

## **BLOOD WARRANTS & CHILDREN**

### **“I DON’T WANT TO DEAL WITH A BLOOD SEARCH WARRANT ON A CHILD”**

**CCP Art. 2.10 Duty of Magistrates.** It is duty of EVERY magistrate to preserve the peace within his jurisdiction by the use of ALL lawful means; to issue ALL process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.

### **CODE OF JUDICIAL CONDUCT CANNON 3**

- (1) A Judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.
- (9) A Judge should dispose of ALL judicial matters promptly, efficiently and fairly

### **WHAT IS IT? WHY NEEDED?**

A blood warrant is a warrant to seize a sample of the suspect’s blood to insure that evidence of the suspect’s guilt or innocence doesn’t disappear.

Some suspects refuse to provide a breath sample or blood sample that law enforcement feels is important evidence in the case.

## **STATUTES**

### **Chapter 49 Penal Code**

- 49.04 DWI
- 49.045 DWI with child passenger – younger than 15 yrs old
- 49.05 Flying while Intoxicated
- 49.06 Boating while Intoxicated
- 49.065 Assembling or Operating an Amusement Ride while Intox
- 49.07 Intoxication Assault
- 49.08 Intoxication Manslaughter

### **Definition of “Motor vehicle” (Penal Code Section 32.34(a)(2))**

“Motor vehicle” is a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

### **Definition of “Watercraft” (Penal Code Section 49.01(4))**

“Watercraft” means a vessel, one or more water skis, an aquaplane, or another device used for transporting or carrying a person on water; other than a device propelled only by the current of water.

**CCP 18.01(j)**

“Any magistrate who is an attorney licensed by this state may issue a search warrant under Article 18.02 (10) to collect a blood specimen from a person who:

- (1) is arrested for an offense under Section 49, Penal Code involving 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code; and,
- (2) Refuses to submit to a breath or blood alcohol test.”

**Exception:** In counties that do not have a Texas-licensed attorney Judge in a Municipal Court or County Court, or statutory County Court judge, then any magistrate can issue warrant.

**Texas Transportation Code Section 724.012(a) Taking of Specimen**

Specimens of person’s breath or blood **may** be taken if the person is *arrested* and at the request of a peace officer having reasonable grounds to believe the person:

- (1) while intoxicated was operating a motor vehicle in a public place, or a watercraft; or
- (2) was in violation of Section 106.041 Alcoholic Beverage Code

**Texas Transportation Code Section 724.012(b) is the Mandatory Blood Specimen Provision:**

- (b) A peace officer *shall* require the taking of a specimen of the person’s breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer’s request to submit to the taking of a specimen voluntarily.

**Circumstances:**

1. Accident with death, serious bodily injury, or hospital treatment for injuries
2. DWI with Minor Child under 15
3. Prior Conviction for Specified Offense
4. 3<sup>rd</sup> DWI

**Texas Alcoholic Beverage Code, Section 106.041 –**

“A minor commits an offense if the minor operates a motor vehicle in a public place, or a watercraft, while having *any detectable amount of alcohol* in the minor’s system.”

In the Texas Alcoholic Beverage, “*minor*” means a person under 21 years of age

## CCP Chapter 18 - Search Warrants

### THREE PARTS IN A BLOOD SEARCH WARRANT

2. The Application and *Affidavit*
3. The *Warrant* to Search and Seize Blood
4. The *Return* and Inventory

### The Affidavit

Is the sworn document submitted by a peace officer stating probable cause:  
Must contain within the “4 corners” of affidavit

1. WHO – how ID’d – TDL, fingerprints, defendant ID himself on videotape
2. WHAT – item to be seized, i.e. “blood samples”
3. WHERE –location of a public place in \_\_\_\_\_County, TEXAS
4. WHEN - date/time Officer observed suspect – timeliness can be an issue, most warrants presented within 2-4 hrs of driving/stop
5. WHY - Probable Cause – detailed description of the activities/events that led to stop and led to officer’s opinion that suspect was intoxicated
6. Officer’s training and experience
7. AND, importantly, that suspect was offered and refused to provide a breath and/or blood sample. \*\*Family Code 51.09 if warrant for child

### The Search Warrant

The Order signed by the Judge/Magistrate commanding the search and seizure of blood samples.

