTY STORY

Harris County boasts a long history of confronting the problem of its large jail population. In the early 1970s, lawsuits were filed challenging overcrowding in the county's single jail facility. At that time, the county's population was about 1.8 million residents and the jail held a maximum of 1,150 prisoners. The litigation lasted decades, resulting in the construction of several new detention centers.[2] Today the county's population has more than tripled to 4.6 million residents and rising, making it the nation's third largest county. As the county grew, so did its jail population, rising from 1,150 prisoners in the 1970s to as many as 10,000 in 2009.[3]

In an effort to combat this rising tide, Harris County began a series of initiatives beginning in 2008 centered on reforming its criminal justice system with a focus on reducing the jail population. Under a contract with the Justice Management Institute (JMI), the county worked to study the criminal justice processes and make recommendations about how it could be improved. In 2009, JMI issued a report with three themes to improve Harris County criminal justice: (1) reduce reliance on the jail to deal with persons whose contact with the system is driven primarily by substance abuse issues or mental illness; (2) modernize the information and communications technology infrastructure; and (3) introduce county-level oversight and coordinate interrelated operations involved in the criminal justice process.[4]

One JMI recommendation Harris County followed immediately was to create a Criminal Justice Coordinating Council (CJCC) to bring all criminal justice stakeholders together. A year later, the County sought and received a grant from the Texas Task Force on Indigent Defense (now the Texas Indigent Defense Commission) to establish the first public defender's office in the county's history.[5] The 2010 grant provided for an office that is appointed to represent severely mentally ill misdemeanor defendants, non-capital felony defendants, juveniles, and anyone appealing a conviction, adjudication, or sentence. Today, the office is entirely county-funded.

As the Harris County Public Defender's Office (PDO) was developed, the JMI report recommended: "[c]onsider the feasibility of providing for representation of newly arrested persons at initial appearance proceedings at which bond is set and conditions may be established for release on personal bond."[6]

However, when the PDO opened its doors in 2011, representing persons at their initial bail hearings was not part of the office's caseload. In fact, defense lawyers were ***never*** at those hearings, despite the fact that for many years the District Attorney staffed these hearings with experienced prosecutors. Today, a number of factors have come together to make having defense counsel at bail hearings, among other reforms, feasible to implement.

One of the catalysts for reform was the CJCC's receipt of a John D. and Catherine T. MacArthur Foundation's Safety and Justice Challenge grant to reduce over-incarceration and racial disparity in America. During the grant application process, the county's criminal justice stakeholders agreed to strategies to reach the goals locally. In 2016, the county was awarded $2 million with the county providing an additional $3.5 million in matching funds.

The PSA examines three areas of concern: failure to appear, new criminal activity, and new violent criminal activity.

In 2015, the CJCC also began negotiations with the Laura and John Arnold Foundation (LJAF) to implement the Public Safety Assessment (PSA), its pretrial risk assessment tool. The PSA examines three areas of concern: failure to appear, new criminal activity, and new violent criminal activity. Using information from court records, the PSA produces a score correlating to the rates at which others with similar scores failed to appear for court, were arrested for involvement in new criminal activity, and were arrested for involvement in new violent criminal activity. Because the PSA relies on criminal justice database information, it is performed without need for an interview. This provides the court with additional information to assist in making a bail determination. The PSA has been implemented in 39 jurisdictions, including state-wide in Arizona, New Jersey, and Kentucky, and in the cities of Chicago, Charlotte, and Phoenix. Harris County hired a new Director of Pretrial Services and

committed county funds to the expansion of the role in order to oversee the implementation and administration of the PSA. Implementation of the PSA began in July 2017.

Another factor that propelled this reform, albeit involuntary, was a federal lawsuit filed against Harris County in May 2016. The lawsuit challenges the county bail system, asserting it illegally detains misdemeanor defendants too poor to pay their cash bail. The class action was brought by two non-profit legal organizations and a local law firm. The defendants include the county's criminal hearing officers and criminal court at-law judges. The plaintiffs assert that strict adherence to a monetary bail schedule, without considering the accused's ability to pay or individual circumstances, violates their rights to due process and equal protection. In April 2017, the United States District Court issued a preliminary injunction. It required any misdemeanor defendant held only for inability to pay their bail be released on an unsecured bond within 24 hours of arrest. The County appealed this ruling. The Fifth Circuit upheld the lower court's constitutional findings holding that Harris County's current bail system violates both due process and equal protections. The appellate court, however, determined that the remedy imposed by the district court was overbroad and remanded the case to allow the court to "craft a remedy more finely tuned to address the harm."[7] At the publication of this Manual, the district court has yet to issue narrowed instructions for how the county should proceed.

Beginning as early as 2014, discussions began in the CJCC about providing defense representation at initial bail hearings. The chief public defender provided a series of memos explaining the viability and legality of such procedures and a subcommittee of CJCC was created to study the matter. In February 2017, Harris County Commissioners Court requested the chief public defender to present a budget for the PDO to provide counsel at initial bail hearings. The next month, a budget of almost $1 million was approved and, two months later, new assistant public defender positions were created to staff bail hearings.

By July 2017, Harris County was ready to implement both the PSA and provide legal representation at bail hearings. Both practices were referred to as "commendable" in the 193-page federal court opinion in support of the preliminary injunction.[8] The combination of these two actions is expected to reduce the jail population and help lessen racial disparity, which meets the objectives outlined in the MacArthur Safety and Justice Challenge, helping to assure limited county resources are focused on the most high risk offenders and most high risk situations.

[2] *Alberti v. Sheriff of Harris County, Tex.*, 937 F.2d 984 (5th Cir. 1991)

[3] Texas Criminal Justice Coalition (TCJC), A Blueprint for Criminal Justice Policy Solutions in Harris County (2015), *available at* https://www.texascjc.org/system/files/publications/Blueprint%20for%20Criminal%20Justice%20Policy%20Solutions%202015.pdf.

[4] The Justice Management Institute (JMI), Harris County Criminal Justice System Improvement Project: Phase 1 Report, 3 (2009), *available at* http://www.jmijustice.org/wp-content/uploads/2014/04/Harris-Co-Phase-1-Report.pdf.

[5] Council Of State Governments Justice Center (CSGJC), Improving Indigent Defense: Evaluation Of The Harris County Public Defender 14 (2013), *available at* http://tidc.texas.gov/media/23579/jchcpdfinalreport.pdf.

[6] The Justice Management Institute, *supra* note 4, at 61.

[7] *ODonnell v. Harris Cty.*, 892 F.3d 147, 152 (5th Cir. 2018); *see also ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1147 (S.D. Tex. 2017) (providing a comprehensive review of the district court's factual findings), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff'd as modified sub nom., ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).

[8] *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, at 1058, 1124, 1158, 1168 (S.D. Tex. 2017).

III. THE RISK ASSESSMENT INSTRUMENT AND BAIL IN HARRIS COUNTY

The use of data, analytics, and technology had a significant effect on the criminal justice system. Substantial research led to the development of pretrial risk assessment instruments that evaluate factors believed to correlate with successful pretrial release. Switching from a system based solely on instinct and experience to one in which judges have access to data-driven information can further the criminal justice system's central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.[9] Defendants who do not threaten public safety and are likely to appear for scheduled court dates should not remain in jail simply because they cannot afford bail. Jurisdictions, such as Kentucky, that have successfully used risk assessment tools for a period of time saw the number of pretrial detainees lowered while public safety and court appearance rates remained constant.[10]

Defendants who do not threaten public safety and are likely to appear for scheduled court dates should not remain in jail simply because they cannot afford bail.

After months of discussion among criminal justice stakeholders and the Laura and John Arnold Foundation, Harris County chose to implement the PSA. The Foundation's Houston base and its record of success in other jurisdictions were important factors. Ultimately, both the misdemeanor and felony courts voted to incorporate the PSA into their bail decision practices.[11]

As noted earlier, the PSA examines risk on three axes (failure to appear, new criminal activity, and new violent criminal activity) and does so without the need for a client interview by a pretrial officer or judge. This protects the unrepresented accused from making statements that may later prove problematic, and assures the information relied upon to reach the scoring can be readily examined if necessary to ensure its accuracy. The PSA provides a score that is then used to assign him or her to a category on the County's bond matrix.

However, the scoring of the risk assessment is just the first step in the process of addressing a client's pretrial release. Regardless of the PSA score, defenders should be prepared to argue the individual circumstances of the accused. Defense attorneys should review the report, assess its accuracy, and prepare to either rely on the instrument or distinguish the client's situation, as appropriate. If the defendant scores as low or moderate risk, defenders must be prepared to argue why the score is appropriate for the client; if the accused scores as high risk, defenders should review the factors to determine whether mitigating explanations exist for the scoring that would support the client's release.

To advocate for a client's release, defenders must first understand how the PSA functions. Using nine factors the PSA examines the risk of arrest for new criminal activity (NCA) or new violent criminal activity (NVCA), as well as the risk of failure to appear (FTA) in court pending case disposition. The instrument is only used for defendants arrested in the community and pending the disposition of their cases. The PSA is not intended for those who are charged with an offense while already incarcerated (e.g., an inmate who assaults a corrections officer or is transferred from another correctional institution) or to predict general risk of future criminal activity.

All pretrial risk factors are determined based on the defendant's adult criminal and court appearance history. Juvenile records are ***not*** considered when completing the assessment. In addition, all related criminal history and failure to appear factors are based only on misdemeanor and felony charges that carry a potential penalty of incarceration in jail or prison. Class C misdemeanors and ordinance violations are not included when calculating the PSA. The omission of juvenile adjudications, Class C misdemeanors, and ordinance violations does not affect the validity of the results.

To provide accurate guidance, the PSA is modified to account for the unique dynamics of each jurisdiction in which it is used. Below are the risk factors as adjusted and defined for Harris County:

A. RISK FACTORS

1. Age at current arrest

Age is calculated based on the defendant's age at the time of the current arrest. If no arrest exists or the arrest

date is unknown, the defendant's age at the time the PSA is completed is used. The age groups considered by the instrument are: 20 or younger, 21 to 22, and 23 or older.

2. Current violent offense

This factor is scored based on whether any of the current offenses is a "**violent offense**." Violent offenses include, but are not limited to:

- Murder
- Manslaughter
- Criminally Negligent Homicide
- Kidnapping
- Arson
- Robbery
- Sexual Assault
- Aggravated Assault.

A charge of attempt, solicitation, or conspiracy to commit any of these offenses is also considered a violent offense.[12]

> ***Note:*** *If one or more of the current offenses is violent as defined above* ***and*** *the defendant is 20 or younger at the time of the arrest, additional points are scored on this factor.*

3. Pending charge at the time of arrest

If the accused has a misdemeanor or felony charge pending at the time of his or her arrest for the current offense, this factor is scored. "**Pending**" includes any case that (1) has a future pre-disposition-related court date, (2) has not been disposed of due to the accused's failure to appear pending trial or sentencing, or (3) is in some form of deferred status (e.g., deferred adjudication). A "**pre-disposition court appearance**" is any court appearance after arrest and prior to and including sentencing.

To earn these points, the charge must have been pending at the time of the new offense. In other words, the accused must have been on some form of pretrial release when the current offense allegedly occurred. If the current arrest for which the PSA is being completed is for failure to appear for a pre-disposition-related court appearance as determined by a failure-to-appear warrant or capias, the underlying charge for the failure to appear is counted as a pending charge.

> ***Rule:*** *If the accused had a pending misdemeanor or felony charge at the time the current offense allegedly occurred, this risk factor is scored.*

4. Prior misdemeanor conviction

A "**misdemeanor**" includes any offense defined by statute as a misdemeanor except Class C misdemeanors. A "**conviction**" includes any guilty plea or finding of guilt *as an adult* to a charge that is not currently in some form of deferred status or pending sentencing. A charge that is in some form of deferred status or pending sentencing is *not* considered a prior conviction but is scored under the pending charge factor (Risk Factor 3 – Pending charge at the time of the offense).

> ***Rule:*** *If the defendant pled guilty or was found guilty as an adult of one or more misdemeanor offenses and the charge is not in deferred status or pending sentencing, this factor is scored.*

5(a). Prior felony conviction

A "**felony**" includes any offense defined by statute as a felony. As noted previously, a "**conviction**" includes any guilty plea or finding of guilt *as an adult* to a charge that is not currently in some form of deferred status or pending

[9] Laura and John Arnold Foundation (LJAF), Developing a National Model for Pretrial Risk Assessment (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

[10] Pretrial Services Administrative Office of the Courts Kentucky Court of Justice, Pretrial Reform in Kentucky at 16 (2013) (stating "pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent").

[11] *See, e.g.*, Harris Cty. Crim. Ct. R. 2.3.1 Application of Bail Schedule; Request for Departure ("In all cases, Pretrial Services shall calculate the appropriate initial bail amount based on the charged offense, *risk assessment results*, and the initial bail schedule reflected in Rule 9.") (emphasis added).

[12] *See* Appendix C (providing a complete list of applicable Texas Penal Code offenses that are considered violent for the purpose of completing the PSA).

sentencing. A charge that is in some form of deferred status or is pending sentencing is *not* considered a prior conviction but is scored under the pending charge factor (Risk Factor 3 – Pending charge at the time of the offense).

> ***Rule:*** *If the defendant pled guilty or was found guilty as an adult of one or more felony offenses and the charge is not in deferred status or pending sentencing, this factor is scored.*

5(b). Any prior conviction

> ***Rule:*** *If the defendant has any prior* misdemeanor or felony *conviction as defined in Risk Factors 4 or 5, this factor is scored.*

6. Number of prior violent conviction

As noted in Risk Factor 2, "**violent offenses**" include, but are not limited to:

- Murder
- Manslaughter
- Criminally Negligent Homicide
- Kidnapping
- Sexual Assault
- Arson
- Robbery
- Aggravated Assault

A charge of attempt, solicitation, or conspiracy to commit any of these offenses is also considered a violent offense.[13]

As described in Risk Factors 4 and 5, a "**conviction**" includes any guilty plea or finding of guilt to a charge not currently in some form of deferred status or pending sentencing. A charge that is in some form of deferred status or pending sentencing is *not* considered a conviction but rather a pending charge (Risk Factor 3). **Unlike the other prior conviction factors, for this risk factor, *each* prior violent conviction charge is *counted separately* even if multiple convictions were related to the same incident and/or were disposed of on the same day.** In scoring this Risk Factor, the number of prior violent convictions is totaled, and defendants are classified as having: none, one to two, or three or more prior violent convictions.

> ***Rule:*** *Count the number of individual violent offenses for which the defendant pled guilty or was found guilty (i.e., the charge is not in deferred status or pending sentencing) and score based on the total number of qualifying convictions.*

7. Number of prior failures to appear pretrial in past two years

A "**failure to appear pretrial**" includes any pre-disposition court appearance for which the defendant failed to appear *and* the court took an action, such as issuing an Alias Capias Issued/Bond Forfeiture (ACI/BF), Alias Capias Issued/Order of the Court (ACI/OC), Alias Capias Issued/Revoke Bond (ACI/REV/B), C87AI, C87AI/Bond Forfeiture (C87AI/BF), or failure-to-appear warrant. A "**pre-disposition court appearance**" is any court appearance after arrest and prior to and including sentencing. The court appearance must be for a pending (pre-disposition) misdemeanor or felony charge.

"**Post-dispositional court appearances**" —such as hearings for non-payment/failure to pay, violations of supervision, and violations of other court-ordered obligations—are **not** counted. A failure to appear for a single court appearance is counted once, regardless of the number of charges or warrants issued related to the single court appearance.

A failure to appear pretrial is *not* counted if there is confirmation that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is not counted if the ACI/BF, ACI/OC, ACI/REV/B, C87AI, C87AI/BF, **or failure-to-appear warrant was issued and withdrawn on the same day.**

The two-year time frame is the two-year period **prior to the date of the current arrest**. If no arrest occurred or the arrest date is unknown, the two-year timeframe is the two-year period prior to the PSA completion date. The number of failures to appear pretrial in the past two years is totaled, and defendants are classified as having: none, one, or two or more prior failures to appear.

