

CRIMINAL PROCEDURE

TEXAS JUSTICE COURT TRAINING CENTER



**First Edition
May 2018**

**Published by the
Texas Justice Court Training Center**

**An educational endeavor of the
Justices of the Peace and Constables Association of Texas, Inc.**

Funded by the Texas Court of Criminal Appeals

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FOREWORD

This deskbook on Criminal Procedure (1st ed. May 2018) represents the Texas Justice Court Training Center's ongoing commitment to provide resources, information and assistance on issues of importance to Texas Justices of the Peace and Constables and their court personnel, and continues a long tradition of support for judicial education in the State of Texas by the Justices of the Peace and Constables Association of Texas, Inc. We hope you will find it to be a valuable resource in providing fair and impartial justice to the citizens of Texas.

Thea Whalen
Executive Director

USER NOTES

This deskbook on Criminal Procedure (1st ed. May 2018) is intended to offer a practical and readily-accessible source of information relating to issues you are likely to encounter while performing your duties as a justice of the peace.

This deskbook is not intended to replace original sources of authority, such as the Code of Criminal Procedure. We strongly recommend that you refer to the applicable statutory provisions and rules when reviewing issues discussed in this book.

Rather than including the citations to cases in the text of the deskbook, we have listed only the case name in the text but have included the entire citation in the appendix of cases.

This deskbook covers general information about processing of criminal cases by a justice of the peace. Specific information about the prosecution of juvenile criminal defendants, magistrate duties in criminal cases, trial procedure, and assessment of court costs and fees may be found in other deskbooks.

TJCTC forms referenced in this manual are not mandatory for use, but TJCTC encourages their use to ensure that court forms are in compliance with statutory guidelines and due process requirements.

Please do not hesitate to contact us should you have any questions or comments concerning any of the matters discussed in *Criminal Procedure*.

Texas Justice Court Training Center
April 2018

CHAPTER 1: WHAT IS A CRIMINAL CASE?

A criminal action is prosecuted in the name of the State of Texas against the accused. *Code of Criminal Procedure Art. 3.02*. It is important to remember that the parties to the case are the State and the defendant, and even though the State may have a main witness, such as a peace officer or an alleged victim, that witness is **not** the party. The State has the obligation to prove its case against the defendant beyond a reasonable doubt. The defendant does **not** have to prove that they are not guilty. The Fifth Amendment of the United States Constitution says that the defendant is presumed innocent, that the defendant does not have to testify, and their failure to testify may not be held against them.

The court is not on the “team” with the prosecutor or the police (or the defendant, for that matter). The court is simply a neutral decider on issues of fact and law.

The court’s role in deciding a case fairly based on the law and the facts does not change simply because these cases are often considered “minor” and are “only” punishable by monetary fines and court costs. Courts must also resist pressure from any county officials to “maximize revenue,” since the function of the court is to dispense justice, not to be serve as a revenue generator. A criminal charge in justice court is **not** like an unpaid utility bill, with a presumption that the defendant owes some amount and needs to pay up, before being found guilty of an offense. A person is presumed innocent until proven guilty in every criminal case, including those in justice court, and it is crucial that a judge ensures due process in their court. Although the offenses may seem minor to some, they do carry real-life consequences that will not be minor in the lives of the defendants.



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CHAPTER 2: INITIATING A CRIMINAL CASE IN JUSTICE COURT

A. Jurisdiction

A court may not act unless it has **jurisdiction** over a case, meaning the power to hear and decide a case. Often, people think jurisdiction has to do with geographic location, but geographic location is primarily a **venue** issue, which we will discuss below. Of course, sometimes geography does play into jurisdiction; for example, a court only has jurisdiction over eviction cases if they are filed in the proper geographic location. There are two types of jurisdiction, **subject matter jurisdiction** and **personal jurisdiction**. A court must have both types of jurisdiction to be able to hear a case.

