

# The Recorder

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## THE FAIR DEFENSE ACT AND THE ROLE OF THE MAGISTRATE

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### Introduction

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

### Overview of the Fair Defense Act of 2001

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

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

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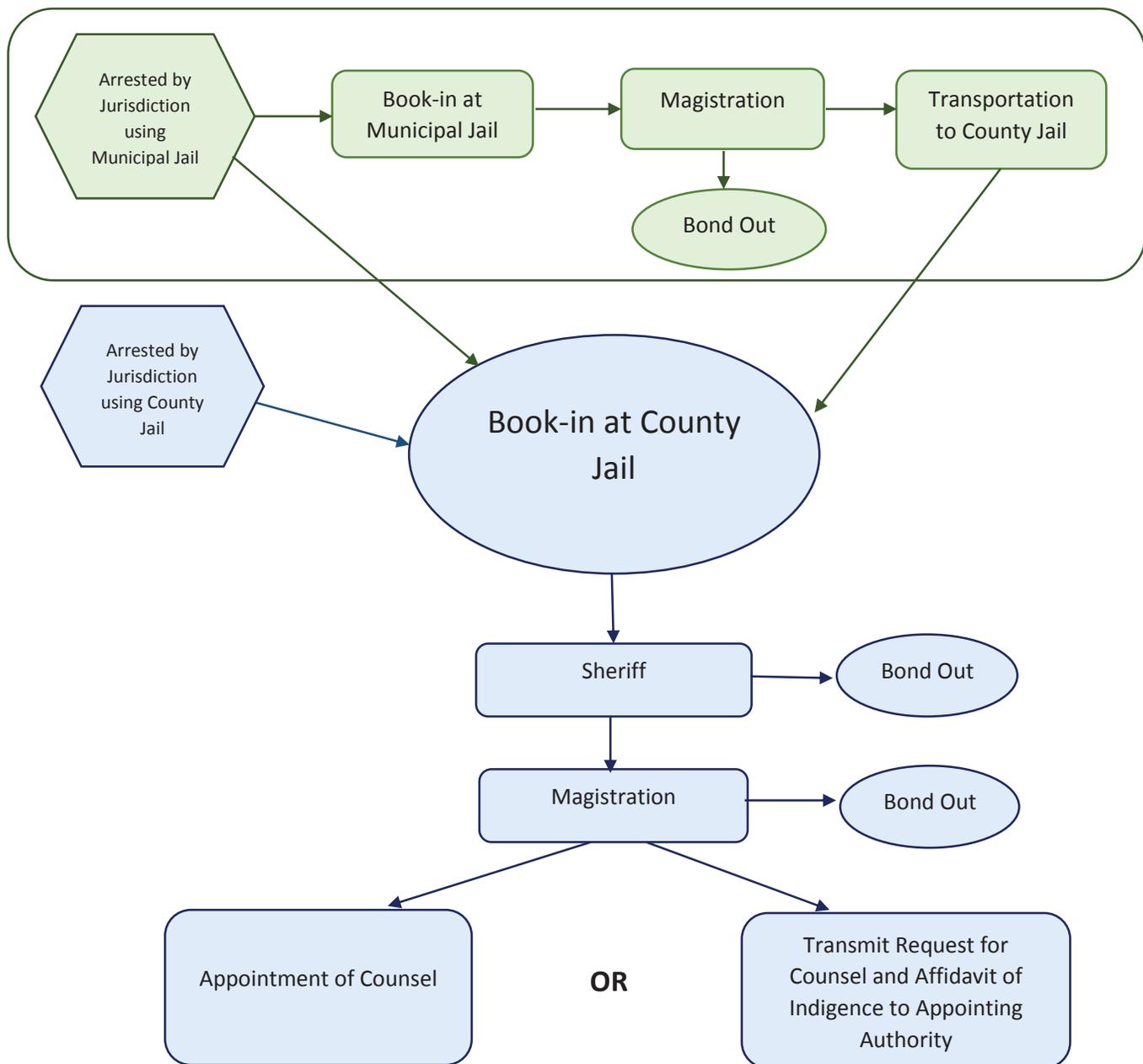
The Fair Defense Act established the Task Force on Indigent Defense to oversee the provision of indigent defense services in Texas. The Task Force was renamed the Texas Indigent Defense Commission (Commission) in 2011. The Commission is a permanent standing committee of the Texas Judicial Council and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