> ***Rule:*** *For the two years preceding the current arrest date, count the number of individual court dates for which the defendant failed to appear and the court issued a warrant or capias. Exclude any dates for which confirmation exists the defendant was incarcerated, the court withdrew the warrant on the same date it was issued, and any proceedings which were post-dispositional (such as hearings for non-payment or violations of supervision). Score based on the total number of qualifying events.*

8. Prior failure to appear pretrial older than two years

Similar to Risk Factor 7, a "**failure to appear pretrial**" for this risk factor includes any pre-disposition court appearance for which the defendant failed to appear and

the Court took an action such as issuing an Alias Capias Issued/Bond Forfeiture (ACI/BF), Alias Capias Issued/Order of the Court (ACI/OC), Alias Capias Issued/Revoke Bond (ACI/REV/B), C87AI, C87AI/Bond Forfeiture (C87AI/BF), or failure to appear warrant. A "**pre-disposition court appearance**," as noted above, is any court appearance after arrest prior to and including sentencing. The court appearance must be for a pending (pre-disposition) misdemeanor or felony charge. Post-disposition court appearances—such as hearings for non-payment/failure to pay, violations of supervision, and violations of other court-ordered obligations—are not counted. A failure to appear for a single court appearance is counted once, regardless of the number of charges or warrants issued related to the single court appearance.

A failure to appear pretrial is *not* counted if there is confirmation that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is not counted if the ACI/BF, ACI/OC, ACI/REV/B, C87AI, C87AI/BF, o**r failure-to-appear warrant was issued and withdrawn on the same day.**

> ***Rule:*** *Starting two years before the current arrest date, count the number of individual court dates for which the defendant failed to appear and the court issued a warrant or capias. Exclude any dates for which confirmation exists the defendant was incarcerated, the court withdrew the warrant on the same date it was issued, and any proceedings that were post-dispositional (such as hearings for non-payment or violations of supervision). Score based on the total number of qualifying events.*

9. Prior sentence to incarceration

A "**sentence to incarceration**" includes any sentence to jail or prison of *14 days or more* imposed by a judge at the time of sentencing or re-sentencing (e.g., violation of probation or revocation of suspended sentence). A sentence of 14 days or more that is "**credit for time served**" *is* counted.

A sentence of 14 days or more is included only if it is imposed as a single sentence. Do not score sentences of 13 days or less, even if a defendant was sentenced in a single proceeding for multiple charges that collectively total 14 days or more. **Incarceration in lieu of payment of fines or costs, suspended sentences, and sanctions imposed by non-judges (e.g., probation officers) are *not* considered sentences to incarceration.**

> ***Rule:*** *If the defendant previously received a sentence of incarceration to jail or prison of 14 days or more as a single sentence imposed by a judge, this risk factor is scored.*

B. OUTCOME MEASURES

Two primary pretrial outcome measures exist for defendants released pending case disposition—success and failure. Two primary types of pretrial failure exist—failure to appear and new criminal activity. In addition, new criminal activity is also measured based on violence. Generally, defendants who do not experience either type of pretrial failure are considered successful. Descriptions of the primary types of pretrial failure are provided below.

1. Failure to Appear (FTA)

Failure to appear is defined as any missed court appearance while on release pending case disposition for the current case that resulted in issuing an Alias Capias Issued/Bond Forfeiture (ACI/BF), Alias Capias Issued/Order of the Court (ACI/OC), Alias Capias Issued/Revoke Bond (ACI/REV/B), C87AI, C87AI/Bond Forfeiture, or failure-to-appear warrant.

A failure to appear is *not* counted if confirmation exists that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is *not* counted if the ACI/BF, ACI/OC, ACI/REV/B **or failure-to-appear warrant was issued and withdrawn on the same day**.

2. New Criminal Activity (NCA)

"**New criminal activity**" is defined as an arrest for a misdemeanor or felony charge that allegedly occurred while on release pending disposition for the current case.

3. New Violent Criminal Activity (NVCA)

"**New violent criminal activity**" is defined as an arrest for a violent offense that allegedly occurred while on release pending case disposition for the current case. Violent offenses include, but are not limited to:

- Murder
- Criminally Negligent Homicide
- Manslaughter
- Kidnapping
- Sexual Assault
- Arson
- Robbery
- Aggravated Assault

A charge of attempt, solicitation, or conspiracy to commit any of these offenses is also considered a violent offense.[14]

C. HARRIS COUNTY BOND SCHEDULES

The PSA is presented at the 15.17 hearing. (Often referred to as "magistration" the 15.17 hearing derives its name from its origin, Article 15.17 of the Texas Code of Criminal Procedure, and refers to the process of taking an arrestee before a magistrate. In Texas it is an arrestee's initial appearance before a judicial officer. At the 15.17 hearing, the magistrate will make a preliminary determination of probable cause, advise the accused of their rights, appoint counsel if requested, and address issues relating to bail and release.) It is just one factor for the parties to argue and for the magistrates and judges to consider when setting bail.

The PSA results are also considered in the Harris County bond schedules. Unlike other jurisdictions' strict money bail schedules that fail to take into account a defendant's individual circumstances and their ability to pay monetary conditions, these schedules are meant to create certain rebuttable presumptions following arrest, based in part upon the results of the PSA. Bail schedules are allowed by Texas law when used on a case-by-case basis.[15] Historically, they have been rigid and oppressive; however, when they are used as flexible tools, they can promote early release with the least restrictive conditions.

Below are the bond schedules approved by the County Criminal Courts at Law and Criminal District Courts of Harris County to work in concert with the PSA. They presume personal (unsecured) bonds (PB) for defendants in most misdemeanor and low-level felony offenses when the defendant scores from below average or average risk on the PSA. This means that absent some other flag, a pretrial officer can seek a personal bond for those defendants without the necessity of a hearing before a magistrate. This is done by a process called "**early presentment**," in which the paperwork is presented to the magistrate without the defendant's presence. This may allow a defendant's release from an outlying holding facility without the need for transporting to and booking into the jail and the added time in custody that process would entail.

(i) County Criminal Courts at Law (Class A & B Misdemeanors)

INSTRUCTIONS

Follow the steps below to identify whether presumption of a personal bond ("PB") exists; the initial bail amount applied when charges are filed at intake, if any; and the recommended bail amount at the 15.17 hearing ("Recommended at 15.17"). Continue the steps until the applicable information becomes apparent.

Step 1 – Determine if the PSA results contain an NVCA flag or an FTA score of 5 or 6

If yes: no presumption of PB exists, no initial bail amount set, and recommended bail amount at the 15.17 hearing is $5,000.

If no: continue to Step 2.

Step 2 – Determine if any carve out situations apply

If yes: no presumption of PB exists and no initial bail amount. You must then identify the risk level (using highest NCA/FTA score) for the recommended bail amount at the15.17 hearing. As used in this chart, "MRPs and MAGs" refer to motions to revoke probation and motions to adjudicate guilt. These apply to defendants serving terms of community supervision who were previously found guilty or previously pled guilty or nolo contendere to their charge.

If no: continue to Step 3.

Step 3 – Determine if there are any specified charges

If yes: identify the risk level to locate the presumption of PB status, initial bail amount, and recommended bail amount at the 15.17 hearing.

If no: continue to Step 4.

Step 4 – Determine if any of the charges are Class A

If yes: identify the risk level to locate the presumption of PB status, initial bail amount, and recommended bail amount at the 15.17 hearing.

If no: continue to Step 5.

Step 5 – All charges are Class B

If all charges are Class B offenses, identify the risk level to locate the presumption of PB status, initial bail amount, and recommended bail amount at the 15.17 hearing.

Look in this column to find if the client's crime qualifies as a carve out, specified charge, or Class A or B felony

Look in this row to identify client's risk level and score

This line indicates if there is a presumption for a personal bond (PB)

This line determines if there is an initial bond amount that can be set

This line indicates the recommended bond amount at the 15.17 hearing

	BELOW AVERAGE RISK *(highest FTA/ NCA score 1 or 2)*	AVERAGE RISK *(highest FTA/ NCA score 3 or 4)*	ABOVE AVERAGE RISK *(NCA score 5)*	HIGH RISK *(NCA score 6)*	SPECIAL CIRCUMSTANCE *(NVCA Flag or FTA score 5 or 6)*
CARVE OUT SITUATIONS **A.** PC 22.01 – Assault involving family violence **B.** PC 38.10 – Bail jumping / failure to appear **C.** PC 25.07 – Violating certain court orders or conditions of bond **D.** PC 46.04 – Unlawful possession of firearm within 5 years of family violence case **E.** PC 38.06 – Escape **F.** PC 38.02 – Failure to identify while fugitive **G.** MRPs & MAGs	**No presumption of PB** No initial bail amount Recommended @15.17: $3,000-$5,000	**No presumption of PB** No initial bail amount Recommended @15.17: $3,000-$5,000	**No presumption of PB** No initial bail amount Recommended @15.17: $3,000-$5,000	**No presumption of PB** No initial bail amount Recommended @15.17: $5,000	**No presumption of PB** No initial bail amount Recommended @15.17: $5,000
SPECIFIED CHARGES **A.** PC 49.09 – DWI 2nd offender **B.** PC 49.04 – DWI ≥ 0.15 **C.** PC 30.04 – Burglary of vehicle **D.** PC 21.08 – Indecent exposure **E.** Any DWI while on bond for a DWI	**Presumptive PB** $2,000 initial bail amount Recommended @ 15.17: $2,000	**Presumptive PB** $2,000 initial bail amount Recommended @ 15.17: $2,000	**No presumption of PB** No initial bail amount Recommended @ 15.17: $2,000	**No presumption of PB** No initial bail amount Recommended @15.17: $3,000	**No presumption of PB** No initial bail amount Recommended @15.17: $5,000
ALL OTHER CLASS A	**Presumptive PB** $1,000 initial bail amount Recommended @ 15.17: $1,000	**Presumptive PB** $1,000 initial bail amount Recommended @ 15.17: $1,000	**No presumption of PB** No initial bail amount Recommended @ 15.17: $1,000	**No presumption of PB** No initial bail amount Recommended @15.17: $2,000	**No presumption of PB** No initial bail amount Recommended @15.17: $5,000
ALL OTHER CLASS B	**Presumptive PB** $500 initial bail amount Recommended @ 15.17: $500	**Presumptive PB** $500 initial bail amount Recommended @ 15.17: $500	**Presumptive PB** $500 initial bail amount Recommended @ 15.17: $500	**No presumption of PB** No initial bail amount Recommended @15.17: $1,000	**No presumption of PB** No initial bail amount Recommended @15.17: $5,000

[13] *See* Appendix C for the complete list of Texas Penal Code offenses that are considered violent for the purpose of completing the PSA.

[14] *Id.*

[15] Tex. Att'y. Gen. Op. DM-57, at 2 (1991).

(ii) Criminal District Courts (Felonies)

Felony Bond Schedule (Applied Following Arrest)

A defendant who meets any of the below listed criteria will remain in custody and have a bail hearing at the 15.17 proceeding:

Current Charges:

- Capital Felony
- First Degree Felony
- Escape—PC 38.06
- Bail Jumping and Failure to Appear—PC 38.10
- Unlawful Possession of Firearm by Felon—PC 46.04
- Aggravated Assault (family member)—PC 22.02
- Violation of Certain Court Orders or Conditions of Bond—PC 25.07 (family violence, sexual assault or abuse, stalking, or trafficking)

Current Conditions:

- On bail for any felony charge at the time of arrest
- On bail with multiple pending misdemeanor cases stemming from different arrest events at the time of arrest
- On felony probation or deferred adjudication at the time of current arrest
- Twice convicted of a felony (higher than a state jail felony) and currently charged with a felony offense
- Prior felony conviction and currently charged with a felony involving a deadly weapon
- Have a NVCA (New Violent Criminal Activity) flag
- Have an NCA (New Criminal Activity) risk score of 6 points (High Risk)
- Have an FTA (Failure to Appear) risk score of 6 points (High Risk)

If an accused does not fall into any of the above specific exemptions and is charged with a felony offense, the following table contains the bond recommendation.

OFFENSE	BELOW AVERAGE RISK *(PSA score of 1-2)*	AVERAGE RISK *(PSA score of 3-4)*	ABOVE AVERAGE RISK *(PSA score of 5)*
STATE JAIL FELONY	Presumption PR Bond for Listed Offenses Other $2,500	No Early Presentment Refer to Magistrate for PR Bond Other $1,500	$15,000
THIRD DEGREE FELONY	Presumption PR Bond for Listed Offenses Other $2,500	$5,000	$10,000
SECOND DEGREE FELONY	$10,000	$20,000	$30,000
THIRD DEGREE SPECIFIED CHARGES Intoxication Offenses Assault Family Kidnapping Deadly Contact Injury Child/Elderly	$15,000	$25,000	$35,000
SECOND DEGREE SPECIFIED CHARGES Agg. Assault Offenses Sexual Assaults Burglary Habitation Intoxication Manslaughter Manslaughter Compelling Prostitution	$30,000	$40,000	$50,000

LIST OF FELONY OFFENSES WITH A PRESUMPTION OF PERSONAL BOND

- Bigamy PC 25.01(e) (3rd degree)
- Credit/Debit Card Abuse PC 32.31(d)(SJF)
- Criminal Mischief PC 28.03(b)(4)
- Criminal Nonsupport PC 25.05
- Evading PC 38.04(b)(1)(a)
- False Alarm/Report PC 42.06(b)(SJF)
- False Stmt to Obtain Property/Credit PC 32.32(c)(4)
- Forgery PC 32.21 (d)(SJF)
- Forgery PC 32.21(e) (3rd degree)
- Fraudulent Transfer of Motor Vehicle PC 32.34(f)(1)
- Graffiti PC 28.08(b)(4)
- Hinder Sec'd Creditors PC 32.33(d)(4) & (e)(4)
- Illegal Recruitment of Athlete PC 32.441(e)(4)
- Insurance Fraud PC 35.02(c)(4)
- Interfere w/Emerg Call PC 42.062(c) (w/ prior)
- Interfere w/Railroad Property PC 28.07(e)(3) Marijuana
- Delivery less than 5 lb. (SJF)
- Possession less than 5 lb. (SJF)
- Possession 5-50 lbs. (3rd degree)
- Misapplication of Fiduciary Property PC 32.45(c)(4)
- Money Laundering PC 34.02(e)(1)
- Possession/Delivery/Manufacture (SJF)
- Prostitution PC 43.02(c)(2) and (c-1)(2)
- Secure Execution of Document by Deception PC 32.46(b)(4)
- Tamper with Evidence PC 37.09(c)(3rd degree)
- Theft of Service PC 31.04(e)(4)
- Theft PC 31.03 (e)(4)
- Trademark Counterfeiting PC 32.23(e)(4)
- Unauth. Use Motor Vehicle PC 31.07(b)
- Unauthorized Use of Telecomm Services PC 33A.02(b)(3)

3. Application of the Bond Schedules

After an accused has a PSA score, the bond schedule is applied. This results in the generation of a report which indicates: (1) whether the charge can be handled by early presentment (a personal bond issued without a hearing), (2) what bond amount is recommended under the applicable bond schedule, and (3) if circumstances exist requiring a hearing regardless of the charge. Those circumstances include the "carve out" offenses identified in the bond schedules, along with any request by the District Attorney to seek a higher bail. See Appendix F for a sample bond schedule recommendation and PSA assessment.

Information on the PSA Report

- Can a personal bond be issued without hearing?
- Is there a recommended bond?
- Is a hearing required?

IV. STRATEGIES TO SECURE PRETRIAL RELEASE

The importance of helping clients achieve pretrial release cannot be overstated. Not only is such advocacy required by professional standards, but the impact of pretrial incarceration on a client is substantial. Social science research demonstrates that persons who are released receive better outcomes than those who stay in jail pending the resolution of their cases.

Research demonstrates that persons who are released receive better outcomes than those who stay in jail pending the resolution of their cases.

