
1. Introduction

a. Importance of Pretrial Release

- i. Burden – for all?
- ii. Even if ultimately found guilty, fairness could be questioned when incarceration is imposed before a final adjudication.
- iii. Pretrial jailing could pose a significant roadblock to preparing a defense, or for requesting an appropriate penalty.

b. Constitutional Considerations

- i. The Eighth Amendment- “Excessive bail shall not be required” is binding on states due to the 14th Amendment.
- ii. *U.S. v. Salerno*, 481 U.S. 739
 1. Pretrial detention is permissible to assure appearance, to prevent the intimidation of witnesses or other violations of the integrity of the trial process.
 2. Limitation on duration of pretrial duration?
 3. Limits on total denial of pretrial release.
- iii. Texas Constitution, Art I, Section 11, 11a, 13
 1. Sets out exceptions to right to have bail set.
 2. Excessive bail shall not be required.

c. Probable Cause Violations

- i. Texas Fair Defense Act.
 1. In 2001, legislature establishes new standard allowing for pretrial release of those whose probable cause determination is delayed.
 2. 17.033, CCP. Person arrested without warrant is entitled to release on bond if magistrate has not determined whether probable cause exists within a specified time. For felonies, release is required if a determination is not made within 24 hours of arrest. For misdemeanors, the

determination must be made within 24 hours. In such a release, bail cannot exceed \$5,000 for a misdemeanor or \$10,000 for a felony. Defendant must be released on personal bond if they cannot make bail with money or surety.

3. Magistrate may postpone release if state presents application explaining reason for no determination. Postponement cannot be made for more than 72 hours after **arrest**.

2. Types of Bail

- a. What is Bail?
 - i. Security given by bailable accused that he or she will appear as required.
- b. Bail Bond is the written undertaking based on the accused's provision of security for his appearance. Generally it is provided by the accused and a surety. Surety may be a bondsman. Surety must provide a sworn affidavit of his worth, unless the court is "fully satisfied" of the surety's financial status. Art. 17.13, CCP.
- c. Cash Bond. If defendant provides cash deposit in the amount of the bond amount, then no surety is needed or required.
- d. Personal Bond. Although this is not defined in the CCP, it means a bond personally obligating the defendant to pay the amount of the bond, plus any fees required to locate and arrest him or her. Requirements are found in Art. 17.04, CCP.
 - i. Magistrates have discretion to release defendants on personal bond. Art. 17.03, CCP.
 - ii. In some situations, personal bond is only permitted by the court before whom the case is pending.
 1. The Eight Felonies
 - a. Capital Murder
 - b. Aggravated kidnapping
 - c. Aggravated sexual assault
 - d. Deadly assault (certain types)

- e. Injury to a child, elderly, or disabled person
 - f. Aggravated robbery
 - g. Burglary
 - h. Organized crime
 - 2. Aggravated felony under Controlled Substances Act
 - 3. Required to test for controlled substance and either refuses or fails test
 - e. Release Without Bond. Under 15.16(c), CCP, magistrate may release defendant without bond, if:
 - i. Charged with fine only misdemeanor;
 - ii. Not previously convicted of a felony or a misdemeanor punishable by incarceration; and
 - iii. Magistrate has identified the defendant “with certainty.”
 - f. Differential Bonds. Illegal to set one amount for cash and another for surety.
 - i. *Professional Bondsmen of Texas v. Carey*, 762 S.W.2d 691
 - ii. Tex. Atty. Gen. Op. JC-0215
 - iii. Tex. Atty. Gen. Op. GA-0048
3. Reasonable Bail -
- a. Basic rules for setting bail are in Art. 17.15, CCP.
 - i. Sufficiently high to give reasonable assurance of appearance.
 - ii. Not to be used as an instrument of oppression.
 - iii. Consider the nature of the offense and the circumstances.
 - iv. Ability to make bail is to be regarded. Proof may be taken.
 - v. Future safety of a victim and community shall be considered.
 - b. Appropriate Bail – case law
 - i. *Ex Parte Wright*, 2010 WL 1609235 (Tex.App.—Houston [14th Dist.] 2010)(not designated for publication
 - ii. *Ludwig v. State*, 812 S.W.2d 323 (Tex.Crim.App.1991)
 - iii. *Ex parte Ivey*, 594 S.W.2d 98 (Tex.Crim.App.1980)

4. Other Considerations
 - a. Community Ties
 - b. State's Case
 - c. Inappropriate Considerations
 - i. *Ex Parte King*, 613 S.W.2d 503 (Tex.Crim.App.1981)
 - ii. *Meador v. State*, 780 S.W.2d 836 (Tex.App.—Houston[14th Dist.] 1989)
 - iii. *Martin v. State*, 176 S.W.3d 887, 904 (Tex.App.—Fort Worth 2005)
 - d. Assuring Pretrial Custody. Avoid *de facto* denial of bail.
5. Conditions
 - a. Capable of Being Met
 - i. Involuntary violations cannot be penalized.
 - b. Authorization for specific conditions.
 - i. Home confinement or electronic monitoring
 - ii. Testing for Drugs and Alcohol
 - iii. Drug Abuse treatment or education program
 - iv. AIDS education
 - v. Offenses against children
 - vi. Stalking
 - c. Inherent Powers. Trial courts may have inherent powers to impose conditions.
 - d. Conditions Related to Safety – Any reasonable condition.
 - i. Revoking for Violations
6. Procedure
 - a. Setting an taking bail poses some unique challenges due to the number of actors involved. Often the initial steps are performed by a magistrate, even if the judge of the district court will ultimately decide the merits of the case.

- b. Peace Officer Involvement. Peace officers can accept or “take bail” in certain circumstances.
 - i. Felonies- Officer may take if it was previously fixed. If not previously fixed, officer can fix it in an amount the officer considers reasonable. This only applies if the court is not in session in the county of defendant’s custody.
 - 1. What does in session mean?
 - ii. Misdemeanors- Officers may take a bail bond from a defendant. No language exists in the code requiring the judge to be unavailable.
 - 1. Officers may fix as well as take bail. *Hokr v. State*, 545 S.W.2d 463 (Tex.Crim.App.1977).
 - a. Limitations on this power?
 - i. Availability of the magistrate.
 - 2. Tex. Atty. Gen. Op. GA-0457
 - a. Before complaint, no case pending so officer can fix and take bail.
 - b. Judicial Function?
 - c. Setting Bail. Generally, it’s a magistrate duty.
 - i. Bail Schedule. Not addressed by Court of Criminal Appeals.
 - 1. Violate the ideals of bail process?
 - 2. Support?
 - ii. Delayed Release. In family violence cases, release can be delayed for four hours if there is probable cause to believe that violence will continue.
7. Bail Modification
8. Release When State is Not Ready. Generally, a defendant is entitled to be released if the State is not ready for trial within a certain period of time.
- a. Art. 17.151, CCP
 - b. Speedy Trial Act
 - c. Time periods

- i. Felony – 90 days
- ii. Misdemeanor punishable by more than 180 days – 30 days
- iii. Misdemeanor punishable 180 days or less – 15 days
- iv. Fine only misdemeanor – 5 days

9. Denial of Bail

- a. Capital Cases
- b. Noncapital Cases
- c. Family Violence Cases