1. Subject Matter Jurisdiction

Subject matter jurisdiction defines what kind of cases a court can hear. For criminal cases, justices of the peace have subject matter jurisdiction over misdemeanor cases punishable by fine only, or punishable by a fine and, as authorized by statute, a sanction not consisting of confinement or imprisonment. *Texas Constitution, Art. 5, § 19; Code of Criminal Procedure Art. 4.11*. This means justice courts may not try offenses punishable by jail time.

A justice court may not try an offense that has a possible punishment of jail time, even if the justice court decides not to impose that punishment. Also, a person may end up committed to jail to satisfy the fine and costs assessed against them, but that doesn't mean the **offense** was punishable by jail. It was **punished** by fine and costs, which were **satisfied** by jail credit. For more information, see **Chapter 8**.

Often the criminal jurisdiction of justice court is described as “**Class C misdemeanors**.” However, Class C misdemeanors are a specific type of misdemeanors, defined by the Penal Code as having a fine range of up to \$500. *Penal Code § 12.23*. Many other offenses are misdemeanors that do not carry the possibility of jail, but with a different fine range, making them technically not Class C misdemeanors. One common example is speeding, which has a fine range of up to \$200. *Transportation Code § 542.401*.



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The catch-all term for offenses that do not carry the possibility of jail time is “**fine-only misdemeanors**.” Some offenses do carry additional sanctions, such as alcohol awareness courses for offenses under Chapter 106 of the Alcoholic Beverage Code. Also, some offenses carry suspension of driving privileges, or surcharges imposed under the Driver Responsibility Program in Chapter 708 of the Transportation Code. These offenses are still called “fine-only misdemeanors,” and these additional sanctions do **not** affect the jurisdiction of the justice court, since they are not confinement or imprisonment in jail.

Limitations on Fines Imposed by Justice Courts

There is no general dollar limitation on the amount of a fine that can be assessed by a justice court. A court is only limited by the statutory fine ranges for specific offenses. Previously, there was a \$500 maximum fine for justice courts, but the Attorney General struck it down as unconstitutional. *Attorney General Opinion DM-277 (1993)*. This means that despite a \$500 cap on “Class C misdemeanor” fines, a justice court has jurisdiction to impose higher fines where authorized in fine-

only offenses. One example of this is the offense of passing a school bus while loading and unloading children, which carries a maximum fine of \$1,250. *Transportation Code § 545.066*.

2. Personal Jurisdiction

Even if a court has subject matter jurisdiction, it may not act unless it also has personal jurisdiction over the parties. In a criminal case, personal jurisdiction is obtained by a court when a charging instrument alleging a criminal offense is filed with the court. *Trejo v. State*. There are two types of charging instruments that might be filed with the court: a **citation** (commonly called a 'ticket') or a **complaint**. If no charging instrument has been filed, the court has no jurisdiction and must not take any action on the case.



B. Venue and Transfer

Venue means the geographic place where a case may be tried. A justice court has jurisdiction to try a misdemeanor case even if venue is not proper, so long as the offense occurred within the same county as the justice court. However, the defendant could raise the issue of venue and have the case transferred to the proper court. Also, many counties have administrative transfer rules that require cases filed in a court that is not proper venue to be automatically transferred.

1. Proper Venue

Proper venue in a justice court criminal case is in either:

- 1) the precinct where the offense occurred;
- 2) the precinct in which the defendant resides (as long as it is in the county where the offense occurred); or
- 3) with written consent of the state and each defendant or their attorney, any other precinct in the county where the offense occurred.

If the judge in the precinct where the offense occurred is not available due to vacancy, recusal or disqualification, the next adjacent precinct in the same county is also proper venue. *Code of Criminal Procedure Art. 4.12*.

For example, say a defendant lives in Precinct 1 in Apple County, and commits an offense in Precinct 2. Either Precinct 1 or 2 would be proper venue. Now say the Precinct 2 judge is disqualified because she is the defendant's mother. Now Precinct 3, as the next adjacent precinct, is also a proper venue. Also, as noted, the defendant and the state could agree in writing for venue to be proper in any other precinct in Apple County..

