

Art. 16.22 Mental Assessments and Emergency Detention Orders

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Art. 16.22 Procedures

Overview of Procedure

- Art. 16.22 of the Code of Criminal Procedure provides for a protocol when a person who has been arrested shows signs of mental illness or intellectual disability.

Overview of Procedure

- The protocol generally provides that:
 - The sheriff or jail gives a notice to the magistrate;
 - The magistrate may order the local mental health authority to collect information and provide an assessment;
 - The magistrate provides copies of the written assessment to the defense counsel, the prosecution and the trial court;

Overview of Procedure

- The trial court may use the assessment for various purposes, including:
 - resuming criminal proceedings,
 - resuming or initiating competency proceedings,
 - in connection with the punishment phase after conviction, or
 - referring the defendant to a specialty court.
 -- Art. 16.22, Code of Criminal Procedure

Definitions

- "Mental illness" means "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that:
 - (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or
 - (B) grossly impairs behavior as demonstrated by recent disturbed behavior."
 -- Health & Safety Code § 571.003(14)

Definitions

- "Intellectual disability" means "significantly **subaverage general intellectual functioning** that is concurrent with deficits in adaptive behavior and originates during the developmental period."
- "Subaverage general intellectual functioning" refers "to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used."
 -- Health & Safety Code § 591.003(7-a) and (20)

2017 Amendments

- In the 85th Legislative Session (2017), the Legislature passed SB 1849 (the Sandra Bland Act) and SB 1326 amending Art. 16.22.
- These bills were enacted after a high profile incident in 2015 in which a 28 year old woman named Sandra Bland was found dead in her jail cell following her arrest after a routine traffic stop.

2017 Amendments

- The amendments:
 - Shorten the time periods for the notice by the jail and for completing the assessment;
 - Make it easier for a defendant with a mental illness or intellectual disability to be released on a personal bond;
 - Require law enforcement to divert a person suffering a mental health crisis or from the effects of substance abuse to treatment; and
 - Require independent law enforcement agencies to investigate jail deaths.

Art. 16.22 Procedures:
Notice by the Jail

- A sheriff or municipal jailer, **not later than 12 hours** [formerly 72 hours] after receiving credible information that may establish reasonable cause to believe that a defendant charged with a Class B misdemeanor or higher offense has a mental illness or intellectual disability, must provide a written or electronic notice to the magistrate.

-- Art. 16.22(a)(1)

Art. 16.22 Procedures:
Notice by the Jail

- The notice must include any information related to the sheriff's or jailer's determination, such as:
 - Information regarding the defendant's behavior immediately before, during and after the defendant's arrest; and
 - If applicable, the results of any previous assessment of the defendant.

-- Art. 16.22(a)(1)

Art. 16.22 Procedures:
Order by the Magistrate

- If the magistrate determines that there is reasonable cause to believe that the defendant has a mental illness or intellectual disability, then the magistrate must order the local mental health authority, or another qualified mental health or intellectual disability expert, to collect information and provide an assessment to the magistrate.

-- Art. 16.22(a)(1)

Art. 16.22 Procedures:
Order by the Magistrate

- But the magistrate is not required to order the collection of information by the local mental health authority if the defendant has been determined to have a mental illness or intellectual disability in the year preceding the defendant's date of arrest.

-- Art. 16.22(a)(2)

Art. 16.22 Procedures:
Order by the Magistrate

- If the defendant fails or refuses to submit to the collection of information, the magistrate may order the defendant to submit to an examination in a jail or in another place for a reasonable period **not to exceed 72 hours** [previously it was 21 days].

-- Art. 16.22(a)(3)

Art. 16.22 Procedures:
Assessment

- Except as permitted by the magistrate for good cause, the written assessment shall be provided to the magistrate:
 - Not later than **96 hours** after an order was issued ordering the assessment if the defendant is held in custody; or
 - Not later than the **30th day** after the order was issued for a defendant released from custody. [previously it was 30 days for all defendants]

-- Art. 16.22(b)

Art. 16.22 Procedures:
Assessment

- The written assessment must include the expert’s observations and findings pertaining to:
 - Whether the defendant has a mental illness or intellectual disability;
 - Whether there is clinical evidence to support a finding that the defendant may be incompetent to stand trial; and
 - Any appropriate or recommended treatment or service.
- Art. 16.22(b-1)

Art. 16.22 Procedures:
Assessment

- The magistrate must provide copies of the assessment to the defense counsel, the attorney representing the state and the trial court.
- Art. 16.22(b-1)

Notice by Jail to Magistrate
(Handout A in Your Packet)

Magistrate's Order for Examination and Assessment

This is a legal form titled "MAGISTRATE'S ORDER FOR EXAMINATION AND ASSESSMENT". It includes sections for "DEFENDANT'S INFORMATION", "DEFENDANT'S COMPLIANCE WITH ORDER", and "DEFENDANT'S STATEMENT OF DEFENSE". There are fields for name, address, and date of birth, and checkboxes for compliance status. It also contains a section for the defendant's statement and a signature line for the magistrate.