A. CLIENTS WHO STAY IN JAIL GET LONGER SENTENCES

A study using data from state courts found defendants detained for the entire pretrial period were more than four times more likely to be sentenced to jail and more than three times more likely to be sentenced to prison than similar defendants released at some point pending trial.[16] Additionally, these incarcerated individuals received significantly longer sentences. Those sentenced to jail saw their sentences increase nearly three-fold over those released at some point during the pendency of their case. For those sentenced to prison, those detained faced a sentence more than twice as long as those released prior to trial. A study of federal court data yielded similar results.[17]

B. CLIENTS INCARCERATED PRIOR TO TRIAL FOR EVEN SHORT PERIODS ARE AT MORE RISK TO REOFFEND

Jail makes people worse. Even short stays in detention have significant negative impacts. Using statewide data from Kentucky, a study conducted by LJAF uncovered strong correlations between the length of time low and moderate risk defendants were detained before trial and the likelihood that they would re-offend in both the short term and the long term. Incarceration of even a few days increased the likelihood that low and moderate risk defendants would commit additional crimes during the pretrial period. When these pretrial detention periods were further increased, even by small amounts, the likelihood of these individuals committing new offenses increased further. Importantly, the impact of this brief pretrial detention did not end with the case's conclusion. Low and moderate risk defendants who had brief periods of pretrial detention remained at an elevated rate of committing subsequent crimes for two years after their case ended.[18]

Jail makes people worse. Even short stays in detention have significant negative impacts.

As a result, every day matters. The failure to release low- and moderate-risk individuals as quickly as possible hurts clients and hurts the community. The increased risk of new offenses and length of sentences mean communities lose personally and fiscally. The benefits of

having counsel at the initial appearance before a judge or magistrate is not only limited to minimizing these losses, but also has been shown to increase the accused's sense of fairness about the process. A defendant with a lawyer at first appearance is:

(1) two-and-a-half times more likely to be released on recognizance;

(2) four-and-a-half times more likely to have their bail significantly reduced;

(3) likely to serve less time in jail or prison; and

(4) more likely to feel fairly treated by the system.[19]

The failure to release low- and moderate-risk individuals as quickly as possible hurts clients and hurts the community.

2.5 *times more likely to be* ***released*** *on recognizance*

likely to ***serve less time*** *in jail or prison*

4.5 *times more likely to have their bail significantly* ***reduced***

more likely to feel ***fairly treated*** *by the system*

[16] *See* Laura and John Arnold Foundation, Pretrial Criminal Justice Research, 2-3 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

[17] *Id.*

[18] Laura and John Arnold Foundation, the Hidden Costs of Pretrial Detention, 8-9 (2013), *available at*: http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

[19] Kentucky Department of Public Advocacy, Kentucky Pretrial Release Manual, 4, 12, 80 (2013) (*citing with approval* Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel* at Bail, 23 Cardozo L. Rev. 1719 (2002)), *available at* https://dpa.ky.gov/Public_Defender_Resources/Documents/PretrialReleaseManualExternal102814REDUCED.pdf.

V. FIVE TOOLS TO SECURE PRETRIAL RELEASE

TOOL #1: INITIAL CLIENT INTERVIEW

Thorough knowledge about the client and his or her background is the most important tool a lawyer has when litigating for release. Conducting a detailed initial interview gives the attorney the information needed to fully advocate and builds client confidence. While risk assessment scores in Harris County rely exclusively on criminal justice data and not on defendant interviews, the information a defense attorney can learn in a client interview can be a rich and useful source of material to convince a judge to release someone the judge might otherwise detain. A sample interview form to help lawyers obtain the necessary information is provided in Appendix E.

The information a defense attorney can learn in a client interview can be a rich and useful source of material to convince a judge to release someone the judge might otherwise detain.

The National Legal Aid and Defender Association (NLADA) Guidelines suggest defense counsel become familiar with the law and facts during the initial client interview, acquire information from the client, and provide the client information about the law and procedures that will affect the client and their case.[20] Key information to obtain includes: ties to the community, criminal record, financial condition, medical and mental health history, and circumstances of the pending case.

In addition to the client's social factors, attorneys should attempt to get a workable understanding of the client's version of events as early as possible to appropriately advocate for release and begin gathering and preserving evidence that will assist the client in his or her defense. Counsel should interview the client as soon as practicable.

Defense counsel should always strive to conduct this initial interview with his client in a private, confidential space to facilitate a fuller exchange of legal, procedural, and factual information.[21] Counsel should have confidential access to the client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with their counsel.

TOOL #2: RISK ASSESSMENT INSTRUMENTS

The Public Safety Assessment (PSA) in use in Harris County was discussed in depth at the beginning of this Manual.[22] Defense attorneys should always be aware of their clients' scores on the PSA and be prepared to address them. If the scores indicate the defendant is below-average or average risk, defenders should use that information as leverage for personal bond. If the score indicates that the client has an above-average risk, defenders must prepare to counter those risk factors based on information gleaned from the client interview and be ready to suggest appropriate conditions of release that address the client's specific risk factors. Attorneys should also ensure the PSA score itself is accurate, make sure the categorization of the client's record and history were correctly reported, interpreted, and calculated.

TOOL #3: TEXAS STATUTES

1. Definition of Bail

The Code of Criminal Procedure defines "**bail**" as:

[T]he security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond.[23]

2. Bail is a Mechanism For a Defendant's Pretrial Release

The fact that a person was arrested for a crime does not mean he or she is guilty. If a defendant is adjudicated guilty, a punishment follows. For many crimes, of course, this punishment includes serving a period of time in jail or prison.

However, imprisonment is not appropriate merely because of arrest and a pending trial. The laws of our nation reflect the belief that defendants should generally be released—not imprisoned—pending trial.[24] Yet Texas law enforcement agencies do not release arrestees without conditions. Rather, defendants are required to provide some assurance that they will appear in court to address their charge(s). In Texas, any such assurance is considered a form of "bail."

As explained above, "bail" is defined as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him." Simply because bail is considered "security" does not mean the accused must pay for release. Bail can, by definition, be secured by use of a bail bond or the payment of cash or unsecured by the execution of a personal bond (PB).[25] Bail refers to the specific amount of money an accused agrees to pay the court if he or she fails to appear for their case. This amount is set by a magistrate or judge. For example, if a magistrate or judge sets bail at $5,000, this is the amount the defendant would be directed to pay the court if he or she does not appear for trial.

3. Bond

The term "**bond**" refers to how bail (security) is posted. Two statutory types of bonds exist in Texas, personal bonds and bail bonds.

(a) Personal bonds

A **personal bond** (PB) is a document executed by the accused containing the following statutorily prescribed oath:

I swear that I will appear before (the court or magistrate) at (address, city, county), Texas, on the (date), at the hour of (time, a.m. or p.m.) or upon notice by the court, or pay to the court the principal sum of (amount) plus all necessary and reasonable expenses incurred in any arrest for failure to appear.[26]

A defendant who executes a PB promises to appear in court at a specified time. The accused is not required to pay the bail amount—even if later he or she is. If the accused fails to appear, the court may demand bail payment in the bond-specified amount. The court can choose not to order payment of the bail based on the defendant's raised defenses.[27]

A defendant need not pay any money to obtain a PB (except when an administrative fee is required.) For example, if the magistrate sets bail at $5,000, the defendant need not pay $5,000 to obtain a personal bond. In many places, this type of bond is referred to as "**unsecured**" because the promise to appear and pay the designated amount is not secured by any financial outlay if the accused willfully fails to appear.

It is important to note: A personal bond (PB) is *not* the same thing as a "**personal recognizance bond**." Like a personal bond, a personal recognizance bond is a document signed by a defendant in which he or she promises to appear for trial and allows release from custody pending trial; yet, a personal recognizance bond does *not* obligate the accused financially if he or she fails to appear for court. In other words, a personal recognizance bond requires no financial commitment or any threat of collecting such commitment if an accused fails to appear for court.

Personal recognizance bonds are available in many states and federal courts, but they do not exist in Texas.[28]

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[20] *See* Appendix A for NLADA Guideline 2.2 Initial Interview (noting attorneys should be careful to only incorporate information relevant to the bail issues when making arguments to the court. Factual arguments about the allegations should only be responsive to representations presented by the State, and should be carefully limited).

[21] *See* Appendix D, Commentary to Principle 4 of the ABA's Ten Principles Of A Public Defense Delivery System; *see also* American Bar Association, Ten Principles of a Public Defense Delivery System (2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

[22] *See supra* "Part III: Risk Assessment and Bail in Harris County."

[23] Tex. Code Crim. Proc. Ann. art. 17.01 (West 2018).

[24] "In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception." *Salerno v. U.S., 481 U.S. 739, 755 (1987).*

[25] *Id.*

[26] Tex. Code Crim. Proc. Ann. art. 17.04(3) (West 2018).

[27] *See* Tex. Code Crim. Proc. Ann. art. 22.13 (West 2018), for listed defenses.

[28] *See* Ronald Goldfarb, Ransom: A Critique Of The American Bail System 153-54 (1965).

Texas law does not envision personal recognizance bonds because the law does not authorize a defendant's release without that person's promise to pay a specified bail amount should he or she fail to appear. Currently, "Texas law does not facially provide for release with no financial conditions."[29]

As mentioned earlier, sometimes a small monetary payment may be required to *obtain* a personal bond. The Texas Code Criminal Procedure. art. 17.42 §4(a) dictates:

> If a court releases an accused on personal bond on the recommendation of a personal bond office, the court shall assess a personal bond fee of $20 or three percent of the amount of the bail fixed for the accused, whichever is greater. The court may waive the fee or assess a lesser fee if good cause is shown.

(emphasis added). The fee can be assessed only if (1) a personal bond office recommended release, (2) the court acted on that recommendation, and (3) the court did not find good cause to waive the fee. Personal bond offices do not exist in every part of Texas, but where they do exist, these offices make recommendations as to whether particular individuals should be released upon execution of a personal bond.

As to the amount of the fee: If, for example, a $5,000 personal bond is set for a defendant on the recommendation of a personal bond office, a $150 personal bond fee could be assessed (3% of $5,000, which is greater than the statutory minimum fee of $20.00). The magistrate or judge may waive the fee entirely or reduce the amount of the fee "if good cause is shown."[30] Arguably, good cause exists for a complete waiver if the defendant is indigent.

When a personal bond fee is assessed, the judge or magistrate may order the fee paid before the defendant is released.[31] But more typically, judges and magistrates order the fee paid as a condition of bond or as court costs assessed upon conviction.[32]

In addition to the above-described oath, a personal bond must contain: (1) the defendant's name, address, and place of employment; (2) identification information, including the defendant's: (a) date and place of birth; (b) height, weight, and hair and eyes color; (c) driver's license number and state of issuance, if any; and (d) nearest relative's name and address, if any.[33]

While magistrates cannot give a personal bond for certain serious offenses in most counties, district judges do maintain that discretion.[34] In Harris County, however, magistrates ***may*** release defendants on personal bond, even for these serious offenses.[35]

One additional restriction provides that only the court before whom the case is pending may release on personal bond a defendant who:

> (1) is charged with an offense under the following sections of the Penal Code:
>
> (A) Section 19.03 (Capital Murder);
>
> (B) Section 20.04 (Aggravated Kidnapping);
>
> (C) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
>
> (D) Section 20A.03 (Continuous Trafficking of Persons);
>
> (E) Section 22.021 (Aggravated Sexual Assault);
>
> (F) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, 1 or Court Participant);
>
> (G) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);
>
> (H) Section 29.03 (Aggravated Robbery);
>
> (I) Section 30.02 (Burglary); OR
>
> (J) Section 71.02 (Engaging in Organized Criminal Activity)
>
> (2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first-degree felony; or
>
> (3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.

Magistrates with jurisdiction over certain complaints and arrests in their own counties, have jurisdiction over the same complaints and arrests from other counties and, consequently, can release eligible accused persons under a personal bond.[36]

(b) Bail Bonds

In many respects a bail bond is like a personal bond. Both are documents a defendant executes to secure release from custody pending trial; both contain promises to appear in court at a designated time; and in both, the defendant agrees to pay a specified amount if he fails to appear.[37] Their fundamental difference is bail bonds require money to be paid up front to secure the defendant's release whereas a personal bond allows a defendant to be released without payment. As a result, bail bonds are thought of as "**secured**." Obviously, it is always preferable to seek a personal bond so the defendant (or his or her family and friends) do not need to pay any money to secure release. Yet in some cases, Texas law prohibits a defendant from receiving a personal bond.

There are two ways to post bail bonds—by cash or by surety. The characteristics of each are detailed below.

(i) Cash Bonds

One way to post a bail bond is by paying the entire bail amount into the registry of the court.[38] For example, if bail has been set at $5,000, the defendant can pay $5,000 into the registry of the court and obtain release from custody. So long as he or she appears in court as required, the $5,000 bail amount is returned to him—less a handling fee of 5% of the bail amount or $50, whichever is less.[39] If the defendant does not appear in court as required, the money is forfeited to the court upon the execution of proper bond forfeiture procedures.

(ii) Surety Bonds

In most situations, however, defendants cannot come up with all the money necessary to post a cash bond. These individuals may nonetheless be able to produce a portion or percentage of the bail amount. In such instances, he or she can contract with a commercial bail company or "bail bondsman." In return for a defendant's payment of a percentage of the bail amount to the bondsman—known as a "**premium**"—the bondsman pledges to the county to pay the total bail amount to the court if the defendant fails to appear.[40] The law refers to these bondsmen as "**sureties**."[41]

Typically, an accused pays 10% of the amount of bail to the bondsman. This premium is nonrefundable. The accused does not get this money back even if he or she appears for all his or her court proceedings. In fact, the accused is not refunded any of the funds paid to effect his or her release even if found not guilty or the charges are withdrawn. If an accused fails to appear, the bondsman forfeits the bail amount to the court upon the execution of proper bond forfeiture procedures.[42]

For example, if a judge or magistrate set bail at $5,000 and does not authorize the defendant to post a personal bond, the defendant must execute a bail bond to be released from custody. If he or she does not have $5,000 to post as a cash bond, the accused will need to try to obtain a surety bond. The defendant (and more often his or her family and friends) may be able to scrape together the $500 needed to pay a commercial bail bondsman. In return for the $500 payment, the bondsman pledges to pay the $5,000 bail amount to the court if the defendant fails to appear. Once this surety bond is filed with the proper court or magistrate, the defendant is released pending trial. The defendant never sees the $500 paid to the bondsman again. If the defendant fails to appear, the county in which the court sits can pursue legal action

[29] *ODonnell, supra* note 8, at 1085.

[30] Tex. Code Crim. Proc. Ann. art. 17.42, § 4(a) (West 2018).

[31] Tex. Code Crim. Proc. Ann. art. 17.03(g) (West 2018).

[32] *Id.*

[33] Tex. Code Crim. Proc. Ann. art. 17.04 (West 2018).

[34] Tex. Code Crim. Proc. Ann. art. 17.03 (West 2018).

[35] Tex. Gov't. Code Ann. art. 54.856 (West 2018).

[36] Tex. Code Crim. Proc. Ann. art. 17.031(a) (West 2018).

[37] *See* Tex. Code Crim. Proc. Ann. art. 17.08 (West 2018).

[38] *See* Tex. Code Crim. Proc. Ann. art. 17.02 (West 2018).

[39] Tex. Local Gov't Code § 117.055 (West 2018).

[40] A commercial bonding company almost never actually posts money in the amount of the bail with the court. Rather, the company simply pledges to pay the amount of the bail if the defendant does not appear. In Texas, companies are legally eligible to serve as sureties "if it be made to appear that such surety is worth at least double the amount of the sum for which he is bound." Tex. Code Crim. Proc. Ann. art. 17.11, § 1 (2013)

[41] Tex. Occ. Code § 1704.001(2) (West 2018).

[42] The county brings a civil lawsuit against the bail bondsman to recover the amount of the bond. Such a lawsuit is known as a bond forfeiture proceeding. *See* Tex. Code Crim. Proc. Ann. art. 22.

against the bonding company for the bail amount.[43] In turn the bonding company can pursue legal action against the defendant to recoup the money paid to the court.

(c) Release for Class C Fine Only Offenses

If a defendant is charged with a Class C misdemeanor only punishable by a fine and taken before a magistrate, he or she may be released without any form of bond once he or she is identified with certainty. The accused is ordered to appear at a later date for arraignment in the applicable justice court or municipal court but is not required to pay or promise to pay any amount of money to secure release.[44] More commonly, defendants charged with fine-only misdemeanors are cited and released; they are not brought before magistrates.

(d) Release of Mentally Ill Defendants

When a mental health provider screens a defendant and finds him or her mentally ill or intellectually disabled,[45] the magistrate shall release the defendant on a personal bond with conditions of out-patient treatment[46] only if he or she is incompetent and not charged with a violent offense.