2. When Venue or Jurisdiction is Unclear

Additionally, the Legislature has provided rules to cover situations where venue and/or jurisdiction might be unclear, many of which are quite rare in justice court prosecutions:

- 1) An offense committed on the boundaries of two or more counties, or within 400 yards of the boundaries of two or more counties, may be prosecuted in any one of those counties. Similarly, an offense committed on the premises of an airport situated in two counties may be prosecuted and punished in either county. *Code of Criminal Procedure Art. 13.04.*
- 2) An offense committed upon any river or stream that is the boundary of the State of Texas may be prosecuted in the county the boundary of which is upon the stream or river, and the county seat of which is nearest the place where the offense was committed. *Code of Criminal Procedure Art. 13.06.*
- 3) If property is stolen in one county and removed by the offender to another county, the offender may be prosecuted either in the county where the property was taken or in any other through or into which the property may have been removed. *Code of Criminal Procedure Art. 13.08.*
- 4) An offense committed on board a vessel that is at the time upon any navigable water within the boundaries of the state may be prosecuted in any county through which the vessel is navigated in the course of its voyage, or in the county where the voyage begins or ends. *Code of Criminal Procedure Art. 13.11.*
- 5) If an offense has been committed within the state and it cannot readily be determined within which county or counties the offense was committed, trial of the case may be held in the county in which the defendant resides, in the county in which defendant is arrested, or in the county to which defendant is extradited. *Code of Criminal Procedure Art. 13.19.*

3. Cases Filed in Improper Venue and Transfer



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If a case is filed that does not meet the above venue requirements, the court should accept the filing and proceed with the case. The defendant has a right to file a Motion to Transfer Venue to have the case moved to a proper venue. Additionally, each county is required to adopt administrative rules to provide for the transfer of criminal cases from precinct to precinct. *Code of Criminal Procedure Art. 4.12(e)*. For example, a county could adopt a rule mandating that courts automatically transfer a case to the court in the precinct where the offense occurred.

C. Charging the Defendant

1. Release on a Citation or “Ticket”

The general rule is that a sworn complaint charging a defendant with an offense is required for prosecution of a criminal case in justice court. However, when a defendant commits a fine-only offense (or certain other minor misdemeanors), instead of arresting them and booking

What Can the Court Do if Citations are Being Filed Improperly?

A frequent source of frustration for courts is peace officers filing citations in other courts which do not have venue, instead of with their court where venue is proper. Unless your county has developed administrative rules of transfer as described above, there really is not a remedy for this situation or a way for a court to “force” the officer to file them in the correct venue.

them in jail, a peace officer is authorized to release a defendant from custody on condition that they appear in court at a later date. *Code of Criminal Procedure Art. 14.06(b)*.

The defendant must be given a notice to appear, called a **citation** or “ticket.” A duplicate copy of the citation must be filed with the court, and that duplicate copy serves as a complaint to which the defendant may enter a plea. *Code of Criminal Procedure Art. 27.14(b)*. For “Rules of the Road” Transportation Code offenses, the defendant must be given at least 10 days from the date of the offense to appear in court and enter a plea to the offense. *Transportation Code § 543.006*.



If a duplicate copy of the citation has not been filed with the court, there is no personal jurisdiction, so the court must not take action. Do not make a copy of the defendant’s citation and file a case using that copy as the charging instrument! Frequently, the citation will have been inadvertently filed with another court. If your court now initiates a case based on the defendant’s copy, and the defendant pays your court, the other court may end up issuing a warrant for the defendant to be arrested on a matter that they have already dealt with! Instead, your court should take the defendant’s information, and contact them if and when a charging instrument is filed.



What About Electronic Data Files?

Additionally, if a court has only received an electronic data file containing information related to the citation, that does not constitute a “duplicate copy” and would not give the court jurisdiction over the case. On the other hand, an electronic version of the citation **is** sufficient to give a court jurisdiction.

If the defendant pleads not guilty to the citation, or if the defendant fails to appear by the appearance date on the notice to appear, a sworn complaint complying with the requirements of Art. 45.019 of the Code of Criminal Procedure must be filed. However, the defendant may waive this requirement and elect in writing to allow the prosecution on the citation instead. *Code of Criminal Procedure Art. 27.14(d)*.