Assessment Form (Handout E)

This is a "MAGISTRATE WRITTEN NOTIFICATION FORM" for an assessment. It contains a table with columns for "Name", "Address", "City", "State", "Zip", "Phone", "Email", and "Date of Birth". Below the table are sections for "MAGISTRATE'S FINDINGS AND RECOMMENDATIONS" and "DEFENDANT'S STATEMENT".

Warrant if Defendant Refuses to Submit to Exam Voluntarily (Handout F)

This is a legal form titled "WARRANT IF DEFENDANT REFUSES TO SUBMIT TO EXAM VOLUNTARILY". It includes sections for "DEFENDANT'S INFORMATION", "DEFENDANT'S COMPLIANCE WITH ORDER", and "DEFENDANT'S STATEMENT OF DEFENSE". It contains fields for name, address, and date of birth, and checkboxes for compliance status. It also contains a section for the defendant's statement and a signature line for the magistrate.

LMHA Contact Information (Handout J)



Art. 16.22 Procedures:
Reports to OCA

- The statute says the magistrate shall submit to OCA on a monthly basis the number of written assessments provided to the court under Art. 16.22(a)(1)(B).
-- Art. 16.22(e)
- However, OCA has said you don't have to do this!

Art. 16.22 Procedures:
Reports to OCA

- OCA's Mental Health Training page states:
 - "The magistrate is required to provide copies of the assessment to the defense counsel, the attorney representing the state, and the trial court (district or county court). The magistrate should send the assessment to the custodian of the district or county court records—the district clerk or county clerk—for inclusion in the defendant's case file."

Art. 16.22 Procedures:
Reports to OCA

- "The number of written assessments will be captured from district and county courts on Judicial Council Monthly District and County Court Activity Reports, submitted by district clerks and county clerks."

Art. 16.22 Procedures:
Reports to OCA

- Therefore OCA is saying you do not have to report these assessments directly to OCA; they will tally the number of assessments each month from the reports submitted to them by the district and county clerks.

Recent Issues

- What if the only "indication" of mental illness is that the defendant says he's depressed? Isn't it normal to be depressed if you're in jail?
- What if the defendant is no longer mentally ill or not experiencing an impaired perception of reality and is not suicidal?

Recent Issues

- What if the sheriff or jail does not send a report but the magistrate believes the defendant IS mentally ill?
- What reports do we have to submit to OCA?
 - Whenever we receive a Notice from the jail?
 - Whenever we order a Mental Assessment?
 - Whenever we receive an Assessment from the LMHA?

Art. 17.032 Procedures

Release on Personal Bond of Defendant with Mental Illness

- A **personal bond** is a bond made by the defendant in which he agrees to appear for any hearings and for trial **and** in the event he fails to appear then he agrees to pay the amount set by the magistrate at the time he entered into the bond.
- A personal bond “is sufficient if it includes the requisites of a bail bond . . . **except that no sureties are required.**”
 -- Art. 17.04, Code of Criminal Procedure.

Release on Personal Bond of Defendant with Mental Illness

- A magistrate shall release a defendant on a **personal bond** notwithstanding Art. 17.03(b), a bond schedule, or a standing order, unless good cause is shown otherwise, if the following five conditions apply:
 - (1) The defendant is not charged with and has not been previously convicted of a violent offense;

Release on Personal Bond of Defendant with Mental Illness

- "Violent offense" means an offense under Penal Code sections:

19.02 (murder); 19.03 (capital murder); 20.03 (kidnapping); 20.04 (aggravated kidnapping); 21.11 (indecenty with a child); 22.01(a)(1)(assault), if the offense involved family violence as defined by Section 71.004, Family Code; 22.011 (sexual assault); 22.02 (aggravated assault); 22.021 (aggravated sexual assault); 22.04 (injury to a child, elderly, or disabled individual); 29.03 (aggravated robbery); 21.02 (continuous sexual abuse of young child or children); or 20A.03 (continuous trafficking of persons).