4. Setting Bail

(a) Statutory Considerations

Magistrates and judges consider five statutory factors when setting the amount of bail:[47]

(1) a sufficiently high bail amount to give reasonable assurance the undertaking will be complied with,[48]

(2) that power to require bail is not used as an instrument of oppression,[49]

(3) nature of the offense and the circumstances under which it was committed,[50]

(4) ability to make bail and any proof taken upon this point,[51] and

(5) future safety of the alleged victim and the community.[52]

The court's consideration should always be framed by the defense as requiring that bail be no higher than necessary to assure compliance with release conditions.

(b) Other Factors Courts May Consider

In addition to the above statutory provisions, case law provides that courts may consider the following factors about the accused in setting bail:

- work record
- family and community ties
- length of residency
- prior criminal record
- conformity with previous bond conditions
- existence of other outstanding bonds
- aggravating circumstances involved in the charged offense
- U.S. citizenship[53]

(c) Harris County Criminal Courts at Law Rules for Misdemeanors

(i) Harris County's misdemeanor court rules provide the same considerations as the statutory provisions:

4.2.3. Initial Bail Schedule

4.2.3.1. The bail schedule maintained by the county criminal court at law judges for all misdemeanor offenses occurring within the courts' jurisdiction shall be referred to by the criminal law hearing officer. The initial bail amount may be changed on motion of the court, the hearing officer, or any party subject to the following criteria:

4.2.3.1.1. the bail shall be sufficiently high to give reasonable assurance that the defendant will comply with the undertaking;

4.2.3.1.2. the nature of the offense for which probable cause has been found and the circumstances under which the offense was allegedly committed are to be considered, including both aggravating and mitigating factors for which there is reasonable ground to believe shown, if any;

4.2.3.1.3. the ability to make bail is to be regarded, and proof may be taken upon this point;

4.2.3.1.4. the future safety of the victim and the community may be considered, and if this is a factor, release to a third person should also be considered.[54]

(ii) All misdemeanor bonds are to be reconsidered by the judge

> 4.3. Next Business Day Setting for Those Incarcerated In the Harris County Jail
>
> 4.3.1. The initial arraignment setting pursuant to Rule 4.1.2 shall be replaced with a bail review hearing setting for any arrestee who is in custody in the Harris County Jail. The arrestee shall appear before the court in which the case is pending on the business day following the booking date. Absent a waiver by the defendant and defense counsel, the court will review conditions of release, bail amount set, and personal bond decision and modify if good cause exists to do so. These hearings will be conducted at regular docket calls on Monday through Friday and the judge shall perform all necessary functions under the law (determining probable cause if necessary, performing an Article 15.17 proceeding if not previously done, assessing indigency and appointing counsel if appropriate, etc.). The defendant shall be docketed in accordance with the following schedule, and in such cases the initial seven-day setting shall be canceled.

(d) Harris County Criminal Courts at Law Rules for Felonies

The felony courts' local rules do not provide any further instructions about how bail is set and reviewed other than the existing statutory terms:

> If the Magistrate finds probable cause exists, the Magistrate shall inform the defendant of his or her statutory rights as required by Art. 15.17 of the Texas Code of Criminal Procedure; the Magistrate shall identify the defendant's counsel and if the defendant is without counsel and is indigent, appoint counsel to represent defendant; and inform the defendant of the defendant's right to waive indictment as provided in Art. 1.141 of the Texas Code of Criminal Procedure. The Magistrate shall set bail, and if bond has been posted in amount of set bail, order such bond shall continue in effect; if bond in the amount of set bail has not been posted, the Magistrate shall determine whether the defendant is eligible for release on personal recognizance, and commit defendant to custody of the Sheriff subject to defendant's posting bond in the amount of set bail.[55]

[43] Kevin Krause and Ed Timms, *Bail Bondsmen owe Dallas County $35 million in uncollected default judgments*, Dallas News (July 2011), *available at* https://www.dallasnews.com/news/investigations/2011/07/02/bail-bondsmen-owe-dallas-county-35-million-in-uncollected-default-judgments.

[44] Tex. Code Crim. Proc. Ann. art. 15.17 (b) (West 2018).

[45] The statute used the now antiquated term, "mentally retarded."

[46] Tex. Code Crim. Proc. Ann. art. 17.032 (West 2018); *see* Appendix B for complete statutory language.

[47] Tex. Code Crim. Proc. Ann. art. 17.15 (West 2018).

[48] *See Ex parte Watson*, 940 S.W.2d 733, 735 (Tex. App. 1997) (finding that prior history of flight and bad behavior in jail sufficient to justify $350,000 bond).

[49] *See Ex parte Brown*, 959 S.W.2d 369, 371 (Tex. App.1997) ("The burden is on the person seeking reduction of bail amount to demonstrate that the bail set is excessive.").

[50] *See Ex Parte Durst*, 148 S.W.3d 496, 499 (Tex. App. 2004) (explaining that the nature of the offense is one of the primary factors to be considered amongst the five).

[51] *See Ex parte Bufkin*, 553 S.W.2d 116, 118 (Tex. Crim. App. 1977) ("[I]t is well established that ability or inability to make bail does not, alone, control in determining the amount; however, it is an element to be considered along with the others....").

[52] *See Ex parte Scott*, 122 S.W.3d 866, 870 n1 (Tex. App. 2003) (holding that it was not unreasonable to deny bail based upon the trial court's comments regarding the safety of the victim: "[M]y concern, as you well know—you'd have to know this—is that because of the nature of the case. If I let you out and anything happens—and I know you're telling me right now, through your attorney, that nothing is going to happen. But if it did happen, it would be on my head, and I'm not going to do that.").

[53] *Ex parte Maelartin*, 464 S.W.3d 789, 792 (Tex. App. 2015); *Ex parte Castellanos*, 420 S.W.3d 878, 882 (Tex. App. 2014); *Ex parte Rodriguez*, 595 S.W.2d 549, 550 n.2 (Tex. Crim. App. 1980).

[54] Harris Cty. Crim. Ct. R. (as amended through Aug. 6, 2018), *available at*: http://www.ccl.hctx.net/attorneys/rules/Rules.pdf, page 10.

[55] Harris Cty. Dist. Ct. R. 6.12, "Arraignment; Initial Appearance."

(e) The *Roberson* Order

In 1987, a federal court issued a final agreed judgment regarding the rights of the accused in probable cause and bail hearings in Harris County, Texas.[56] In many ways, the *Roberson* order restates Texas Code of Criminal Procedure art. 17.15:

> Such bail determinations shall be according to the following criteria:
>
> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with;
>
> 2. The nature of the offense for which Probable Cause has been found and the circumstances under which the offense was allegedly committed are to be considered, including both aggravating and mitigating factors for which there is reasonable ground to believe shown, if any;
>
> 3. The ability to make bail is to be regarded, and proof may be taken upon this point;
>
> 4. The future safety of the victim may be considered, and if this be a factor, release to a third person should also be considered; and
>
> 5. The Judicial Officer shall also consider the accused's employment history, residency, family affiliations, prior criminal record, previous court appearance performance and any outstanding bonds.[57]

The *Roberson* order further required that a personal bond be the default whenever possible and that at the hearing the magistrate shall use the bail schedule, in addition to other criteria, including ability to pay, in determining the appropriate bail in a given case. The order gave the magistrate authority to order the accused released on personal bond or released on other alternatives to pre-scheduled bail amounts.[58]

Additionally, the order required:

> The Judges shall direct the Pretrial Services Agency to make every effort to insure [sic] that sufficient information is available at the time of the hearings required herein for the Judicial Officer to determine an accused's eligibility for a personal bond or alternatives to prescheduled bail amounts.[59]

The *Roberson* Order also provided the following factors for Harris County judicial officers to consider regarding appointed counsel, which have some similarities with case law:

> The posting of bond by the accused is not good cause for the revocation, rescission, withdrawal, or termination of the appointment of counsel for an accused. In considering whether an accused is entitled to appointed counsel the Judges shall consider factors including, but not limited to, the following: (1) the accused's income, (2) significant property owned by the accused, (3) outstanding obligations of the accused, (4) necessary expenses of the accused, (5) the number and ages of any dependents of the accused, and (6) whether the accused has posted or is capable of posting bail.[60]

In the 2017 *ODonnell* opinion, United States District Judge Lee Rosenthal explained that despite the *Roberson* Order the judicial officers in Harris County are *required* to:

> Make individual adjustments to the bail schedule in each case to provide a mechanism for release either by lowering the scheduled amount when setting a secured bond; setting nonfinancial conditions of release; or granting release on unsecured "personal bonds" without additional conditions.[61]

(f) Case Law Considerations

Case law established other factors that courts utilize when determining appropriate bail. The primary case law factors are:

(1) length of the potential sentence;

(2) nature of the offense;

(3) other supportive data that the court deems relevant including the accused's:

- a. work record,
- b. family ties,
- c. length of residency,
- d. ability to post the current bond,
- e. prior criminal record,
- f. conformity with previous bond conditions,
- g. other outstanding bonds, and
- h. aggravating factors involved in the offense.

These factors must be analyzed ***individually*** and weighed as a whole to arrive at an appropriate and reasonable bail that will serve to secure the presence of the defendant in court.[63]

(g) Bail Schedules

Some jurisdictions rely solely or heavily upon a bail schedule to determine the amount of bail. The "deans" of Texas criminal law, George Dix and John Schmolesky, have an opinion on this practice: "Arguably the use of a bail schedule is contrary to the entire spirit of the bail process."[64]

"Arguably the use of a bail schedule is contrary to the entire spirit of the bail process."

Under current Texas law, use of a bail schedule itself is not unconstitutional, but its inflexible application can be.

> Using a bail schedule is not inherently unconstitutional . . . . The constitutional problem in this case arises from rigid adherence to imposing secured money bail when that will obviously result in, and is often intended to effect, pretrial detention of indigent defendants charged only with misdemeanors who are eligible for release under Texas law.[65]

Magistrates and judges may not order misdemeanor arrestees unable to afford the bail amount to post a secured bail bond instead of an unsecured personal bond.[66] As the United States District Court recognized in *ODonnell*:

> [T]he issue in this case is not the right to "affordable bail." As cases and commentaries make clear, courts may impose secured money bail beyond a defendant's ability to pay: (1) in cases of dangerous felony; (2) after finding that no alternative to secured money bail can reasonably assure the defendant's appearance or public safety; (3) with the due process of a detention order if the secured money bail in fact operates to detain the defendant . . . . That does not amount to a "right to affordable bail." Under Texas law, Harris County magistrates . . . may weigh the state-law factors to arrive at a high amount of bail. Tex. Code Crim. Pro. art. 17.15. But they cannot, consistent with the federal Constitution, set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection.[67]

Yet while Texas boasts constitutional and statutory provisions for bail pretrial and post-conviction of violent felony offenses, no requirement exists that bail must be affordable. Despite the language of *ODonnell*, the inability of the accused to pay the amount of bail assessed in violent offense cases is "a circumstance to be considered, but it is not a controlling circumstance nor the sole criterion in determining the amount of bail."[68]

5. Conditions of Bond

Pretrial bond conditions are meant to secure the accused's presence at court. Thus, a condition must meet three standards:

(1) it must be "reasonable,"

(2) it must be intended to "secure a defendant's attendance at trial," and

(3) it must be related to the safety of the alleged victim or the community.[69]

[56] *Roberson v. Richardson*, No. 84-2974 (S.D. Tex. Nov. 25, 1987) (DeAnda, J.).

[57] *Roberson*, at 3.

[58] *Id.* at 4.

[59] *Roberson*, at 4.

[60] Id.

[61] *ODonnell*, *supra* note 8, at 1076.

[62] *Ex parte Rubac*, 611 S.W.2d 848, 849–50 (Tex. Crim. App. 1981).

[63] *Ex parte Nimnicht*, 467 S.W.3d 64, 67 (Tex. App. 2015) ("Appropriate bail is a fact-driven determination and each case must be judged on its own unique facts."); *Ex parte Nimnicht*, 467 S.W.3d 64, 67 (Tex. App. 2015) (citing *Esquivel v. State*, 922 S.W.2d 601, 604 (Tex. App. 1996).

[64] Tex. Code Crim. Prac. & Proc. 41 § 21:45 (3d ed.).

[65] *ODonnell, supra* note 8, at 1142.

[66] *Id.* at 1167.

[67] *Id.*

[68] *See Ex parte Vasquez*, 558 S.W.2d 477, 480 (Tex. Crim. App.1977).

[69] *Ex parte Anderer*, 61 S.W.3d 398, 401–02 (Tex. Crim. App. 2001).

Numerous statutory provisions provide guidance on the conditions of bond. For any offense a magistrate may impose any reasonable condition of bond related to the safety of the alleged victim or community to secure the accused's attendance to court proceedings.[70] However, in addition, the legislature went into detail regarding conditions for certain offenses, as detailed below.

(a) General Conditions of Release

A magistrate may require as a condition of release on personal bond that the defendant submit to home curfew and electronic monitoring under the supervision of an agency designated by the magistrate.[71] Cost of monitoring may be assessed as court costs or ordered paid directly by the defendant as a condition of bond.[72] Home confinement and drug testing are allowed [73] and frequently utilized.

(a) A magistrate may require as a condition of release on bond that the defendant submit to:

(1) home confinement and electronic monitoring under the supervision of an agency designated by the magistrate; or

(2) testing on a weekly basis for the presence of a controlled substance in the defendant's body.

(b) In this article, "controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(c) The magistrate may revoke the bond and order the defendant arrested if the defendant:

(1) violates a condition of home confinement and electronic monitoring;

(2) refuses to submit to a test for controlled substances or submits to a test for controlled substances and the test indicates the presence of a controlled substance in the defendant's body; or

(3) fails to pay the costs of monitoring or testing for controlled substances, if payment is ordered under Subsection (e) as a condition of bond and the magistrate determines that the defendant is not indigent and is financially able to make the payments as ordered.

(d) The community justice assistance division of the Texas Department of Criminal Justice may provide grants to counties to implement electronic monitoring programs authorized by this article.

(e) The cost of electronic monitoring or testing for controlled substances under this article may be assessed as court costs or ordered paid directly by the defendant as a condition of bond.[74]

(b) Special Conditions of Release

(i) DWI charges

Individuals charged with either a subsequent DWI offense (Tex. Penal Code §§49.04 to 49.06), intoxication assault (Tex. Penal Code §49.07), or intoxication manslaughter (Tex. Penal Code §49.08) face additional conditions of release including an ignition interlock device.

To date, courts considering this requirement upheld it as constitutional and non-punitive.[75]

(a) Except as provided by Subsection (b), a magistrate shall require on release that a defendant charged with a subsequent offense under Sections 49.04-49.06, Penal Code, or an offense under Section 49.07 or 49.08 of that code:

(1) have installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator; and

(2) not operate any motor vehicle unless the vehicle is equipped with that device.

(b) The magistrate may not require the installation of the device if the magistrate finds that to require the device would not be in the best interest of justice.

(c) If the defendant is required to have the device installed, the magistrate shall require that the defendant have the device installed on the appropriate motor vehicle, at the defendant's expense, before the 30th day after the date the defendant is released on bond.

(d) The magistrate may designate an appropriate agency to verify the installation of the device and to monitor the device. If the magistrate designates an agency under this subsection, in each month during which the agency verifies the installation of the device or provides a monitoring service the defendant shall pay a fee to the designated agency in the amount set by the magistrate. The defendant shall pay the initial

fee at the time the agency verifies the installation of the device. In each subsequent month during which the defendant is required to pay a fee the defendant shall pay the fee on the first occasion in that month that the agency provides a monitoring service. The magistrate shall set the fee in an amount not to exceed $10 as determined by the county auditor, or by the commissioners court of the county if the county does not have a county auditor, to be sufficient to cover the cost incurred by the designated agency in conducting the verification or providing the monitoring service, as applicable in that county.[76]

(ii) Stalking charge

Those charged with stalking under Section 42.072 can be required to cease communications with the purported victim and be barred from going within a certain distance of the purported victim's home, work, or school.

(a) A magistrate may require as a condition of release on bond that a defendant charged with an offense under Section 42.072, Penal Code, may not:

(1) communicate directly or indirectly with the victim; or

(2) go to or near the residence, place of employment, or business of the victim or to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance.

