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OPINION COMMITTEE

State of Texas
House of Representatives



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I.D. # 47135

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September 24, 2012

The Honorable Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1085-GA

Dear General Abbott:

I would like to request an official opinion concerning the legality of waiving the warnings under Article 15.17 of the Texas Code of Criminal Procedure (commonly referred to as "waiving magistration"). My specific questions are listed below.

Background:

Travis County has a personal bond pretrial release program established under Article 15.17 of the Texas Code of Criminal Procedure. The Travis County District and County Courts have established guidelines which *inter alia* state that "all personal bonds shall be evaluated by pretrial services unless there are exigent circumstances." "No personal bond shall be granted to any defendant until a criminal background check has been made." "The personal bond shall be fully completed before being signed by the judge." Despite the aforementioned guidelines, an informal practice has emerged which involves defense counsel offering an expedited personal bond review and release service for a fee by offering to waive the necessity of taking their client before a neutral magistrate under Article 15.17, commonly referred to as "waiving magistration." The informal practice of "waiving magistration" is not officially endorsed by a written policy but has been an informal practice in Travis County for some time.

In Travis County, the waiver practice works as follows: the retained attorney signs his name on the commitment sheet signaling that he is waiving the arrested person's warnings but the arrested person is never required to sign the commitment sheet. On weekends and evenings during the week, it is very busy at the Travis County Central Booking Facility (CBF). During these busy times, defense counsels commonly use the practice of waiving magistration as a strategy to ensure early release of their clients. Indigent defendants awaiting appointment of counsel are not

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allowed to waive magistration but must patiently await their turn to be magistrate by the judge. The practice of waiving magistration is sometimes also used as a strategy to ensure premature release of arrested persons before the attachment of detainers from other counties and federal detainers (including ICE detainers).

The lawfulness of the practice of waiving magistration was one of the topics discussed during the 2012 Judicial Education Seminar provided by the Texas Municipal Courts Education Center (TMCEC). During the seminar, some regional variation as to the practice of waiving magistration became apparent. The vast majority of counties in Texas do not appear to allow the practice of waiving magistration. The few counties that allow the practice of waiving magistration appear to be located in urban areas and/or central Texas. The majority view in Texas appears to be that the Article 15.17 hearing cannot be waived due to the mandatory language of Article 15.17(a). The practice effect of waiving magistration is that the judge solely communicates with the arrested person's counsel and never communicates directly with the arrested person. In certain parts of Texas human trafficking and gang violence is on the rise and sometimes victims of these crimes are identified during the Article 15.17 hearing when they are initially arrested for suspicion of criminal activity. By foregoing the Article 15.17 hearing and solely speaking to counsel in lieu of the arrested person, potential victims of human trafficking and gang violence may never be identified.

Following the TMCEC seminar, Travis County magistrate judge Rebecca Sonogo ceased to allow the practice of waiving magistration. However, the practice is still allowed by a majority of the judges in Travis County. Currently, there is an inconsistency as to whether the practice of waiving magistration is allowed depending on which judge is working as a magistrate at the jail. Since this inconsistency exists not only in Travis County but also state-wide and there is no case law directly on point, an Attorney General Opinion is requested to ensure that the requirements of Article 15.17 are consistently applied throughout the State of Texas.

Questions:

1. Whether a magistrate judge has a mandatory duty to admonish an arrested person as required by Article 15.17 of the Texas Code of Criminal Procedure irrespective of the arrested person's wishes?
2. Whether an arrested person may lawfully waive his right to be taken before a neutral magistrate and be admonished in accordance with Article 15.17?

Legal Authorities:

Article 15.17 of the Texas Code of Criminal Procedure states in relevant part:

DUTIES OF ARRESTING OFFICER AND MAGISTRATE. (a) In each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested **shall** without unnecessary delay, but not later than 48 hours after the person is arrested, take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, to provide more expeditiously to the person arrested the warning described by this article, before a magistrate in any other county of this state. The arrested person may be taken before the magistrate in person or the image of the arrested person may be presented to the magistrate by means of an electronic broadcast system. The magistrate **shall** inform in clear language the person arrested, either in person or through the electronic broadcast system, of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate **shall** also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel. The magistrate **shall** inform the person arrested of the procedures for requesting appointment of counsel. If the person does not speak and understand the English language or is deaf, the magistrate **shall** inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate. The magistrate **shall** ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. If the person arrested is indigent and request counsel and if the magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the county, the magistrate **shall** appoint counsel in accordance with Article 1.051. If the magistrate is not authorized to appoint counsel, the magistrate **shall** without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel. The magistrate **shall** also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. 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. A recording of the communication between the arrested person and the magistrate **shall** be made...