-- Art. 17.032(a)

Release on Personal Bond of Defendant with Mental Illness

- (2) The defendant is examined under Article 16.22;
- (3) The expert:
 - concludes that the defendant has a mental illness or intellectual disability and is nonetheless competent to stand trial; and
 - recommends mental health or intellectual disability treatment;

Release on Personal Bond of Defendant with Mental Illness

(4) The magistrate determines, in consultation with the local mental health or intellectual and developmental disability authority, that mental health or intellectual disability services for the defendant are available; and

Seven horizontal lines for notes.

Release on Personal Bond of Defendant with Mental Illness

(5) After considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided by a prosecutor or the defendant, the magistrate determines that release on personal bond would reasonably ensure the defendant's appearance in court and the safety of the community and the victim of the alleged offense.

-- Art. 17.032(b), Code of Criminal Procedure

Seven horizontal lines for notes.

Release on Personal Bond of Defendant with Mental Illness

- Unless good cause is shown for not requiring treatment, the magistrate must require as a condition of release on personal bond that the defendant submit to outpatient or inpatient mental health treatment or intellectual disability services, as recommended by the local mental health authority or other expert, if:

Seven horizontal lines for notes.

Diversion for Treatment

- Law enforcement shall make a good faith effort to divert a person suffering a mental health crisis or suffering from the effects of substance abuse to a proper treatment center in the agency's jurisdiction if:
 - There is an available and appropriate treatment center in the agency's jurisdiction;

Diversion for Treatment

- it is reasonable to divert the person;
- the offense the person is accused of is a misdemeanor, other than a misdemeanor involving violence; and
- the mental health crisis or substance abuse issue is suspected to be the reason the person committed the alleged offense.

-- Art. 16.23(a), Code of Criminal Procedure

Diversion for Treatment

- Diversion does not apply to a person who is accused of an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code [DWI offenses].

-- Art. 16.23(b), Code of Criminal Procedure

Emergency Apprehension, Detention & Treatment

Emergency Apprehension: Peace Officer

A peace officer, without a warrant, may take a person into custody if the officer:

<p>(1) has reason to believe and does believe that:</p> <ul style="list-style-type: none"> the person is mentally ill; and because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and 	<p>(2) believes that there is not sufficient time to obtain a warrant before taking the person into custody.</p> <p>Health & Safety Code § 573.001(a)</p>
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**Emergency Apprehension:
Peace Officer**

- An officer doing so must take the individual to the nearest available inpatient mental health facility or another suitable mental health facility; **or**
- Transfer the person to EMS personnel in accordance with a memorandum of understanding executed under H&S Code § 573.005 for transportation to such a facility.

-- Health & Safety Code § 573.001(d) and (f)

Emergency Apprehension:
Peace Officer

- SB 344, 85th Legislative Session (2017):
 - Allows a law enforcement officer to transfer the person to EMS
 - And have EMS transport the person to a facility under a memorandum of understanding

Emergency Apprehension:
Peace Officer

- The jail must not be used except in “extreme emergency” and the person must be kept separate from inmates.
-- Health & Safety Code § 573.001(e)

Emergency Apprehension:
Peace Officer

- The officer must immediately inform the person orally in simple nontechnical terms of the reason for the detention and that a staff member of the facility will inform the person of their rights within 24 hours.
-- Health & Safety Code § 573.001(g)

**Emergency Apprehension:
Peace Officer**

- The officer may immediately seize any firearms which must be dealt with under Art. 18.191 of the Code of Criminal Procedure.

-- Health & Safety Code § 573.001(h)

**Emergency Apprehension:
Peace Officer**

- The officer must immediately file a notice of emergency detention with the facility.
- If EMS transports the person to the facility, then they “shall immediately file with the facility the notification of detention completed by the peace officer who made the request.”

-- Health & Safety Code § 573.002(a)

**Emergency Apprehension:
Peace Officer**

- A mental health facility or hospital emergency department may not require a peace officer or EMS personnel to execute any other form as a predicate to accepting the person.

-- Health & Safety Code § 573.002(b),(d) and (e)

Emergency Apprehension:
Guardian

- After transporting the ward to the facility, the guardian must immediately file an application for emergency detention with the facility.
- The guardian shall immediately provide written notice of the filing of the application to the court that granted the guardianship.

-- Health & Safety Code § 573.004

Emergency Apprehension:
Application

- Other than the above scenarios, an emergency apprehension must be accomplished by filing a written application with a judge or magistrate.
- Any adult may file this application.
- The application must be presented personally to the judge or magistrate (except for physicians).

-- Health & Safety Code § 573.011, 573.012(a),(h)

Emergency Apprehension:
Application

- A judge with probate jurisdiction may require by administrative order that applications are presented personally to that court
- Or if the judge is not available that they are held by staff and presented to another judge or magistrate as soon as practicable.