(b) If the magistrate requires the prohibition contained in Subsection (a) (2) of this article as a condition of release on bond, the magistrate shall specifically describe the prohibited locations and the minimum distances, if any, that the defendant must maintain from the locations.[77]

(iii) Require submission of a DNA sample

A magistrate may require submission of a DNA sample as a condition of release on bail or bond if the accused is indicted or waives indictment for an enumerated felony listed in Tex. Gov't Code § 411.1471(a).

(iv) Persons accused of certain sexual and assaultive offenses

For persons accused of enumerated sexual offenses (Chapter 21), assaultive offenses (Chapter 22), prohibited sexual conduct (Section 25.02), or sexual performance by a child offenses (Section 43.25)—a magistrate shall require as a condition of bond that the defendant not: (1) directly communicate with the alleged victim of the offense or (2) go near a residence, school, or other location, as specifically described in the bond, frequented by the alleged victim. A magistrate who imposes a condition of bond under this article may grant *supervised* access to the alleged victim. If a condition imposed under this article conflicts with an existing court order granting possession of or access to a child, the condition imposed under this article prevails for a period specified by the magistrate **not to exceed 90 days**.[78]

It is questionable whether a magistrate can impose additional conditions as described in the above subsection. In *Ex parte Tucker*, the Fort Worth Court of Appeals held this section controlled over the general law on bond conditions:

> As a result, we find that the Legislature's express enumeration of the specific bond conditions included in Chapter 17 are an exclusive grant of authority to the trial court to condition a defendant's pre-trial release. Accordingly, we hold that the trial court does not have inherent authority to impose conditions on a defendant's pre-trial bond that are not authorized by statute and further, that article 17.15 does not implicitly authorize other conditions not expressly stated. [79]

[70] Tex. Code Crim. Proc. Ann. art. 17.40 (West 2018).

[71] Tex. Code Crim. Proc. Ann. art. 17.43(a) (West 2018).

[72] Tex. Code Crim. Proc. Ann. art. 17.43(b) (West 2018).

[73] Tex. Code Crim. Proc. Ann. art. 17.44 (West 2018).

[74] Tex. Code Crim. Proc. Ann. art. 17.44.

[75] *See Ex Parte Shires*, 508 S.W.3d 856, 861, 861 n.9 (Tex. App. 2016) (citing *Ex parte Elliott*, 950 S.W.2d 714, 716 (Tex. App. 19970) (noting the bail condition requiring an interlock device was appropriate to protect the safety of the community in light of defendant's history of DWI)).

[76] Tex. Code Crim. Proc. Ann. art. 17.441.

[77] Tex. Code Crim. Proc. Ann. art 17.46.

[78] Tex. Code Crim. Proc. Ann. art. 17.41 (West 2018).

[79] *Ex parte Tucker*, 977 S.W.2d 713, 717 (Tex. App. 1998).

(v) Accused with mental health issues

For persons accused of non-violent offenses found to be mentally ill or intellectually disabled and released on a personal bond under the provisions of Texas Code of Criminal Procedure art. 17.032, outpatient or inpatient mental health treatment is a mandatory condition of their release.[80]

(vi) Family violence

(a) Delayed release

The legislature enacted an extensive number of bail conditions in relation to family violence cases.[81] When a person is arrested or held without a warrant for prevention of family violence, the head of the agency arresting or holding such a person may hold the person for a period of not more than four hours *after bond has been posted* if the magistrate finds probable cause to believe violence will continue if the person is immediately released.[82]

This detention period may be extended for an additional period **not to exceed 48 hours**, but only if authorized in writing directed to the person having custody of the detained person by a magistrate who concludes that:

(1) the violence would continue if the person is released; and

(2) if the additional period exceeds 24 hours, 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:

> (A) on more than one occasion for an offense involving family violence; or
>
> (B) for any other offense, if a deadly weapon, as defined by Section 1.07, Penal Code, was used or exhibited during commission of the offense or during immediate flight after the commission of the offense.[83]

(b) GPS monitoring

In family violence cases, magistrates can order global positioning monitoring devices (GPS) use to track a defendant's movements and proximity to alleged victims.[84] Magistrates may order that the victim receive information about the defendant's whereabouts. Indigent defendants may be assessed costs for GPS monitoring on a "sliding scale."[85]

(c) Emergency Protection Orders

For an offense involving family violence, the magistrate may issue an order for emergency protection at the request of the victim or guardian of the victim, a peace officer, or the prosecutor. Under many circumstances, the magistrate is *required* to issue the order.[86] The procedures for obtaining an emergency protection order, often known by the acronym MOEP (Motion for an Order for Emergency Protection), are in Texas Code of Criminal Procedure art. 17.292, which is included in its entirety in Appendix B.

6. Modifying Bail

An initial bail amount is set at a probable cause hearing held by a magistrate under Article 15.17 of the Code of Criminal Procedure.[87] "The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall, after determining whether the person is currently on bail for a separate criminal offense, admit the person to bail if allowed by law."[88]

While the probable cause hearing presents the first opportunity for bail consideration and an appropriate bail amount, this hearing is not the only opportunity. Typically, the next opportunity for bail issue consideration is at the defendant's first setting in the assigned county or district when counsel is present.[89]

The purpose of this arraignment is to fix the defendant's identity and to hear his plea.[90] The arraignment takes place before the judge presiding over the case. (By contrast the probable cause hearing is conducted by a magistrate who typically does not have jurisdiction over the merits of the case.)

Bail will not be automatically reconsidered at the arraignment.[91] Rather, a motion for modification of bail or a motion of reconsideration of bail will need to be filed. Even after arraignment, motions to reconsider bail may be filed any time prior to trial. Factors warranting a reduction in bail are the same factors used in setting the bail amount in the first place. No rule for notice is provided by statute.

Factors warranting a reduction in bail are the same factors used in setting bail amount in the first place. No rule for notice is provided by statute.

The defendant carries the burden of proof to establish that bail is excessive.[92] In reviewing a trial court's ruling, appellate courts apply an **abuse of discretion standard**. Appellate courts will not intercede if the trial court's ruling is at least within the zone of reasonable disagreement.[93] An abuse of discretion review requires more of the appellate court than simply deciding the trial court did not rule arbitrarily or capriciously.[94] The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made.[95]

7. Revocation of Bond

In certain situations, a defendant's bond can be revoked. Revocation only occurs upon finding the accused violated a condition of bond. The standard of proof at a revocation hearing is **preponderance of the evidence**.

> (b) At a hearing limited to determining whether the defendant violated a condition of bond imposed under Subsection (a), the magistrate may revoke the defendant's bond only if the magistrate finds by a preponderance of the evidence that the violation occurred. If the magistrate finds that the violation occurred, the magistrate shall revoke the defendant's bond and order that the defendant be immediately returned to custody. Once the defendant is placed in custody, the revocation of the defendant's bond discharges the sureties on the bond, if any, from any future liability on the bond. A discharge under this subsection from any future liability on the bond does not discharge any surety from liability for previous forfeitures on the bond.[96]

8. Denial of Bail

Besides the potential for preventative detention in cases when a defendant violated a previous condition of bail or a protective order in family violence cases, see above and Texas Code of Criminal Procedure art. 17.152. Texas also provides for denial of bail in some cases involving alleged child victims,[97] and limited further detention in some family violence cases.[98]

TOOL #4: UNITED STATES AND TEXAS CONSTITUTIONS

1. United States Constitutional Provisions

(a) The Excessive Bail Clause

The Eighth Amendment prohibits "excessive bail." According to the U.S. Supreme Court, this language does not actually create a right to bail:

> The Eight Amendment addresses pretrial release by providing merely that "[e]xcessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all.[99]

[80] *See* Appendix B for complete statutory language.

[81] Tex. Code Crim. Proc. Ann. art. 17.152 (West 2018); *see also* Appendix B.

[82] Tex. Code Crim. Proc. Ann. art. 17.291 (West 2018) (*emphasis added*).

[83] Tex. Code Crim. Proc. Ann. art. 17.291 (West 2018).

[84] *See* Tex. Code Crim. Proc. Ann. art. 17.49 (West 2018); *see also* Appendix B.

[85] *See* Tex. Code Crim. Proc. Ann. art. 17.49 (West 2018).

[86] Tex. Code Crim. Proc. Ann. art. 17.292 (West 2018); *see also Harvey v. State*, 78 S.W.3d 368, 371 (Tex. Crim. App. 2002) (explaining Article 17.292 authorizes, and in some cases requires the magistrate to issue an order for emergency protection that prohibits the arrested party from performing the acts that are specified in Section 25.07(a) of the Penal Code so long as service of a copy of the order on the defendant in open court.).

[87] This hearing is informally referred to as a "probable cause hearing" or merely as "magistration." In this Manual, the term "probable cause hearing" is used.

[88] Tex. Code Crim. Proc. Ann. art. 15.17(a) (West 2018).

[89] Although this setting in Harris County is often referred to as "first appearance," the section of the code that governs this procedure is found in Tex. Code Crim. Pro. art. 26.02 and is referred to as an "arraignment." To align with the statutory language, hereafter the "first appearance" will be referred to as an "arraignment."

[90] Tex. Code Crim. Proc. Ann. art. 26.02 (West 2018).

[91] *Contra* Harris Cty. Crim. Ct. R. 4.3.1 (2018) ("Absent a waiver by the defendant and defense counsel, the court will review conditions of release, bail amount set, and personal bond decision and modify if good cause exists to do so.").

[92] *Ex parte Rubac*, 611 S.W. 2d 848, 849 (Tex. Crim. App. 1981).

[93] *Cooley v. State*, 232 S.W.3d 228, 234 (Tex. App. 2007) (citing *Ex parte Beard, 92 S.W.3d 566, 573 (Tex. App. 2002)*); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990).

[94] *Cooley*, 232 S.W.3d at 234.

[95] *Id.*

[96] Tex. Code Crim. Proc. art. 17.40.

[97] Tex. Code Crim. Proc. Ann. art. 17.153 (West 2018).

[98] Tex. Code Crim. Proc. Ann. art. 17.291 (West 2018); *see* Appendix B for complete statutory language.

[99] *Salerno, supra* note 24 at 752.

The *Salerno* Court quoted from an earlier Supreme Court case to support its position:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the class of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.[100]

In *Salerno*, the Supreme Court considered a challenge to the constitutionality of the Bail Reform Act of 1984. This act permitted a federal court to detain an arrestee without bail if "the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"[101]

In response to Salerno's Eighth Amendment challenge, the Court recognized that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[102] But the Court concluded that "the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception."[103] "We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail."[104]

(b) The Due Process Clause

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[105] This provision applies to *federal* government actions. The Fourteenth Amendment prohibits a *state* from "depriv[ing] any person of life, liberty, or property, without due process of law."[106]

Two types of due process exist—substantive due process and procedural due process. **Substantive due process** prevents the government from engaging in conduct that "shocks the conscience."[107] It also prevents the government from engaging in conduct that interferes with rights "implicit in the concept of ordered liberty."[108]

Procedural due process prevents the government from depriving persons of life, liberty, or property in an unfair manner.[109] Thus, even if government action depriving a person of life, liberty, or property does not violate substantive due process, the way in which it is carried out may violate procedural due process.

As noted above, the defendant in *Salerno* challenged the constitutionality of the Bail Reform Act of 1984 on the basis of the Eighth Amendment Excessive Bail Clause. But this was not the defendant's only constitutional challenge. He also asserted that the Bail Reform Act violated both substantive and procedural due process.

Salerno argued there was a substantive due process violation because the act's authorization of pretrial detention (a liberty deprivation) constituted impermissible punishment before trial.[110] In ruling against Salerno, the Supreme Court recognized that pretrial detention could constitute impermissible punishment if the legislative intent of the statutorily authorized detention was to punish the defendant. The Court, however, found the intent of the act was not punishment but rather to prevent danger to the community. As a result, Salerno's substantive due process challenge failed.

The Supreme Court recognized that pretrial detention could constitute impermissible punishment if the legislative intent of the statutorily authorized detention was to punish the defendant.

Although Salerno's substantive due process argument did not prevail, the case shows that substantive due process is a relevant constitutional consideration in the bail context.

Salerno also argued that the Bail Reform Act violated procedural due process. Ruling against him on this ground, the Supreme Court found the procedures adequate on their face.

> Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily-enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of

> fact and a written statement of the reasons for a decision to detain.[111]

Although Salerno also failed in his procedural due process argument, procedural due process is nevertheless relevant when it comes to bail.

In fact, in the recent federal lawsuit challenging detention practices in Harris County, the federal district court found Harris County "must provide the procedures necessary . . . under the Due Process . . . Clause[] . . . for setting bail and for ordering detention for indigent misdemeanor defendants unable to pay secured money bail."[112] The *ODonnell* Court explained:

> Under the federal case law defining due process for detention orders in general, as well as the case law defining due process for state-created liberty interests, the court concludes that Harris County, in order to detain misdemeanor defendants unable to pay a secured financial condition of pretrial release, must, at a minimum, provide: (1) notice financial and other resource its officers collect is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.[113]

The Court went on to conclude that Harris County was not following these procedures and was thereby violating the Due Process Clause.[114]

(c) The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws."[115] The Supreme Court declared that the concept of equal protection also applies to the federal government via the Fifth Amendment's Due Process Clause.[116]

The concept of equal protection applies in the bail context. In *ODonnell* the U.S. District Court considered Harris County's practice of imposing secured money bail on indigent misdemeanor defendants.[117] The plaintiffs asserted "detaining misdemeanor defendants before trial solely because of their inability to pay violates the Equal Protection Clause, because defendants with similar histories and risks but with access to money are able to purchase pretrial release."[118]

In its ruling the district court found the plaintiffs were likely to succeed on the merits of their Equal Protection Violation claim and entitled to a preliminary injunction.[119]

2. Texas Constitutional Provisions

(a) Basic Provisions

Unlike the United States Constitution, the Texas Constitution explicitly creates a right to bail. The relevant constitutional provision is Article I, §11:

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[100] *Salerno, supra* note 24 at 754 (quoting *Carlson v. Langston*, 342 U.S. 524, 545-46 (1952)).

[101] *Id.* at 741.

[102] *Id.* at 755.

[103] *Id.*

[104] *Id.* at 754-55.

[105] U.S. Const., amend. V.

[106] U.S. Const., amend XIV

[107] *Rochin v. California*, 342 U.S. 165, 172 (1952).

[108] *Palko v. Connecticut*, 302 U.S. 319, 324-26 (1937); *see also Rochin v. California*, 342 U.S. at 169.

[109] *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

[110] *Salerno, supra* note 24 at 745.

[111] *Id.* at 751-52.

[112] *ODonnell, supra* note 8, at 1147.

[113] *Id.* at 1145.

[114] *Id.* at 1147.

[115] U.S. Const. amend. XIV

[116] *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[117] *ODonnell, supra* note 8, at 1130-31.

[118] *Id.* at 1067.

[119] *Id.* at 1069.

> BAIL. 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.

The general rule under the Texas Constitution is that bail is available to arrestees. An exception to this general rule is that persons arrested for **capital offenses are not entitled to bail**. This is not the only exception. Additional exceptions to the general rule can be found in Article I, §11a, which **allows for the denial of bail in the following situations**:

- The arrestee stands accused of a felony and has twice before been convicted of a felony.
- The arrestee stands accused of a felony committed while on bail for a prior felony for which an indictment exists.
- The arrestee stands accused of a felony involving the use of a deadly weapon and has once before been convicted of a felony.
- The arrestee stands accused of a "violent offense" or a "sexual offense" committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State (e.g., while on parole) for a prior felony. A violent offense means murder, aggravated assault with a deadly weapon, aggravated kidnapping, and aggravated robbery. A sexual offense means aggravated sexual assault, sexual assault, and indecency with a child. (All of the listed offenses are felonies.)

Significantly, subsection 11a does *not* say bail is unavailable to arrestees falling into one of the foregoing categories. Rather, under the state constitution, the **denial of bail is discretionary**. Any denial of bail for an arrestee falling into one of these categories is subject to certain strict limitations:

(1) Only a district judge can deny bail;

(2) Any order denying bail must be issued within seven days of the day the arrestee's incarceration;

(3) Any order denying bail must be set aside if the arrestee is not accorded a trial within 60 days of his or her incarceration (unless the arrestee sought and obtained a continuance); and

(4) The arrestee may appeal any denial of bail under Article I, §11a to the Court of Criminal Appeals, which must give preference to the appeal.