TEX. CODE CRIM. PROC. ART 15.17 (West 2011) [emphasis added]

1. Whether a magistrate judge has a mandatory duty to admonish an arrested person of his rights as required by Article 15.17 of the Texas Code of Criminal Procedure irrespective of the arrested person's wishes?

When the language of a statute is unambiguous and yields only one reasonable interpretation, courts are required to construe the statute "according to its plain meaning." See *Iloff v Iloff*, 339 S.W.3d 74, 79 (Tex. 2011) and *Tex. Att'y Gen Op.* No. GA-0922 (2012). The word "shall" imposes a duty and thus the requirements set forth in Article 15.17 are mandatory. TEX. GOV'T CODE ANN. § 311.016 (West 2011) ("shall" imposes a duty"). The Court of Criminal Appeals (CCA) has held that a mandatory duty can be created from the plain language of a statute alone. See e.g. *State of ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 198 (Tex. Crim. App. 2003) and *Winters v. Presiding Judge of the Crim. Dist. Court No. Three*, 118 S.W.3d 773, 775 (Tex. Crim. App. 2003). The CCA has expressly rejected the argument that there must be dispositive case law to create a mandatory duty upon which mandamus relief can be granted. *Id.* In *State ex el Rosenthal*, the CCA conditionally granted mandamus relief to vacate an order authorizing videotaping of jury deliberations in capital murder trial since this was contrary to the plain language of Article 36.22 of the Code of Criminal Procedure. *State ex rel. Rosenthal* at 198. The CCA held that the plain language of Article 36.22, "clearly and indisputably prohibits the videotaping of jury deliberations" even though there was no case law setting forth such a prohibition. *Id.* Similarly, the plain language of Article 15.17(a) clearly and indisputable creates a mandatory duty to give the warnings required by the statute even though there is no case law setting forth such a requirement.

2. Whether an arrested person may lawfully waive his right to be taken before a neutral magistrate and be admonished in accordance with Article 15.17?

a. Statute and case law concerning waivers

Art. 1.14(a) states in relevant part "The defendant in a criminal prosecution for any offense may waive any rights secured him by law..." See TEX. CODE CRIM. PROC. ART. 1.13 (West 2011). The aforementioned provision does not dispose of the issue at hand since the Article 15.17 hearing takes place pre-trial. Traditionally, the CCA held that pre-trial waivers were invalid since the right waived had yet to be matured, the defendant could not anticipate unknown errors that might occur during trial and because the consequences of the waiver was unknown. See *Ex parte Townsend*, 538 S.W.2d 419, 420 (Tex. Crim. App. 1976) and *Ex parte Thomas*, 545 S.W.2d 469, 470 (Tex. Crim. App. 1977). At the time the arrested person is brought before the magistrate by the peace officer, the criminal case is at its infancy. The arrested person has yet to be advised of the charges against him and basic constitutional rights such as his right to counsel, right to remain silent, right to bail, and right to an examining trial. It is difficult to contemplate how the arrested person's waiver of these rights could be knowing and intelligent since he has yet to experience the consequences of his waiver.

In recent years, the CCA has moved away from its blanket rule invalidating pre-trial waivers. However, pre-trial waivers are still closely scrutinized. *See e.g. Blanco v. State*, 18 S.W.3d 218, 219 (Tex. Crim. App. 2000). The CCA has held that a pre-trial waiver based upon a bargained-for-exchange with the State can be upheld. *Id.* That is the defendant must have received some kind of benefit from the State in exchange for his waiver for the waiver to be upheld. *Id.* In regards to the Article 15.17 waiver, there is not bargain-for-exchange with the State. The criminal case is at its infancy at the time of the Article 15.17 hearing and the prosecutor has yet to start the formal prosecutorial process by filing an indictment or information. The magistrate judge has no duty to wait for arrival of the prosecutor to screen the cases before performing the duties required by Article 15.17. *See Tex Att'y Gen Op. No. Jm-151 (1984).*

b. Statute and case law concerning waivers

In Op. No. JC-0044, the Texas Attorney General examined the validity of waiving mandatory duties required by Article 11.07, Subsection 3(b) of the Texas Code of Criminal Procedure.¹ *See Tex. Att'y Gen Op. No. JC-0044 (1999).* The opinion concluded that Article 11.07 subsection 3(b) creates a mandatory duty for the district clerk to serve the state attorney with a copy of Applicant's petition for habeas corpus relief by certified mail within 20 days. *Id. See also TEX. CODE CRIM. PROC. ART. 11.07 § 3(b) (West 2011).* The opinion concluded that the clerk's mandatory duty to serve the state attorney could be waived but only if the beneficiary of the duty (the state attorney) agreed. *See Tex. Att'y Gen Op. No. JC-0044 (1999).* The opinion explained the waiver could not be unilateral but had to be bilateral between duty holder and the beneficiary. *Id.*