2. Sworn Complaints



If a sworn complaint becomes necessary, it should be filed by a peace officer or prosecutor. Although a complaint filed by a clerk may be legally sufficient, it raises ethical concerns about the neutrality and impartiality of the court. For example, if the defendant files a motion to **quash** the complaint (a motion stating that the complaint is defective and should therefore be dismissed), would they expect a judge to rule fairly on the sufficiency of a complaint created by their own staff? Also, the filing of a sworn complaint stops the statute of limitations from running out, which benefits the State in the case.

The complaint may be sworn before any notary or officer authorized to administer oaths (including a clerk or judge), and must meet the requirements of Art. 45.019 of the Code of Criminal Procedure, which are:

- It must be in writing;
- It must commence “in the name and by the authority of the State of Texas”;
- It must state the name of the accused, if known, or if the name is unknown, must include a reasonably accurate description of the accused;

- It must show that the accused has committed an offense against the law of this state, or state that affiant has good reason to believe and does believe that accused has committed an offense against the law of this state;
- It must state the date on which the offense was committed and show that the offense is not barred by the statute of limitations (language that the offense was committed “on or about” a certain date is standard and acceptable);
- It must allege that the offense occurred in the county in which the complaint is being made;
- It must be signed by the complainant either by writing complainant’s name or making complainant’s mark;
- It must be signed by a credible person; and
- It must conclude with “against the peace and dignity of the State”.

Note that a clerk or judge signing a complaint to verify that the complainant was under oath and swears to the complaint does **not** raise the ethical concerns that the clerk or judge actually **signing the complaint as the complainant** does.

Culpable Mental State

The complaint should allege each element of the offense, including that the defendant acted with the **culpability** required by the definition of the offense. A person commits an offense only if the person voluntarily engages in conduct, including an act, an omission, or possession (such as a minor possessing alcohol). *Penal Code § 6.01(a)*.

Most offenses require a “**culpable mental state**”, or “state of mind” (also sometimes called *mens rea*) that the defendant must have toward the act committed to be legally responsible. A culpable mental state is an element of every Penal Code offense except when the statute clearly states otherwise. The culpable mental states, in order from most to least strict are intentionally, knowingly, recklessly, and with criminal negligence. *Penal Code §§ 6.02, 6.03*.

Offenses not found in the Penal Code do not have a culpable mental state unless the statute includes one. Offenses that do not require a culpable mental state are called **strict liability offenses**. A very common example is speeding. So, if a defendant is traveling 65 mph in a 55 mph zone, they are guilty of the offense, even if they are unaware of the speed limit or of their own speed.

If recklessness or criminal negligence is an element of an offense, the complaint **must** allege what act or acts of the defendant show recklessness or criminal negligence. *Code of Criminal Procedure Art. 21.15; Crume v. State*.

An example of an offense frequently filed in justice court that requires this specific allegation of conduct for criminal negligence is Parent Contributing to Nonattendance, since the statute requires that the person acted with criminal negligence. Education Code § 25.093. This means that a complaint for Parent Contributing to Nonattendance must show specifically how the parent was criminally negligent in contributing to the nonattendance of the student. For example, the school might show that the parent allows the student to stay home whenever they want. Or that the parent refuses to meet to discuss the nonattendance with school officials.

Notice of the Complaint

A defendant is entitled to notice of a complaint against the defendant not later than the day before the date of any proceeding in the prosecution of the defendant under the complaint. The defendant may waive the right to notice. *Code of Criminal Procedure Art. 45.018(b)*. However, if the defendant does not object to a defect, error, or irregularity of form or substance in a complaint before the day of trial, the defendant waives and forfeits the right to object to the defect, error, or irregularity. A trial court may require that an objection to a charging instrument be made at an earlier time. *Code of Criminal Procedure Art. 45.019(f)*.

If the defendant does make an objection, or, as described above, makes a “motion to quash” the complaint, the court should set the matter for a hearing. A complaint in justice court does not have to be as particular as in county and district court, and it will not be dismissed due to mere informality or technicality. *Code of Criminal Procedure Art. 21.23; Vallejo v. State*.