Must contain:

1. WHO is to be searched
2. WHAT is to be seized
3. Directing suspect be taken to qualified person
4. Must be dated and time that Judge signs
5. Should have seal affixed

### The Return

Must contain:

1. The date the search warrant was executed
2. The items seized – “Specimen of Defendant’s blood”
3. The signature of the Executing officer

**\*Typos and proofing errors**, i.e. name or TDL numbers do not match between Affidavit and warrant itself, must be corrected and re-submitted.

**FAMILY CODE STATUTES CONTROL WHEN THE WARRANT IS  
FOR BLOOD SPECIMEN FROM A CHILD**

**Family Code 51.02(2)** defines “child” as a person “ten years of age or older and under 17 years of age”

**Family Code 51.095** - Waiver of Rights. All rights granted child may be waived if:

- (1) Waiver is made by child and attorney, and
- (2) The child and attorney are informed of and understand the right and possible consequences of waiving; and
- (3) The waiver is voluntary; and
- (4) The waiver is made in writing or in court proceedings.

**Family Code 51.095(a)** – All strict provisions for admissibility of statement of a Child.

**Family Code 52.02(a)** – Strict provisions to take juvenile taken into custody, straight to juvenile processing center – *except as provided by 52.02(c)*

**Family Code 52.02(c)** – Provides authorization to take child’s **breath or blood specimen**, if the person taking the child into custody has reasonable grounds to believe that the child has been operating a motor vehicle in a public place while having “*any detectable amount of alcohol*” in the child’s system. It allows:

- (1) Child to be taken to a place to obtain a specimen of breath or blood (as provided by TRC Chapter 724);
- (2) Performing intoxilyzer processing and videotaping of the child in an adult processing office of a law enforcement agency.

**Family Code 52.02(d)** Provides that a child taken into custody can submit or refuse to **BREATH TEST** without “concurrence of an attorney” ***IF officer’s request and child’s response*** is videotaped. The provision provides exception to requirements of 51.09 and 51.09(a)

**ISSUE: THERE IS NO SIMILAR PROVISION PROVIDING AN EXCEPTION WHEN DEALING WITH BLOOD SPECIMEN.**

Hence, we conclude, the strict requirement of 51.095 must be met, and a child can only *submit or refuse to a Blood Specimen* with an attorney. To voluntarily submit to a blood specimen, the attorney would have to agree to waive the child’s rights. The attorney would also be required in order for the child to “voluntarily and validly” refuse.

## SUMMARY

### **A Search warrant for a blood draw of a child is valid if:**

1. The child is arrested for DWI or its other related offenses under **Section 49 of Penal Code (listed above), and**
2. The child has voluntarily and validly refused officer's request to take **breath** test. (Family Code 52.02(d) – No attorney is required if the request and refusal have been videotaped), **or**
3. The child has voluntarily and validly refused the officer's request to taking of **blood specimen**. Family Code 51.09 requires child consult with attorney before consenting or refusing; child can submit to blood specimen only with acquiescence of an attorney.

### **NOTE:**

**If child arrested under Alcohol Beverage Code Sec. 106.041 (minor operating a motor vehicle in public place, or watercraft while having any detectable amount of alcohol in the minor's system), he CANNOT be required to submit to a blood specimen.**

## **BLOOD WARRANT FAQs**

1. Does a Magistrate have to sign a blood warrant?

NO.. As with all search warrants, the Magistrate has to make a determination, based solely on the affidavit alone, that there is *probable cause* to believe that the search and seizure will produce evidence of a crime. The task of a magistrate in issuing a blood warrant is to make a practical, common sense decision whether, given all the circumstances set forth in the warrant's supporting affidavit, there is a fair probability that evidence of a crime, specifically an intoxication offense, will be found in the specific person's blood.

2. Does a Magistrate *have to* sign a blood warrant that is *legally sufficient*?

NO but SHOULD. A magistrate never *has to sign anything* **BUT** there are potential consequences for declining to perform magisterial duties.

If an affiant/officer has presented a written affidavit alleging facts amounting to probable cause that a specific person committed a specific crime and alleging why the blood sought will provide evidence regarding that crime; meets all legal criteria and is legally sufficient, then a magistrate has no *legal* reason to deny the request.

3. Can a blood search warrant be faxed to a magistrate?

YES. Many counties and agencies are already faxing affidavits for blood warrants. Nothing in the CCP specifically requires that the officer/affiant *personally appear* before magistrate. CCP Section 2.26 declares electronic documents a written document for all purposes.