(b) Bail Denial

The State maintains the burden to prove strict compliance with the limitations and safeguards within Article I, §11a.[120]

(i) Burden of proof

The burden of proof in a proceeding to deny bail under Article I, §11a, is a "**substantial showing**" of the guilt of the accused.[121] Although this is less than a showing that the accused is guilty beyond a reasonable doubt, as the constitution favors the setting of bail, this burden of proof should be treated as requiring substantial evidence.[122]

(ii) Motion must be filed within seven days after incarceration

The failure of a trial court to issue an order denying bail within seven calendar days following a detainee's "initial incarceration" deprives the trial court of jurisdiction to deny bail pursuant to Article I, §11a.[123] "**Initial incarceration**" refers to the detainee's initial arrest date; the date of the filing of the charging instrument is irrelevant.[124]

(iii) 60-day rule

If the trial judge enters an order denying bail under Art. I, §11a, the defendant must be accorded a trial within 60 days from his incarceration.[125] If the accused is not brought to trial within 60 days, the trial judge's order denying bail is automatically set aside, unless a continuance is obtained by the accused.[126]

As Article I, §11a also provides that the defendant may challenge the order denying bail by direct appeal. If the aforementioned 60-day period expires during the pendency of the appeal, the Court of Appeals considers the issue moot and dismisses the appeal because typically either the accused has been brought to trial or the order denying bail was automatically set aside and reasonable bail was set as required by the Texas Constitution.[127] In either event, the issue of whether bail was properly denied is moot.

The Court of Criminal Appeals has explained,

> [w]ithin sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals.[128]

(c) Other limitations

In addition to the exceptions set out in subsection 11a, an exception exists to the general availability of bail under subsection 11b.[129] This exception applies to all felonies (as well as to misdemeanors involving family violence) if the arrestee was initially placed on bail pending trial and then had his or her bail revoked. In such instances, the bail revocation must be for a violation of a condition of release related to the (1) safety of a victim of the alleged offense or (2) safety of the community. In revoking bond, a judge or magistrate must determine by a **preponderance of the evidence** that the arrestee violated such a condition of release.[130]

The bail revocation must be for a violation of a condition of release related to the (1) safety of a victim of the alleged offense or (2) safety of the community.

Finally, one further exception is possible under the Texas Constitution. Under Art. I, §11c, a provision permits the legislature may pass a law authorizing the discretionary denial of bail for certain arrestees who violate orders for emergency protection.[131] In those instances, the arrestee must have: (1) violated an order for emergency protection that was issued after a previous arrest for an offense involving family violence, (2) violated an active protective order rendered by a court in a family violence case, or (3) engaged in conduct that constitutes an offense involving the violation of an order for emergency protection described in (1) or (2). A denial of bail can only occur if a judge or magistrate holds a hearing and afterwards determines that the arrestee did the actions described in (1), (2), or (3). The judge's determination on the issue must be by a **preponderance of the evidence**.

3. The Right to Counsel at Bail Hearings

In a case from Texas, *Rothgery v. Gillespie County*, the U.S. Supreme Court declared a criminal defendant's initial appearance before a judicial officer, when he or she learns the charge against him or her *and his or her liberty is subject to restriction*, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. [132]

In so ruling, the U.S. Supreme Court said the Article 15.17 hearing held by a magistrate[133] is the "initial appearance." Thus, the **initial appearance** in Texas hearing marks the initiation of adversary judicial proceedings and triggers a "consequent state obligation to appoint counsel within a reasonable time after a request for assistance is made."[134]

Rothgery did not reach the issue of whether a defendant is entitled to court-appointed legal counsel at the initial hearing itself. However, since *Rothgery* was decided, two of the states' highest courts found a bail proceeding is a critical stage requiring counsel.[135] Even before *Rothgery*, bail hearings were found to be critical stages of trial by courts in Pennsylvania, New Jersey, and North Carolina.[136]

[120] *Lee*, 683 S.W.2d at 9; *Taylor v. State*, 667 S.W.2d 149, 152 (Tex. Crim. App.1984).

[121] *See* Appendix B for complete statutory language.

[122] *Lee v. State*, 683 S.W.2d 8, 9 (Tex. Crim. App. 1985) (citing *Ex Parte Moore*, 594 S.W.2d 449, 452 (Tex. Crim. App.1980)).

[123] *Garza v. State*, 736 S.W.2d 710 (Tex. Crim. App.1987).

[124] *Id.* at 711; *Kersh v. State*, 736 S.W.2d 709, 710 (Tex. Crim. App.1987).

[125] *Criner v. State*, 878 S.W.2d 162, 164 (Tex. Crim. App. 1994), *see also Holloway v. State*, 781 S.W.2d 605, 606 (Tex. Crim. App.1989).

[126] Tex. Const. art. I, § 11a.2 (West 2018).

[127] *Holloway*, 781 S.W.2d at 606; *Taylor v. State*, 676 S.W.2d 135 (Tex. Crim. App.1984); *Armendarez v. State*, 798 S.W.2d 291 (Tex. Crim. App.1990) (per curium opinion).

[128] *Neuenschwander v. State*, 784 S.W.2d 418, 420 (Tex. Crim. App. 1990) (citing Tex. Const. art. I, § 11 (West 2018)).

[129] *See* Appendix B for complete statutory language.

[130] *Id.*

[131] *See* Tex. Code Crim. Proc. Ann. art. 17.152 (West 2018) - "Denial of Bail for Violation of Certain Court Orders or Conditions of Bond in a Family Violence Case."

[132] *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008).

[133] As noted earlier, this hearing is known as a "probable cause hearing" or simply as a "magistration."

[134] *Rothgery, supra* note 131, at 198.

[135] *Hurrell-Harring v. State*, 930 N.E.2d 217, 223-24 (N.Y. 2010); *Gonzalez v. Comm'r of Correction*, 68 A.3d 624, 635 36 (Conn. 2013), *cert. denied*, 134 S. Ct. 639 (2013).

[136] *See Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007) ("Applying the reasoning used in Coleman, we conclude that a Pennsylvania preliminary hearing is also a critical stage in a criminal prosecution"); *State v. Fann*, 571 A.2d 1023, 1026 (N.J. Super. Ct. Law Div. 1990); *State v. Detter*, 260 S.E.2d 567, 583 (N.C. 1979).

Nothing prohibits a lawyer from representing a defendant at that hearing. Significantly, Texas law contemplates representation occurring at the hearing:

> The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall, after determining whether the person is currently on bail for a separate criminal offense, admit the person arrested to bail if allowed by law.[137]

TOOL # 5: TEXAS CASE LAW ON PRETRIAL RELEASE

1. Litigating Bail issues

(a) Bail Hearings

The Rules of Evidence **do not apply** in bail ***proceedings*** to set, reduce, or reconsider bail, or in pretrial writs of habeas corpus, but these proceedings do follow the Rules of Evidence concerning privilege.[138] The Rules of Evidence **do apply** in ***hearings*** seeking to deny, revoke, or increase bail.[139]

(b) Challenging Bail Amounts

"The Texas courts at the appellate level generally enforce a strict rule that a defendant seeking relief from a district judge's failure to reduce bail have shown at the hearing that he was unable to make the bail set."[140]

During the bail hearing, a defendant should put into evidence the amount of bail that could be met.

During the bail hearing, a defendant should put into evidence the amount of bail that could be met. In *Holliman v. State*, the court held a habeas corpus petitioner who "failed to show what bond he could have made and alleged only that bond set by the trial court was unreasonable was not entitled to reduction of bail set after the indictment, which was not on its face unreasonable."[141]

(c) Delay in probable cause

Regardless of the accused's charge, the following bonds must be set if no arrest warrant exists: (1) a maximum of $5,000 in a misdemeanor if probable cause is not determined by a magistrate within 24 hours of arrest or (2) a maximum of $10,000 in a felony if probable cause is not determined by a magistrate within 48 hours of arrest.

The prosecution may file an application with the magistrate to postpone the release for not more than 72 hours. The application must state the reason why a magistrate has not determined whether probable cause exists.[142]

(d) Delay of Trial

> Sec. 1. 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:
>
> (1) 90 days from the commencement of his detention if he is accused of a felony;
>
> (2) 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;
>
> (3) 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
>
> (4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.
>
> Sec. 2. The provisions of this article do not apply to a defendant who is:
>
> (1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;
>
> (2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;
>
> (3) incompetent to stand trial, during the period of the defendant's incompetence; or
>
> (4) 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.[143]

Where no showing of bad faith exists, the State must be ready for trial for purposes of the speedy trial statute, even in cases where the indictment forming the basis for prosecution is so defective as to be void. When the defendant avers the State was not ready to try the case within the statutory time limits, **the State bears the burden to make a prima facie showing it was ready**. The State may satisfy its burden either by announcing

itself ready within the allotted time or by retrospectively announcing it was ready within the allotted time.[144] The State's assertion that it was ready during the 90-day period creates a rebuttable presumption.[145]

Absent a delay caused by the defendant, the State's announcement of being ready on the 91st day and by the time of the bond hearing is insufficient:

> Section 17.151 is mandatory. If the State is not ready for trial within 90 days after commencement of detention for a felony, the trial court has two options: to release the defendant upon personal bond or to reduce the amount of bail. Moreover, the trial court "must reduce bail to an amount that the record reflects the accused can make in order to effectuate release."[146]

[137] Tex. Code Crim. Proc. Ann. art. 15.17 (West 2018).

[138] *Garcia v. State*, 775 S.W.2d 879, 880 (Tex. App. 1989); TEX. R. EVID. 101(d)- (e)(1) (West 2018).

[139] *Ex parte Graves*, 853 S.W.2d 701, 703-04 (Tex. App. 1993) ("The Texas Rules of Criminal Evidence apply in both habeas corpus hearings and proceedings to deny bail"); Tex. R. Evid. 101 (c), (d) and (e) (West 2018).

[140] Tex. Code Crim. Prac. & Proc. 41 § 21:56 (West 2018).

[141] *Holliman v. State*, 485 S.W.2d 912, 914 (Tex. Crim. App. *1972)* (citing *Ex parte De Leon*, 455 S.W.2d 260 (Tex. Crim. App.1970)).

[142] Tex. Code Crim. Proc. art. 17.033(c) (West 2018).

[143] Tex. Code Crim. Proc. art. 17.151 (West 2018).

[144] *Ex parte Brosky*, 863 S.W.2d 775, 778 (Tex. App. 1993).

[145] *Jones v. State*, 803 S.W.2d 712, 718-19 (Tex. Crim. App. 1991).

[146] *Pharris v. State*, 196 S.W.3d 369, 373–74 (Tex. App. 2006) (internal citations omitted); *see also Ex parte Hicks*, 262 S.W.3d 387, 388 (Tex. App. 2008).

VI. ADVOCATING FOR THE CLIENT AT THE BAIL HEARING

A. MAKING THE ARGUMENT

Defense attorneys must always remember that only three legal and legitimate purposes of conditions of bail exist:

(1) to secure presence in court,

(2) to maximize public safety by assessing whether the person might commit a crime while case is pending, and

(3) to prevent the defendant from obstructing the criminal justice process.

AFTER LOOKING AT THE RELEVANT STATUTES, DEFENDERS SHOULD:

- Know the client's risk assessment score and understand its meaning;
- Review the complaint and any other police reports available;
- Understand the defendant's criminal history;
- Understand the defendant's prior FTA(s);
- Check for any prior pretrial misconduct *and* for prior pretrial successes;
- Know if the defendant has family or friends who can support him or her;
- Know any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is relevant to and supports release;
- Consider the strength of the case as well as its severity;
- Consider the likely outcome of the case (e.g., whether the defendant likely will get a non-custody sentence); and
- Be familiar with Harris County Pretrial Services and what services it offers.

In most pretrial release arguments, counsel should presume unsecured release on personal bond and address the conditions that will meet any appropriate statutory concerns. Defenders should make the court aware of the research about the lack of connection between paying a monetary cash or secured bail and public safety or court appearance.[147]

Defenders should make the court aware of the research about the lack of connection between paying a monetary cash or secured bail and public safety or court appearance.

Argument to the court should be individualized to the client. Attorneys should talk about clients by name and outline the specific circumstances that make monetary conditions of bond or onerous non-monetary conditions unworkable for that client.

When a judge sets a monetary bail that the client cannot afford, defenders should press the judge to rationalize the particular money bail. When applicable, defense attorneys should highlight the support the client will get from family and other persons. It may also prove helpful to describe why the services offered by Pretrial Services will adequately secure the client's appearance in court and protect public safety.

Defenders should always know the judge. Judges frequently maintain specific condition-setting proclivities and/or biases that defenders should try to address with information about the client, the case, and/or the resources available. Defenders should succinctly and accurately make the record, but not at the expense of zealous advocacy.

When appropriate, federal and state constitutional provisions and case law can be used to bolster arguments for release. Whenever courts set conditions, release terms, or bail amounts that are unfair, unreasonable, irrational, or arbitrary, defenders should invoke the Due Process Clause of the Fourteenth Amendment and the Texas Constitution. For example, one may argue that

Pointers for Pretrial Release Arguments

- Know your judge.
- Highlight that there is no connection between monetary bail and public safety or court appearance rates.
- Make individualized arguments on behalf of the client.
- When bail is set above the amount a client cannot afford, press the judge to provide a justification for the amount.
- Challenge conditions which are not specifically relevant to the case or the client.
- Incorporate caselaw, statutory, and constitutional authority and arguments.
- Be aware of and use relevant research.

unnecessarily onerous conditions represent punishment without trial in violation of the client's substantive due process rights or that monetary bail violates the Equal Protection Clause when it is set without consideration of the defendant's actual financial resources

B. SPECIFIC PROBLEM AREAS

1. Over-Conditioning

Remember that studies recommend that "least restrictive" conditions are appropriate for defendants. The specific meaning of this phrase, however, has not been clearly defined. Texas case law is not yet clear on the issue. As a result, attorneys should always argue against any conditions that are not specifically relevant to the case. Defenders should challenge conditions—such as restrictions on alcohol use, unwanted no contact orders, or requiring regular reporting to pretrial services—unless those conditions can be individually justified for the client and the case. Defenders need to be aware of the research (and pretrial services should support this) that over-supervision can make people worse and unnecessarily wastes tax payer dollars.[148] Further, such over-supervision prevents pretrial services from properly supervising individuals who are higher risk and in greater need of monitoring and assistance, thereby negatively impacting public safety.

2. Video Bail Hearings

Video conferencing presents unique problems for defense counsel. Video conferencing is a poor substitute for in-person hearings with the client standing directly before a judge. Among other problems, deficiencies exist related to access to counsel and presentation of evidence. The hearings tend toward the impersonal. If the lawyer is with the client, the lawyer should make sure to explain what is happening in the courtroom. Lawyers should caution defendants appearing by video to avoid making any statements about the factual allegations.

3. Family Violence Cases

Family violence cases have special provisions for isolating and detaining defendants in Texas. See the above sections that provide for preventative detention for violating bail conditions or protective orders, as well as other safety conditions of supervision.

[147] *See, e.g.*, Michael R. Jones, Pretrial Justice Institute, Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option 13 (2013) (reviewing bail setting practices in Colorado and extrapolating likely results in other jurisdictions).

[148] *See* Roger Przybylsk, Colorado Div. of Criminal Justice, *What Works: Effective Recidivism Reduction and Risk-Focused Prevention Programs* (2008), *available at* https://cdpsdocs.state.co.us/ccjj/Resources/Ref/WhatWorks2008.pdf (providing a comprehensive discussion of effective interventions in criminal justice, including reports on the research about over-supervision).

VII. REVIEW OR APPEAL OF BAIL

1. NO DIRECT APPEAL FROM BAIL HEARINGS

Although Texas Rule of Appellate Procedure 41 appears to contemplate appeals in bond hearings, the Court of Criminal Appeals held that the courts of appeals have no jurisdiction over attempted interlocutory appeals from orders denying motions to reduce or set bail.[149]

No appeal of a condition of pretrial bail exists, but such challenges can be raised in a pretrial writ of habeas corpus.[150] If a defendant is convicted prior to the conclusion of an appeal, any issues regarding bail and pretrial release become moot.[151]

2. WRITS OF HABEAS CORPUS

The way to have bail issues and bond amounts considered by a trial court and a court of appeals is through a pretrial writ of habeas corpus. A writ is a separate and distinct proceeding.