Op. No. JC-0044 concerned a narrow subsection (11.07 3(b)) wherein there was only one duty holder (the clerk) and one beneficiary (the prosecutor) as set forth by TEX. CODE OF CRIM. PROC. ART. 11.07 § 3(b) (West 2011). *Tex. Att'y Gen Op. No. JC-0044 (1999).* This opinion request is distinguishable because it concerns a broad statute (Art. 15.17) wherein there are many duty holders and many beneficiaries. The main duty holder in Article 15.17 is the magistrate judge who is required to admonish the arrested person as to his legal rights. TEX. CODE OF CRIM. PROC. ART. 15.17(a) (West 2011). However, Article 15.17 also requires "**the person making the arrest**" (the peace officer) or "**the person having custody of the person**" (the sheriff) to perform certain duties within designated time periods. *Id.* [emphasis added.] Similarly, the main beneficiary in Article 15.17(a) is the arrested person but there are also many other beneficiaries including prosecutors and courts of other jurisdictions. Article 15.17(a) requires the magistrate judge to review the arrested person's record to determine if he is "currently on bail for a separate criminal offense" and determine if he is a "fugitive from justice." *Id.* The judge is required to notify appropriate officials in foreign jurisdictions as to the person's arrest as required

¹ Tex. Att'y Gen Op. No. JC-0044 See Tex. Att'y Gen Op. No. JC-0044 (1999) [Re: Whether, under the Texas Code of Criminal Procedure article 11.07, section 3(b), the prosecuting attorney and court clerk may agree to substitute another method of service for service by certified mail, return receipt requested (RQ-1227)].

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by "Article 51.13" of the Code of Criminal Procedure. *Id.* Furthermore, Article 15.17(a) solely allows the judge to release arrested persons on bail "if allowed by law."² *Id.* The aforementioned notification requirements benefit peace officers, prosecutors and courts with outstanding warrants since a person can be lawfully transferred; negating the need to spend resources to locate the fugitive. Ensuring that persons with outstanding warrants are transferred to face justice also benefits victims and the community at large.³ Finally, the magistrate judge also admonishes the defendant as to his right to contact his consulate as required by the Vienna Convention.⁴ Since it is mandatory to contact the consulate irrespective to the arrested person's wishes in regard to some signatory nations, the intended beneficiaries are the foreign nations that entered into the Vienna Convention with the United States.

In summary, Article 15.17(a) appears to involve many duty holders such as the magistrate judge, arresting peace officer and sheriff and several beneficiaries such as the person arrested, prosecutors who have secured indictments in cases with outstanding warrants, law enforcement personnel in jurisdictions with outstanding warrants, courts issuing the warrant for a fugitive from justice, victims of crimes, and signatory nations to the Vienna Convention. Should it be determined that Article 15.17(a) warnings are waivable, it would nevertheless be very cumbersome if not practically impossible to arrange for such a waiver since this would involve the coordination of so many distinct duty holders and beneficiaries. Considering the time constraints of the Article 15.17 hearing (which must occur within 48 hours of arrest for a felony and 24 hours of arrest for a misdemeanor) it appears that a multilateral waiver is a practical impossibility.

Based on the foregoing, a Texas Attorney General Opinion is requested in regard to the questions presented herein.

² Traditionally, bail could only be denied in Texas for capital murder cases. However, recent legislative amendments allow the denial of bail in cases involving family violence, human trafficking, and cases wherein the arrested person has previously been released on bond and violated conditions of release. See TEX. CODE CRIM. PROC. ARTS 17.152 to 17.153. Added by Acts 2011, 82nd Leg., R.S., Ch. 515, Sec. 2.01, eff. September 1, 2011. It is during the Art. 15.17 hearing that the magistrate judge is required by law to determine whether bail should be denied since the case involve human trafficking or a violation of conditions of release.

³ Failure to adequately perform the duties required by Article 15.17 can result in convicted felons not being required to serve their time but granted time credit for time spent released on bond. In *Ex parte Thiles*, 333 S.W.3d 148 (Tex. Crim. App. 2011) the defendant was convicted of aggravated sexual assault and sentenced to 16 years. The CCA gave the defendant credit for time served out on bond since he tried to surrender but was turned away.

⁴ *Pecina v. State*, No. PD-1095-10, 2012 Tex. Crim. App. LEXIS 143 (Tex. Crim. App. Jan. 25, 2012) ("*Pecina IV*"). The opinion clarifies that the standard Article 15.17 admonishments are often supplemented by admonishments required by the Vienna Convention.

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Thank you for your attention to this issue. Should you have any questions concerning this request, please feel free to contact Martin Lujan in my Capitol office at 512-463-0566.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete P. Gallego", with a long, sweeping horizontal flourish extending to the right.

Pete P. Gallego

PPG/ml