4. Who can administer the Oath to the officer seeking the blood warrant?

Tex. Govt. Code Sec 602.002 provides a list of who may administer an oath in Texas. Generally, that includes a judge, notary or an officer acting engaged in the performance of and related to his duties. The person who administers the oath should certify this act by signing, dating and noting official title.

5. Who is authorized to draw blood for a blood warrant and where is it drawn?

Under the Tex .Transportation Code 724.017, a physician, a qualified technician, a registered professional nurse, a licensed vocation nurse, or a licensed or certified emergency medical technician-intermediate or emergency technician-paramedic are authorized to take blood specimen. The blood specimen "must be taken in a sanitary place".

**Scenarios for Discussion**  
*Or*  
**“What’cha gonna do when they come to you”**

**NO. 1**

Police are 911 dispatched to accident scene after citizens report a motor vehicle – motorcycle accident. Police arrive; and find two 16-yr-old teenage females sitting on the curb. The motorcyclist is conscious, but seriously injured and transported to hospital. He cannot identify who was driving. Both teenage girls refuse to give statements, refuse to state which one was driving, and officers have reasonable belief that both girls have been drinking, notice usual signs of intoxication i.e. slurred speech, trouble standing, and detect a strong odor of alcohol on both girls.

A run on the license plate comes back to John East. Abbey East is one of the girls; Belinda West is the other teenage girl.

Officers take both girls down to the station. Officers are not absolutely sure who was driving, but begin processing both girls. Individually, each girl is videotaped refusing to consent to breath test, complying with Family Code. They arrest Abbey for Driving While Intoxicated. They arrest Belinda for Public Intoxication, but also want her blood/alcohol concentration (BAC) just in case they change charge to DWI.

They prepare separate Blood Warrant affidavits for each defendant. They come to you for Blood warrant Orders.

**NO. 2**

Police have been dispatched to a fatal accident scene at 11:00 pm. Upon investigation and witness statements, it appears that the Charger driven by a 16-year old male driver, Jonathan Wesley, was driving erratically down the street, crossed the middle line, and crashed head-on into the Honda.

Jonathan is unconscious and Life-Flighted to Hospital. His teenage female passenger is dead at the scene. The Honda had two passengers. The Honda driver is dead at the scene, the Honda passenger is in critical condition and also Life-Flighted.

After the extensive and diligent investigation, the Officers prepare a blood warrant affidavit and come to you at 3 am requesting a blood warrant. As you read aloud that the Officer could not request the defendant to consent to give a blood specimen, the officer informs you that the defendant is in a coma.

THE STATE OF TEXAS

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AFFIDAVIT FOR

COUNTY OF HARRIS

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SEARCH WARRANT

I, **David Matthews**, a peace officer employed by the **Houston Police Department**, in reference to incident # 876543, do solemnly swear that I have reason to believe and do believe that within the body of **William Jason Little**, hereafter Defendant, located in Harris County, Texas, is evidence which is more particularly described as blood samples.. Said location and person is more particularly described as **William Jason Little, a (Green) Male**, with a date of birth of **January 6, 1998**, with a **Texas Drivers License** with the number 01234567.

MY BELIEF IS BASED UPON THE FOLLOWING FACTS:

I, **David Matthews**, am employed with the **Houston Police Department** as a certified peace officer in the State of Texas. In my position as a peace officer with the **Houston Police Department**, I have successfully completed my department's requirements for employment in my field.

Additionally, I have successfully completed the following courses in the field of alcohol detection: the National Highway and Traffic Safety Administration Standardized Field Sobriety Testing Course. Standard Field Sobriety Tests (SFSTs) include, but are not limited to the Horizontal Gaze Nystagmus (HGN), one leg stand (OLS) and/or the walk and turn (WAT).

During my course of employment, I have observed numerous people who are under the influence of alcohol or other substances such as alcohol, controlled substances, and other narcotics.

During my course of employment, I have testified under oath regarding intoxication and impairment.

I have formed opinions on intoxication on many occasions and have had my suspicions confirmed by breath, blood, or urine samples that were administered after I performed my law enforcement duties relating to the detection of impaired drivers.

I am familiar with the methods in the State of Texas used to obtain samples for alcohol impairment or impairment caused by the introduction of other substances in the body, that being breath, blood, or urine samples. I have found these forensic tests to be reliable in supporting my opinions and observations on consumed substances and levels of impairment.