The Commission is led by the Honorable Sharon Keller,

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

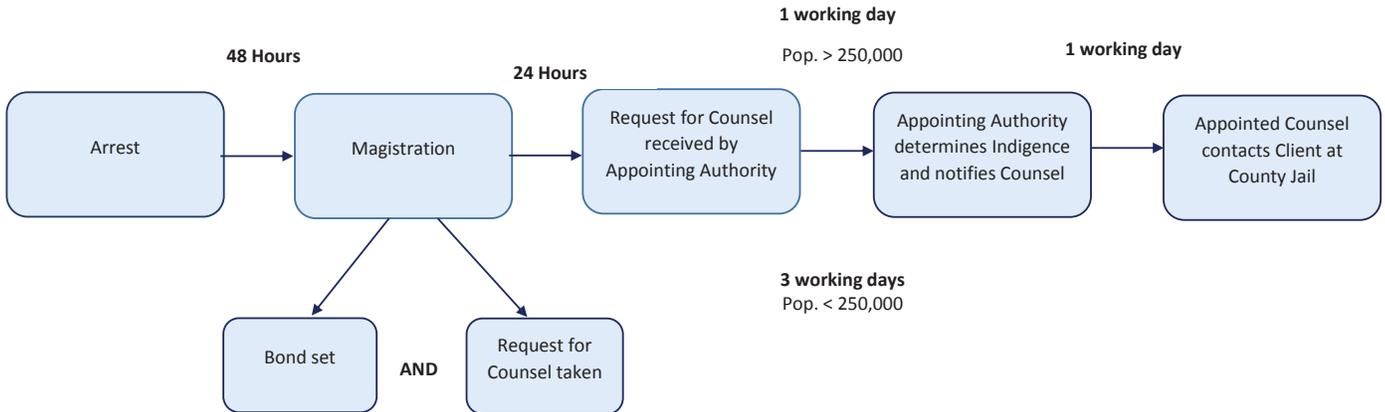
Since 2001, the Fair Defense Act has gone through numerous revisions to improve its scope and comprehensiveness as well as the quality of indigent defense services provided throughout the state. In the 2013 Legislative Session, a few new key provisions were added, including a requirement that attorneys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

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

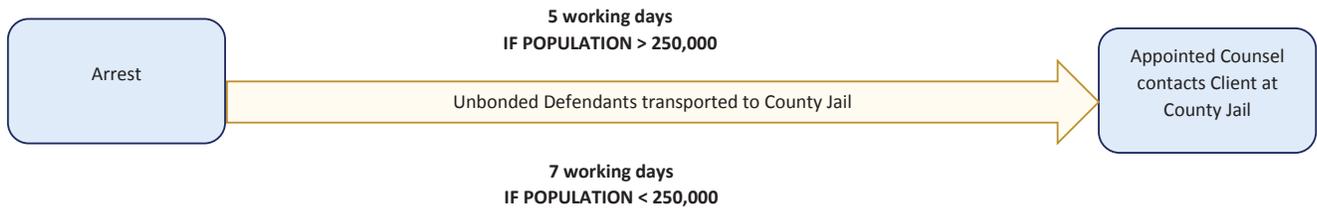


**Figure 2. Timeline Specified by the Fair Defense Act**

**Paperwork Timeline**



**Defendant Timeline**



to indigent defense in each county in each fiscal year.

**Caseflow and Timelines**

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

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

If the arrest offense is a Class C misdemeanor, the peace officer may issue a citation instead of bringing the accused before the magistrate immediately. The citation

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

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

**Article 15.17 Hearings**

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

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

### **When Right to Counsel Attaches**

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

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

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

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

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

appearance or when adversarial judicial proceedings are initiated, whichever comes first.”

### **Prompt Probable Cause Determination**

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

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

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

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

### **The Warnings**

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

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

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

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

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

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

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

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

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

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

### Making the Record

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

### Conclusion

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

<sup>1</sup> Article 1.051(c), Code of Criminal Procedure.

<sup>2</sup> Texas Appleseed, *The Fair Defense Report: Findings and Recommendations on Indigent Defense Practices in Texas* (2000).

<sup>3</sup> *Id.*

<sup>4</sup> Article 14.06, Code of Criminal Procedure.

<sup>5</sup> Article 15.17(a), Code of Criminal Procedure.

<sup>6</sup> Article 14.06 (b) and (c), Code of Criminal Procedure.

<sup>7</sup> *Pecina v. State*, 361 S.W.3d 68, 71 (Tex. Crim. App. 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Montejo v. Louisiana*, 556 U.S. 778 (2009).

<sup>10</sup> W. Clay Abbott, "Magistrations Under Article 15.17, C.C.P.," *The Recorder*, (August 2000).

<sup>11</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

<sup>12</sup> Art. 1.051(c), Code of Criminal Procedure.

<sup>13</sup> *Gerstein v. Pugh*, 420 U.S. 103 (1975).

<sup>14</sup> *Sanders v. City of Houston*, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd* 741 F. 2d 1379 (5th Cir. 1984).

<sup>15</sup> Article 1, Section 11, Texas Constitution.

<sup>16</sup> *Illinois v. Gates*, 462 U.S. 213 (1983); *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988).

<sup>17</sup> Art. 17.033(a), Code of Criminal Procedure.

<sup>18</sup> Art. 17.033(b), Code of Criminal Procedure.

<sup>19</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

<sup>20</sup> Art. 17.033(c), Code of Criminal Procedure.

<sup>21</sup> *Clark v. State*, 627 S.W.2d 693, 704 (Tex. Crim. App. 1982) (holding that compliance with Article 15.17 of the Texas Code of Criminal Procedure ensures compliance with Miranda requirements).

<sup>22</sup> *Id.*

<sup>23</sup> The Public Policy Research Institute, Texas A&M University, *Study to Assess the Impacts of the Fair Defense Act on Texas Counties*, 35-38 (January 2005).

<sup>24</sup> Article 15.17(f) of the Code of Criminal Procedure provides that a record required under this article may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under Article 26.04(a).