> The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.[152]

In such proceedings, the court's pretrial bail determination is evaluated under an **abuse-of-discretion standard**.[153] The applicant bears the burden of proving the bail set is excessive.[154]

A defendant is entitled to appeal from the denial of a writ of habeas corpus.[155]

[149] *Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014) (noting that the lack of an express grant of statutory authority meant that the court lacked jurisdiction to hear interlocutory appeals regarding excessive or denied bail).

[150] *Bridle v. State*, 16 S.W.3d 906 (Tex. App. 2000); *Ex parte Tucker*, 977 S.W.2d 713, at 715 (Tex. App. 1998).

[151] *Delangel v. State*, 132 S.W.3d 491, 494 (Tex. App. 2004).

[152] Tex. Code Crim. Proc. art. 11.01(c) (West 2018).

[153] *Ex parte Davis*, 147 S.W.3d 546, 548 (Tex. App. 2004) (citing *Ex parte Rubac*, 611 S.W.2d 848, 850 (Tex. Crim. App. 1981)).

[154] *Ex parte Rubac*, 611 S.W.2d at 849.

[155] Tex. R. App. Proc. § 31 (West 2018).

VIII. CONCLUSION

The addition of defense counsel to initial bail proceedings is part of a national trend to emphasize the importance of the bail decision. As early as 1956, Professor Caleb Foote recognized "[p]retrial decisions determine mostly everything."[156] Since then, research solidified the premise that unnecessary pretrial detention does more harm than good. It magnifies all the negative consequences of the criminal justice system upon the accused and is expensive for society.

"Pretrial decisions determine mostly everything."

This manual is an attempt to provide resources to defense counsel in one jurisdiction. The bail decision is part of an adversary system in which both sides need a voice. With competent and zealous advocacy, defendants retain a chance to be heard and to have their release conditions comport with and further the interest of fairness and justice.

[156] Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 Berkeley J. Crim. L. 135, 135-37 (2007).

APPENDIX A – NLADA PERFORMANCE GUIDELINES

NLADA Performance Guidelines for Criminal Defense Representation 2.2 Initial Interview

(a) Preparation: Prior to conducting the initial interview the attorney, should, when possible:

(1) Be familiar with the elements of the offense and the potential punishment, when the charges against the client are already known;

(2) Obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

(3) Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

(4) Be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release; and

(5) Be familiar with any procedures available for reviewing the trial judge's setting of bail.

(b) The Interview:

(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, overcome.

(2) Information that should be acquired includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record, and history;

(B) the client's physical and mental health, educational, and armed services records;

(C) the client's immediate medical needs;

(D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court (counsel should also determine whether the client has any pending charges and whether he or she is on probation or parole and the client's past or present performance under supervision);

(E) the ability of the client to meet any financial conditions of release; and

(F) the names of individuals or other sources that counsel can contact to verify the information provided by the client (counsel should obtain the permission of the client before contacting these individuals).

(3) Information to be provided the client includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(D) the charges and the potential penalties; and

(E) a general procedural overview of the progression of the case, where possible.

(c) Supplemental Information:

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(1) the facts surrounding the charges against the client;

(2) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved; and

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

APPENDIX B – SELECTED TEXAS STATUTES AND CONSTITUTIONAL PROVISIONS

TEX. CODE. CRIM. PROC. art. 17.032 Release on Personal Bond of Certain Mentally Ill Defendants

(a) In this article, "violent offense" means an offense under the following sections of the Penal Code:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.03 (kidnapping);

(4) Section 20.04 (aggravated kidnapping);

(5) Section 21.11 (indecency with a child);

(6) Section 22.01(a)(1) (assault);

(7) Section 22.011 (sexual assault);

(8) Section 22.02 (aggravated assault);

(9) Section 22.021 (aggravated sexual assault);

(10) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(11) Section 29.03 (aggravated robbery);

(12) Section 21.02 (continuous sexual abuse of young child or children); or

(13) Section 20A.03 (continuous trafficking of persons).

(b) A magistrate shall release a defendant on personal bond unless good cause is shown otherwise if the:

(1) defendant is not charged with and has not been previously convicted of a violent offense;

(2) defendant is examined by the local mental health or mental retardation authority or another mental health expert under Article 16.22 of this code;

(3) applicable expert, in a written assessment submitted to the magistrate under Article 16.22:

(A) concludes that the defendant has a mental illness or is a person with mental retardation and is nonetheless competent to stand trial; and

(B) recommends mental health treatment for the defendant; and

(4) magistrate determines, in consultation with the local mental health or mental retardation authority, that appropriate community-based mental health or mental retardation services for the defendant are available through the Texas Department of Mental Health and Mental Retardation under Section 534.053, Health and Safety Code, or through another mental health or mental retardation services provider.

(c) The magistrate, unless good cause is shown for not requiring treatment, shall require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health or mental retardation treatment as recommended by the local mental health or mental retardation authority if the defendant's:

(1) mental illness or mental retardation is chronic in nature; or

(2) ability to function independently will continue to deteriorate if the defendant is not treated.

(d) In addition to a condition of release imposed under Subsection (c) of this article, the magistrate may require the defendant to comply with other conditions that are reasonably necessary to protect the community.

(e) In this article, a person is considered to have been convicted of an offense if:

(1) a sentence is imposed;

(2) the person is placed on community supervision or receives deferred adjudication; or

(3) the court defers final disposition of the case.

TEX. CODE. CRIM. PROC. art. 17.033 Release on Bond of Certain Persons Arrested Without a Warrant

(a) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $5,000, not later than the 24th hour after the person's arrest if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

(a-1) Notwithstanding Subsection (a) and except as provided by Subsection (c), a person who, in a county with a population of three million or more, is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $5,000, not later than the 36th hour after the person's arrest if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense.

(b) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $10,000, not later than the 48th hour after the person's arrest if the person was arrested for a felony and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

(c) On the filing of an application by the attorney representing the state, a magistrate may postpone the release of a person under Subsection (a), (a-1), or (b) for not more than 72 hours after the person's arrest. An application filed under this subsection must state the reason a magistrate has not determined whether probable cause exists to believe that the person committed the offense for which the person was arrested.

(d) The time limits imposed by Subsections (a), (a-1), and (b) do not apply to a person arrested without a warrant who is taken to a hospital, clinic, or other medical facility before being taken before a magistrate under Article 15.17. For a person described by this subsection, the time limits imposed by Subsections (a), (a-1), and (b) begin to run at the time, as documented in the records of the hospital, clinic, or other medical facility, that a physician or other medical professional releases the person from the hospital, clinic, or other medical facility.

TEX. CODE. CRIM. PROC. art. 17.151 Release Because of Delay

Sec. 1. 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:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 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;

(3) 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

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Sec. 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;

(3) incompetent to stand trial, during the period of the defendant's incompetence; or

(4) 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.

TEX. CODE. CRIM. PROC. art. 17.152 Denial of Bail for Violation of Certain Court Orders or Conditions of Bond in a Family Violence Case

(a) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(b) Except as otherwise provided by Subsection (d), a person who commits an offense under Section 25.07, Penal Code, related to a violation of a condition of bond set in a family violence case and whose bail in the case under Section 25.07, Penal Code, or in the family violence case is revoked or forfeited for a violation of a condition of bond may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate determines by a preponderance of the evidence that the person violated a condition of bond related to:

(1) the safety of the victim of the offense under Section 25.07, Penal Code, or the family violence case, as applicable; or

(2) the safety of the community.

(c) Except as otherwise provided by Subsection (d), a person who commits an offense under Section 25.07, Penal Code, other than an offense related to a violation of a condition of bond set in a family violence case, may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate determines by a preponderance of the evidence that the person committed the offense.

(d) A person who commits an offense under Section 25.07(a)(3), Penal Code, may be held without bail under Subsection (b) or (c), as applicable, only if following a hearing the judge or magistrate determines by a preponderance of the evidence that the person went to or near the place described in the order or condition of bond with the intent to commit or threaten to commit:

(1) family violence; or

(2) an act in furtherance of an offense under Section 42.072, Penal Code.

(e) In determining whether to deny release on bail under this article, the judge or magistrate may consider:

(1) the order or condition of bond;

(2) the nature and circumstances of the alleged offense;

(3) the relationship between the accused and the victim, including the history of that relationship;

(4) any criminal history of the accused; and

(5) any other facts or circumstances relevant to a determination of whether the accused poses an imminent threat of future family violence.

(f) A person arrested for committing an offense under Section 25.07, Penal Code, shall without unnecessary delay and after reasonable notice is given to the attorney representing the state, but not later than 48 hours after the person is arrested, be taken before a magistrate in accordance with Article 15.17. At that time, the magistrate shall conduct the hearing and make the determination required by this article.

TEX. CODE. CRIM. PROC. art. 17.153 Denial of Bail for Violation of Condition of Bond Where Child Alleged Victim

(a) This article applies to a defendant charged with a felony offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age:

(1) Chapter 21 (Sexual Offenses);

(2) Section 25.02 (Prohibited Sexual Conduct);

(3) Section 43.25 (Sexual Performance by a Child);

(4) Section 20A.02 (Trafficking of Persons), if the defendant is alleged to have:

(A) trafficked the child with the intent or knowledge that the child would engage in sexual conduct, as defined by Section 43.25, Penal Code; or

(B) benefited from participating in a venture that involved a trafficked child engaging in sexual conduct, as defined by Section 43.25, Penal Code; or

(5) Section 43.05(a)(2) (Compelling Prostitution).

(b) A defendant described by Subsection (a) who violates a condition of bond set under Article 17.41 and whose bail in the case is revoked for the violation may be taken into custody and denied release on bail pending trial if, following a hearing, a judge or magistrate determines by a preponderance of the evidence that the defendant violated a condition of bond related to the safety of the victim of the offense or the safety of the community. If the magistrate finds that the violation occurred, the magistrate may revoke the defendant's bond and order that the defendant be immediately returned to custody. Once the defendant is placed in custody, the revocation of the defendant's bond discharges the sureties on the bond, if any, from any future liability on the bond. A discharge under this subsection from any future liability on the bond does not discharge any surety from liability for previous forfeitures on the bond.

TEX. CODE. CRIM. PROC. art. 17.291 Further Detention of Certain Persons

(a) In this article:

(1) "family violence" has the meaning assigned to that phrase by Section 71.004, Family Code; and

(2) "magistrate" has the meaning assigned to it by Article 2.09 of this code.

(b) Article 17.29 does not apply when a person has been arrested or held without a warrant in the prevention of family violence 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 may hold the person for a period of not more than four hours after bond has been posted. This detention period may be extended for an additional period not to exceed 48 hours, but only if authorized in a writing directed to the person having custody of the detained person by a magistrate who concludes that:

(1) the violence would continue if the person is released; and

(2) if the additional period exceeds 24 hours, 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:

(A) on more than one occasion for an offense involving family violence; or

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

TEX. CODE. CRIM. PROC. art. 17.292 Magistrate's Order for Emergency Protection

(a) At a defendant's appearance before a magistrate after arrest for an offense involving family violence or an offense under Section 20A.02, 20A.03, 22.011, 22.021, or 42.072, Penal Code, the magistrate may issue an order for emergency protection on the magistrate's own motion or on the request of**:**

(1) the victim of the offense;

(2) the guardian of the victim;

(3) a peace officer; or

(4) the attorney representing the state.

(b) At a defendant's appearance before a magistrate after arrest for an offense involving family violence, the magistrate shall issue an order for emergency protection if the arrest is for an offense that also involves:

(1) serious bodily injury to the victim; or

(2) the use or exhibition of a deadly weapon during the commission of an assault.

(c) The magistrate in the order for emergency protection may prohibit the arrested party from:

(1) committing:

(A) family violence or an assault on the person protected under the order; or

(B) an act in furtherance of an offense under Section 20A.02 or 42.072, Penal Code;

(2) communicating:

(A) directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner;

(B) a threat through any person to a member of the family or household or to the person protected under the order; or

(C) if the magistrate finds good cause, in any manner with a 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;

(3) going to or near:

(A) the residence, place of employment, or business of a member of the family or household or of the person protected under the order; or

(B) the residence, child care facility, or school where a child protected under the order resides or attends; or

(4) 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.

(c-1) In addition to the conditions described by Subsection (c), 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.

(d) The victim of the offense need not be present when the order for emergency protection is issued.

(e) In the order for emergency protection the magistrate shall specifically describe the prohibited locations and the minimum distances, if any, that the party must maintain, 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.

(f) To the extent that a condition imposed by an order for emergency protection issued under this article conflicts with an existing court order granting possession of or access to a child, the condition imposed under this article prevails for the duration of the order for emergency protection.

(f-1) To the extent that a condition imposed by an order issued under this article conflicts with a condition imposed by an order subsequently issued under Chapter 85, Subtitle B, Title 4, Family Code, or under Title 11 or Title 5, Family Code,2 the condition imposed by the order issued under the Family Code prevails.

(f-2) To the extent that a condition imposed by an order issued under this article conflicts with a condition imposed by an order subsequently issued under Chapter 83, Subtitle B, Title 4, Family Code, the condition imposed by the order issued under this article prevails unless the court issuing the order under Chapter 83, Family Code:

(1) is informed of the existence of the order issued under this article; and

(2) makes a finding in the order issued under Chapter 83, Family Code, that the court is superseding the order issued under this article.

(g) An order for emergency protection issued under this article must contain the following statements printed in bold-face type or in capital letters:

"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 FAMILY VIOLENCE OR A STALKING OR TRAFFICKING OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE, AS APPLICABLE. 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."

(h) 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.

(h-1) A magistrate or clerk of the court may delay sending a copy of the order under Subsection (h) only if the magistrate or clerk lacks information necessary to ensure service and enforcement.

(i) If an order for emergency protection issued under this article prohibits a person from going to or near a child care facility or school, the magistrate shall send a copy of the order to the child care facility or school.

(i-1) The copy of the order and any related information may be sent under Subsection (h) or (i) electronically or in another manner that can be accessed by the recipient.

(j) 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. An order for emergency protection issued under Subsection (a) or (b)(1) of this article remains in effect up to the 61st day but not less than 31 days after the date of issuance. An order for emergency protection issued under Subsection (b)(2) of this article remains in effect up to the 91st day but not less than 61 days after the date of issuance. After notice to each affected party and a hearing, the issuing court may modify all or part of an order issued under this article if the court finds that:

(1) the order as originally issued is unworkable;

(2) the modification will not place the victim of the offense at greater risk than did the original order; and

(3) the modification will not in any way endanger a person protected under the order.

(k) To ensure that an officer responding to a call is aware of the existence and terms of an order for emergency protection issued under this article, not later than the third business day after the date of receipt of the copy of the order by the applicable law enforcement agency with jurisdiction over the municipality or county in which the victim resides, the law enforcement agency shall enter the information required under Section 411.042(b)(6), Government Code, into the statewide law enforcement information system maintained by the Department of Public Safety.

(k-1) A law enforcement agency may delay entering the information required under Subsection (k) only if the agency lacks information necessary to ensure service and enforcement.

(l) In the order for emergency protection, the magistrate shall suspend a license to carry a handgun issued under Subchapter H, Chapter 411, Government Code,3 that is held by the defendant.

(m) In this article:

(1) "Family," "family violence," and "household" have the meanings assigned by Chapter 71, Family Code.

(2) "Firearm" has the meaning assigned by Chapter 46, Penal Code.

(3) "Business day" means a day other than a Saturday, Sunday, or state or national holiday.

(n) On motion, notice, and hearing, or on agreement of the parties, an order for emergency protection issued under this article may be transferred to the court assuming jurisdiction over the criminal act giving rise to the issuance of the emergency order for protection. On transfer, the criminal court may modify all or part of an order issued under this subsection in the same manner and under the same standards as the issuing court under Subsection (j).

TEX. CODE. CRIM. PROC. art. 17.49 Conditions for Defendant Charged with Offense Involving Family Violence

(a) In this article:

(1) "Family violence" has the meaning assigned by Section 71.004, Family Code.

(2) "Global positioning monitoring system" means a system that electronically determines and reports the location of an individual through the use of a transmitter or similar device carried or worn by the individual that transmits latitude and longitude data to a monitoring entity through global positioning satellite technology. The term does not include a system that contains or operates global positioning system technology, radio frequency identification technology, or any other similar technology that is implanted in or otherwise invades or violates the individual's body.