I have reason to believe that on or about **September 1, 2014 at 12:05 A.M., in Harris County, Texas**, the Defendant did then and there unlawfully operate a motor vehicle in a public place while intoxicated. My belief is based on the following:

In this case, on **September 1<sup>st</sup>, 2014 at approximately 12:05 AM**, I, **David Matthews**, employed as a **Houston Police Officer** observed a **Black Lexus IS250, Texas Plate AB123**, upon **IH 45**, between **mile post 44 and Mile post 43**, a public place in **Houston, Harris County, TX**. I observed the vehicle speeding **80 miles per hour** in a **60 mile per hour zone**. I confirmed the vehicle's speed by **spacing it with my speedometer**. As I got behind the vehicle, I observed it fail to maintain a single lane by **drifting from the number 1 lane in the number 2 lane**. I initiated a traffic stop and spoke to the defendant.

I came into contact with Defendant and noticed the defendant had a strong odor of an alcoholic beverage on his breath, spoke with slurred speech and noticed him to have blood shot eyes.

I asked Defendant to perform some field sobriety tests to determine the Defendant's level of intoxication, including the FST's requested (HGN, OLS, WAT, etc.) I use these tests frequently and find them to be accurate and reliable indicators of intoxication or lack thereof and have arrested many people based on their poor performances on these tests (as well as having released many people based upon their satisfactory performance on these tests). **I observed the Defendant with 6 of 6 clues on the Horizontal Gaze Nystagmus test, 3 of 4 clues on the one leg stand test and 7 of 8 clues on the walk and turn.**

Therefore, I placed the Defendant under arrest and transported the Defendant to the police station.

At the police station, the defendant was given his Statutory Warning, in writing and given a copy of the Statutory Warning. **The defendant is a child as defined in Section 51.02, Family Code**, and the request for a breath specimen and his response have been videotaped. *On videotape*, I asked the Defendant to identify himself, and I asked him to provide a sample of his breath. *On videotape*, Defendant **refused** to provide a sample of his breath.

Based on the totality of the circumstances including Defendant's actions and performance prior to the testing, I formed the opinion that Defendant was intoxicated due to the introduction of **Alcohol** into the Defendant's system and had lost the normal use of the Defendant's mental and physical faculties. I am aware that blood can be drawn and used to scientifically determine a person's level of intoxication and I have therefore done so on many occasions. I am aware through my training and my experience that blood can be drawn through minimally invasive and medically accepted techniques. It is my belief that based upon all my observations, that a chemical sample will provide evidence of this Defendant's state of intoxication as well as evidence of the type of substance that has been consumed.

I identified Defendant through the Defendant's **Texas Drivers License**. I verified the accuracy of this identity information by comparing the photo on the card to the face of Defendant and determined them to be the same. I also verified through the use of the Department of Public Safety crime computer that this card belongs to Defendant.

WHEREFORE, PREMISES CONSIDERED, your affiant respectfully requests that a warrant issue authorizing your affiant, or any other peace officer of Harris County, Texas to obtain the aforementioned evidentiary samples from **William Jason Little, a (Green) male**, with a date of birth of **January 6, 1998**, with a **Texas Drivers License**, with the number 01234567, located in Harris County, Texas, with authority to search for and to seize blood samples as set out earlier in this affidavit.

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AFFIANT

Sworn to and Subscribed before me on this September 01, 2014 A.D. at 01:20 o'clock A. M.

- 
- Notary Public**
  - Judge**
  - Peace Officer** (as described by Art. 2.12, CCP Engaged in the performance of Officer's Duties, And oath is related to officer's duties)

THE STATE OF TEXAS

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SEARCH WARRANT

COUNTY OF HARRIS

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TO THE SHERIFF OR ANY PEACE OFFICER OF HARRIS COUNTY TEXAS

GREETINGS:

WHEREAS, Complaint in writing, under oath, has been made by ~~Joseph D. Little~~, a peace officer employed by the **Houston Police Department**, in reference to incident # ~~110121112~~, which complaint is attached hereto and expressly made a part hereof for all purposes and said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of this warrant;

YOU ARE THEREFORE COMMANDED to forthwith search the body of the person therein named, to wit: ~~Robert Lawrence Cochran~~, a **White Male** with a date of birth of ~~May 13, 1978~~ with a **Texas Drivers License** with the number ~~10110570~~, located in Harris County, Texas, with the authority to search for and to seize any and all evidence that may be found therein, namely blood samples.