-- Health & Safety Code § 573.012(a)

Emergency Apprehension:
Application

- The application must state:
 - (1) that the applicant has reason to believe and does believe that the person evidences mental illness;
 - (2) that the applicant has reason to believe and does believe that the person evidences a substantial risk of serious harm to himself or others;
 - (3) a specific description of the risk of harm;
 - (4) that the applicant has reason to believe and does believe that the risk of harm is imminent unless the person is immediately restrained;

Emergency Apprehension:
Application

- (5) that the applicant's beliefs are derived from specific recent behavior, overt acts, attempts, or threats;
 - (6) a detailed description of the specific behavior, acts, attempts, or threats; and
 - (7) a detailed description of the applicant's relationship to the person whose detention is sought.
- Health & Safety Code § 573.011(b)

Emergency Apprehension:
Issuance of Warrant

- The magistrate must review the application and may interview the applicant.
- The magistrate **shall deny the application unless** the magistrate finds that there is reasonable cause to believe that:
 - (1) the person evidences mental illness;
 - (2) the person evidences a substantial risk of serious harm to himself or others;

Emergency Apprehension:
Issuance of Warrant

- (3) the risk of harm is imminent unless the person is immediately restrained; and
 - (4) the necessary restraint cannot be accomplished without emergency detention.
- Health & Safety Code § 573.012(b)

Emergency Apprehension:
Issuance of Warrant

- A substantial risk of serious harm to the person or others may be demonstrated by:
 - (1) the person's behavior; or
 - (2) evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty.
- Health & Safety Code § 573.012(c)

Emergency Apprehension:
Issuance of Warrant

- The magistrate shall issue to an on-duty peace officer a warrant for the person's immediate apprehension if the magistrate finds that each criterion is satisfied.
- Health & Safety Code § 573.012(d)

Emergency Apprehension:
Issuance of Warrant

- A person apprehended under such a warrant shall be transported for a preliminary examination to:
 - The nearest appropriate inpatient mental health facility; or
 - A mental health facility deemed suitable by the local mental health authority, if an appropriate inpatient mental health facility is not available.
 - Health & Safety Code § 573.012(e)

Emergency Apprehension:
Issuance of Warrant

- The warrant serves as an application for detention in the facility.
- The warrant and a copy of the application for the warrant must be immediately transmitted to the facility.
 - Health & Safety Code § 573.012(f)

Emergency Apprehension:
Issuance of Warrant

- Section 573.021, Health & Safety Code, governs the transportation and evaluation of the person once the warrant has issued (or they are transported without a warrant by a peace officer or by a guardian).
- Once the warrant issues, the case is out of your hands.

**Emergency Apprehension:
Application by Physician**

- A judge or magistrate may permit a physician to submit an application by:
 - Email with the application attached as a secure document in PDF format; or
 - Secure electronic means, including satellite transmission, closed-circuit television transmission, or another two-way electronic communication that is secure, available to the judge or magistrate, and provides full 2-way sight and sound.
- Health & Safety Code § 573.012(h)

**Emergency Apprehension:
Application by Physician**

- Then the judge or magistrate may transmit a warrant to the applicant by digital signature or with the warrant attached as a PDF
 - The judge or magistrate must provide for a recording of the presentation of an application, preserved until the patient or proposed patient has been released or discharged.
 - The patient may obtain a copy of the recording with reasonable payment to cover costs. If indigent, the court must provide a copy without charge.
- Health & Safety Code § 573.012(h-1) and (i)

**Emergency Detention Orders:
Recent Questions**

- Do I have to go to the hospital to sign a warrant?
- May the sheriff refuse to transport the person if they think it is too far to drive?
- What if law enforcement takes the person to the emergency room and then refuses to transport them to the LMHA?

Emergency Detention Orders:
Recent Question

- When must a judge sign a warrant and when may a peace officer sign a warrant?
- I no longer wish to issue emergency detention orders at all.
- How should I respond to a request by a nursing home for an Emergency Detention Order for a patient in the nursing home who has Alzheimers?

Resources

- TJCTC Mental Health Webpage: <http://www.tjctc.org/Mental-Health.html>
- OCA's Mental Health Training page: <http://www.txcourts.gov/publications-training/training-materials/mental-health/>

Resources

- Webinar on November 7, 2017 (on TJCTC website)
- Forms (in your handouts)
- OCA Statement on Reporting Mental Assessments
- Flowchart: Art. 16.22 Assessment (prepared by OCA)