(b) A magistrate may require as a condition of release on bond that a defendant charged with an offense involving family violence:

(1) refrain from going to or near a residence, school, place of employment, or other location, as specifically described in the bond, frequented by an alleged victim of the offense;

(2) carry or wear a global positioning monitoring system device and, except as provided by Subsection (h), pay the costs associated with operating that system in relation to the defendant; or

(3) except as provided by Subsection (h), if the alleged victim of the offense consents after receiving the information described by Subsection (d), pay the costs associated with providing the victim with an electronic receptor device that:

(A) is capable of receiving the global positioning monitoring system information from the device carried or worn by the defendant; and

(B) notifies the victim if the defendant is at or near a location that the defendant has been ordered to refrain from going to or near under Subdivision (1).

(c) Before imposing a condition described by Subsection (b)(1), a magistrate must afford an alleged victim an opportunity to provide the magistrate with a list of areas from which the victim would like the defendant excluded and shall consider the victim's request, if any, in determining the locations the defendant will be ordered to refrain from going to or near. If the magistrate imposes a condition described by Subsection (b)(1), the magistrate shall specifically describe the locations that the defendant has been ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.

(d) Before imposing a condition described by Subsection (b)(3), a magistrate must provide to an alleged victim information regarding:

(1) the victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the magistrate terminate the victim's participation;

(2) the manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements;

(3) any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations;

(4) any sanctions that the court may impose on the defendant for violating a condition of bond imposed under this article;

(5) the procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails;

(6) community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of family violence; and

(7) the fact that the victim's communications with the court concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

(e) In addition to the information described by Subsection (d), a magistrate shall provide to an alleged victim who participates in a global positioning monitoring system under this article the name and telephone number of an appropriate person employed by a local law enforcement agency whom the victim may call to request immediate assistance if the defendant violates a condition of bond imposed under this article.

(f) In determining whether to order a defendant's participation in a global positioning monitoring system under this article, the magistrate shall consider the likelihood that the defendant's participation will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the alleged victim before trial.

(g) An alleged victim may request that the magistrate terminate the victim's participation in a global positioning monitoring system at any time. The magistrate may not impose sanctions on the victim for requesting termination of the victim's participation in or refusing to participate in a global positioning monitoring system under this article.

(h) If the magistrate determines that a defendant is indigent, the magistrate may, based on a sliding scale established by local rule, require the defendant to pay costs under Subsection (b)(2) or (3) in an amount that is less than the full amount of the costs associated with operating the global positioning monitoring system in relation to the defendant or providing the victim with an electronic receptor device.

(i) If an indigent defendant pays to an entity that operates a global positioning monitoring system the partial amount ordered by a magistrate under Subsection (h), the entity shall accept the partial amount as payment in full. The county in which the magistrate who enters an order under Subsection (h) is located is not responsible for payment of any costs associated with operating the global positioning monitoring system in relation to an indigent defendant.

(j) A magistrate that imposes a condition described by Subsection (b)(1) or (2) shall order the entity that operates the global positioning monitoring system to notify the court and the appropriate local law enforcement agency if a defendant violates a condition of bond imposed under this article.

(k) A magistrate that imposes a condition described by Subsection (b) may only allow or require the defendant to execute or be released under a type of bond that is authorized by this chapter.

(l) This article does not limit the authority of a magistrate to impose any other reasonable conditions of bond or enter any orders of protection under other applicable statutes.

Texas Constitution Art. I, §11a

Sec. 11a. (a) Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, or (4) accused of a violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above, of the offense committed while on bail in (2) above, or of the offense in (4) above committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however, that if the accused is not accorded a trial upon the accusation under (1) or (3) above, the accusation and indictment used under (2) above, or the accusation or indictment used under (4) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals.

(b) In this section:

(1) "Violent offense" means:

(A) murder;

(B) aggravated assault, if the accused used or exhibited a deadly weapon during the commission of the assault;

(C) aggravated kidnapping; or

(D) aggravated robbery.

(2) "Sexual offense" means:

(A) aggravated sexual assault;

(B) sexual assault; or

(C) indecency with a child.

Texas Constitution Art. I, §11b

Sec. 11b. Any person who is accused in this state of a felony or an offense involving family violence, who is released on bail pending trial, and whose bail is subsequently revoked or forfeited for a violation of a condition of release may be denied bail pending trial if a judge or magistrate in this state determines by a preponderance of the evidence at a subsequent hearing that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community.

Texas Constitution Art. I, §11c

Sec. 11c. The legislature by general law may provide that any person who violates an order for emergency protection issued by a judge or magistrate after an arrest for an offense involving family violence or who violates an active protective order rendered by a court in a family violence case, including a temporary ex parte order that has been served on the person, or who engages in conduct that constitutes an offense involving the violation of an order described by this section may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate in this state determines by a preponderance of the evidence that the person violated the order or engaged in the conduct constituting the offense.

APPENDIX C –
TEXAS PENAL CODE VIOLENT OFFENSE LIST

TEXAS STATUTE - PENAL CODE VIOLENT OFFENSE LIST (INCLUDES ONLY CURRENT CODES)

	TEXAS OFFENSE CODES	DEGREE
STATUTE	DESCRIPTION	
Chapter 19	**Criminal Homicide**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.19.htm**
19.02	Murder	F1, F2
19.03	Capital Murder	FC
19.04	Manslaughter	F2, F3
19.05	Criminally Negligent Homicide	F3, FS
Chapter 20	**Kidnapping, Unlawful Restraint, and Smuggling of Persons**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.20.htm**
20.03	Kidnapping	F3, MA
20.04	Aggravated Kidnapping	F1, F2
Chapter 20A	**Trafficking of Persons**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.20A.htm**
20a.02	Trafficking of Persons or Children	F1, F2
20a.03	Continuous Trafficking of Persons	F1
Chapter 21	**Sexual offenses**	**http://www.statutes.legis.state.tx.us/docs/pe/htm/pe.21.htm**
21.02	Continuous Sexual Abuse of Young Child or Children	F1
21.11	Indecency with a Child	F2, F3, FS
21.12	Improper Relationship between Educator and Student	F2, F3
Chapter 22	**Assaultive Offenses**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.22.htm**
22.01	Assault	F2, F3, FS, MA
22.011	Sexual Assault	F1, F2, F3
22.02	Aggravated Assault	F1, F2, F3
22.021	Aggravated Sexual Assault	F1, F2
22.04	Injury to a Child, Elderly Individual, or Disabled Individual	F1, F2, F3
22.05	Deadly Conduct	F3

Chapter 25	**Offenses Against the Family**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.25.htm**
25.08	Sale or Purchase of Child	F2, F3
25.11	Continuous Violence Against the Family	F3
Chapter 28	**Arson, Criminal Mischief, and Other Property Damage or Destruction**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.28.htm**
28.02	Arson	F1
Chapter 29	**Robbery**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.29.htm**
29.02	Robbery	F2, F3
29.03	Aggravated Robbery	F1, F2
Chapter 30	**Burglary and Criminal Trespass**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.30.htm**
30.02	Burglary	F1, F2
Chapter 38	**Obstructing Governmental Operation**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.38.htm**
38.03	Resisting Arrest, Search, or Transportation	F3
38.06	Escape	F1, F2
38.14	Taking or Attempt to take Weapon from Peace Officer, etc.	F3, FS
Chapter 42	**Disorderly Conduct and Related Offenses**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.42.htm**
42.072	Stalking	F2, F3
Chapter 43	**Public Indecency**	**http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.43.htm**
43.05	Compelling Prostitution	F1, F2
43.25	Sexual Performance by a Child	F1, F2, F3

APPENDIX D –
ABA COMMENTARY TO PRINCIPLE 4

Commentary to Principle 4 of the ABA's Ten Principles of a Public Defense Delivery System

Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

APPENDIX E – CLIENT INTERVIEW FORM

PDO BAIL CLIENT INFORMATION

Hearing Result:

Name: _____

Age: _____ Citizen: Yes / No LPR or Visa: Yes / No Since: _____ Country: _____

Residence: _____ Since: _____ Hou Area Since: _____

Lives with: _____

Alternate Residence if MOEP _____

Kids (by age) _____

_____

Sole Provider: Yes / No

Current Employment: _____ Since: _____ Pay/Hours: _____

Prior Employment: _____ Gov't Benefits: _____

College, etc?: _____ Current School: _____

Military Branch: _____ Dates: _____ Combat: _____

Decorations: _____

Signif. Medical Conditions: _____

_____

Family/Dependents w/Disabilities/Conditions: _____

_____

Mental Health Diagnoses: _____

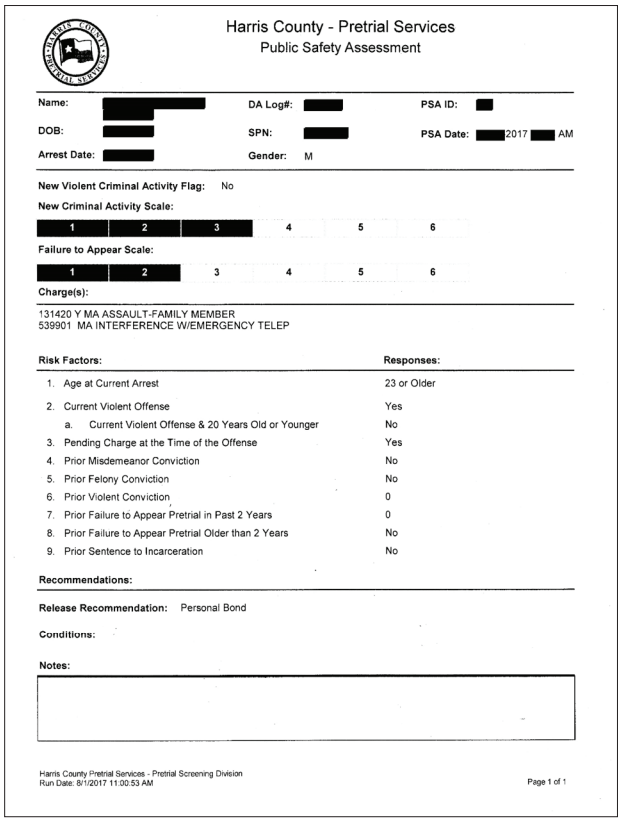
Client Receives Support/Assistance from _____

Transportation to court: _____

On probation, parole, or pretrial release?	Significant Priors	Holds

Notes:

APPENDIX F – PSA ASSESSMENT AND BAIL RECOMMENDATION



Harris County - Pretrial Services
Public Safety Assessment

Name: [redacted] **DA Log#:** [redacted] **PSA ID:** [redacted]

DOB: [redacted] **SPN:** [redacted] **PSA Date:** [redacted]2017 [redacted] AM

Arrest Date: [redacted] **Gender:** M

New Violent Criminal Activity Flag: No

New Criminal Activity Scale:

1	2	3	4	5	6

Failure to Appear Scale:

1	2	3	4	5	6

Charge(s):

131420 Y MA ASSAULT-FAMILY MEMBER
539901 MA INTERFERENCE W/EMERGENCY TELEP

Risk Factors:	Responses:
1. Age at Current Arrest	23 or Older
2. Current Violent Offense	Yes
a. Current Violent Offense & 20 Years Old or Younger	No
3. Pending Charge at the Time of the Offense	Yes
4. Prior Misdemeanor Conviction	No
5. Prior Felony Conviction	No
6. Prior Violent Conviction	0
7. Prior Failure to Appear Pretrial in Past 2 Years	0
8. Prior Failure to Appear Pretrial Older than 2 Years	No
9. Prior Sentence to Incarceration	No

Recommendations:

Release Recommendation: Personal Bond

Conditions:

Notes:

Harris County Pretrial Services - Pretrial Screening Division
Run Date: 8/1/2017 11:00:53 AM

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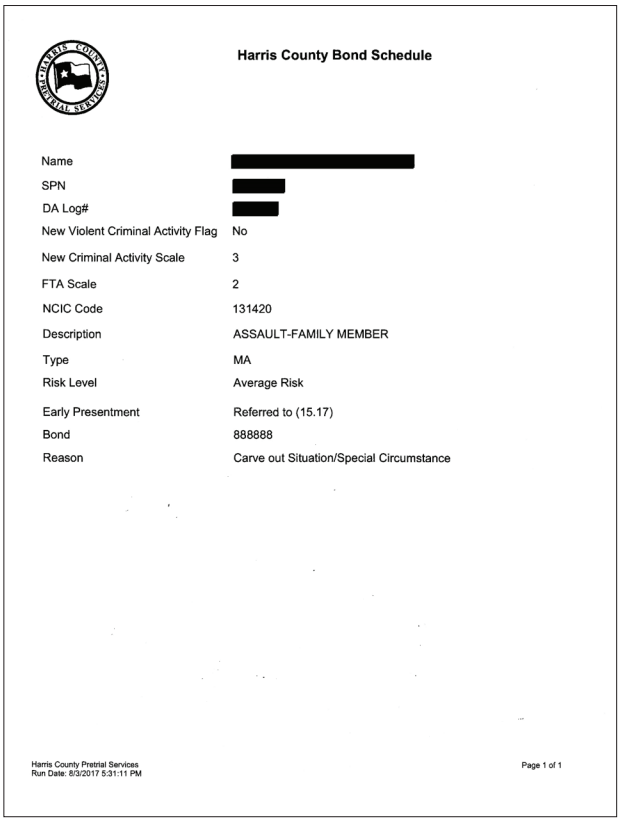

Harris County Bond Schedule

Name	[redacted]
SPN	[redacted]
DA Log#	[redacted]
New Violent Criminal Activity Flag	No
New Criminal Activity Scale	3
FTA Scale	2
NCIC Code	131420
Description	ASSAULT-FAMILY MEMBER
Type	MA
Risk Level	Average Risk
Early Presentment	Referred to (15.17)
Bond	888888
Reason	Carve out Situation/Special Circumstance

Harris County Pretrial Services
Run Date: 8/3/2017 5:31:11 PM

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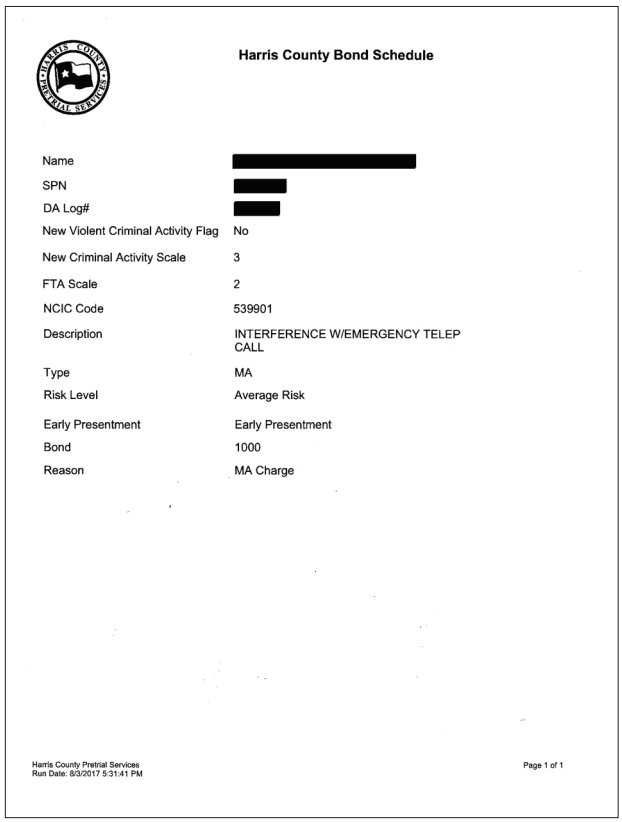

Harris County Bond Schedule

Name	[redacted]
SPN	[redacted]
DA Log#	[redacted]
New Violent Criminal Activity Flag	No
New Criminal Activity Scale	3
FTA Scale	2
NCIC Code	539901
Description	INTERFERENCE W/EMERGENCY TELEP CALL
Type	MA
Risk Level	Average Risk
Early Presentment	Early Presentment
Bond	1000
Reason	MA Charge

Harris County Pretrial Services
Run Date: 8/3/2017 5:31:41 PM

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"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

– *SALERNO V. UNITED STATES,* 481 U.S. 739, 755 (1987)

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Public Defender's Office
Harris County, Texas

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NACDL FOUNDATION FOR CRIMINAL JUSTICE