FURTHERMORE, pursuant to Article 18.08 Texas Code of Criminal Procedure, the officer executing this warrant may call to his or her aid any number of citizens in Harris County, who shall be bound to aid in the execution of this search warrant. The officer executing this warrant is therefore directed to execute this warrant by taking the subject to any medical personnel, paramedic, nurse, doctor, or other person qualified to draw blood and that person is hereby bound to assist the officer in his attempt to obtain the requested sample.

HEREIN FAIL NOT and due return make hereof.

WITNESS MY SIGNATURE on this September 1<sup>st</sup> 2014 at 1:22 O'clock, A.M.

*[Handwritten Signature]*  
\_\_\_\_\_  
Judge/Magistrate  
Harris County, Texas



THE STATE OF TEXAS

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RETURN AND INVENTORY

COUNTY OF HARRIS

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The undersigned, being a peace officer under the laws of the State of Texas, certifies that the foregoing warrant came to hand on the day it was issued and that it was executed on the \_\_\_\_ day of \_\_\_\_\_ A.D., \_\_\_\_\_, by making the search directed therein and seizing during the search the following samples:

Specimens of the Defendant's blood

\_\_\_\_\_  
OFFICER EXECUTING PROCESS

STATUTORY WARNING

DIC-24 (Rev. 9/11)

SUBJECT'S NAME \_\_\_\_\_ DL NO./STATE \_\_\_\_\_ DOB \_\_\_\_\_

PHYSICAL DESCRIPTION (if unlicensed) Race: \_\_\_\_\_ Sex: \_\_\_\_\_ Height: \_\_\_\_\_ Weight: \_\_\_\_\_ Eyes: \_\_\_\_\_ Hair: \_\_\_\_\_

DATE OF ARREST: \_\_\_\_\_ TIME OF ARREST: \_\_\_\_\_ COUNTY OF ARREST: \_\_\_\_\_

You are under arrest for an offense arising out of acts alleged to have been committed while you were operating a motor vehicle in a public place, or a watercraft, while intoxicated, or an offense under Section 106.041, Alcoholic Beverage Code. You will be asked to give a specimen of your breath and/or blood. The specimen will be analyzed to determine the alcohol concentration or the presence of a controlled substance, drug, dangerous drug or other substance in your body.

If you refuse to give the specimen, that refusal may be admissible in a subsequent prosecution. Your license, permit or privilege to operate a motor vehicle will be suspended or denied for not less than 180 days, whether or not you are subsequently prosecuted for this offense.

If you refuse to submit to the taking of a specimen, the officer may apply for a warrant authorizing a specimen to be taken from you.

If you are 21 years of age or older and submit to the taking of a specimen and an analysis of the specimen shows that you have an alcohol concentration of 0.08 or more, your license, permit or privilege to operate a motor vehicle will be suspended or denied for not less than 90 days, whether or not you are subsequently prosecuted for this offense.

If you are younger than 21 years of age and have any detectable amount of alcohol in your system, your license, permit or privilege to operate a motor vehicle will be suspended or denied for not less than 60 days. However, if you submit to the taking of a specimen and an analysis of the specimen shows that you have an alcohol concentration of less than 0.08, you may be subject to criminal penalties less severe than those provided for under Chapter 49, Penal Code.

If you were operating a motor vehicle and you refuse to give the specimen or provide a specimen that shows you have an alcohol concentration of 0.08 or more, you may be disqualified from driving a commercial motor vehicle for a period of not less than one year.

You may request a hearing on the suspension or denial. This request must be received by the Texas Department of Public Safety at its headquarters in Austin, Texas, no later than 15 days after you receive or are presumed to have received notice of suspension or denial. The request can be made by written demand, fax, or other form prescribed by the Department.

I certify that I have informed you both orally and in writing of the consequences of refusing to submit to the taking of a specimen or providing a specimen. I have provided you with a complete and true copy of this statutory warning.

I am now requesting a specimen of your  Breath  Blood

Subject refused to allow the taking of a specimen and further refused to sign below as requested by this officer.

OR

Subject refused to allow the taking of a specimen as evidenced by his/her signature below.

\_\_\_\_\_  
Subject's Signature

I further certify that because you are a child as defined in Section 51.02, Family Code, the above request for a specimen and your response have been videotaped.

\_\_\_\_\_  
Officer's Signature

\_\_\_\_\_  
Officer's Printed Name

\_\_\_\_\_  
Agency

\_\_\_\_\_  
Telephone No.

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