Complaints Filed by Private Citizens

Private citizens can legally file criminal complaints directly with the justice court. In practice, this can be quite problematic because the complaint must establish probable cause that the defendant committed the offense, and most private citizens will not know how to draft a proper complaint. Additionally, if a prosecutor isn’t interested in prosecuting the case, it will be impossible for the defendant to be convicted.

If a private citizen wishes to file a criminal complaint, the best practice is to recommend they speak with a prosecutor or law enforcement agency. If they insist on filing a complaint, the judge should determine if it establishes probable cause. If it does not, no case has been initiated. On the other hand, if it does establish probable cause, assign the complaint a cause number, and summon the defendant in to enter a plea. Additionally, the court should notify the prosecutor of the filing.

3. Statute of Limitations

For misdemeanor cases, a complaint must be filed within two years from the date on which the offense was committed. When determining if the statute of limitations has expired, the day the offense was committed and the day the complaint was filed are **not** counted. *Code of Criminal Procedure Arts. 12.02, 12.04*. After two years, the offense is barred by the statute of limitations and there can be no prosecution.



Citations and the Statute of Limitations

A citation does not serve to “toll,” or stop the statute of limitations from running; only a sworn complaint does this. *Code of Criminal Procedure Art. 12.05*. This is the reason the Legislature added the requirement that a sworn complaint must be filed if the defendant does not appear by their appearance date – many cases were lost due to the statute of limitations running out since only a citation had been filed.

What if a Case is Outside the Statute of Limitations?

If a case is outside the statute of limitations, the prosecutor should file a motion to dismiss the case, and it is unethical for them to continue to attempt to prosecute it. It is not “up to the defendant” to raise the issue of the statute of limitations. However, a judge is not authorized to dismiss a case due to the expiration of the statute of limitations without a motion from the prosecutor.

D. Docketing the Case

Each justice of the peace is required to keep a docket and enter the proceedings in each criminal case filed with the court, or direct the clerk to do so. The information in the docket may be processed and stored electronically at the judge’s discretion. *Code of Criminal Procedure Art. 45.017*.

The docket shall contain the following information:

- 1) the style and file number of each criminal action;
- 2) the offense charged;
- 3) the plea offered by the defendant and the date the plea was entered;
- 4) the date the warrant, if any, was issued and the return made on the warrant;
- 5) the date the examination or trial was held, and if a trial was held, whether it was by a jury or by the judge;
- 6) the verdict of the jury, if any, and the date of the verdict;
- 7) the judgment and sentence of the court, and the date each was given;
- 8) the motion for new trial, if any, and the court’s ruling on the motion; and
- 9) whether an appeal was taken and, if so, the date of that action.

The docket should be detailed enough that a brand new judge and clerk could walk into the office and process a case properly based on its history.

If a court does not provide online Internet access to the court’s criminal case records, the clerk **must** post criminal court docket settings in a designated public place in the courthouse as soon as the court notifies the clerk of the setting. *Code of Criminal Procedure Art. 17.085*.

E. Giving Notice to the Defendant

There is no requirement that the court give the defendant notice that a citation has been filed. This makes sense because a duplicate copy with the date by which they must appear was given to them when they were released from custody by the officer. Although the practice is discouraged, courts should be aware that officers occasionally mail citations to defendants, so those defendants may not have gotten notice of the charge. To solve that problem, instead of mailing the citations to the defendant, officers should just file sworn complaints.



Notification to the Defendant of a Sworn Complaint

If a sworn complaint that complies with Art. 45.019 of the Code of Criminal Procedure is filed, the court should notify the defendant that they are facing a criminal charge.



Although Art. 45.014 authorizes the judge to issue an arrest warrant once a complaint based on probable cause is filed, the best practice is to issue a **summons** to the defendant notifying them of the charge, and giving them the date by which they must appear. A judge is explicitly authorized to issue a summons anytime a warrant is legally allowed. *Code of Criminal Procedure Art. 15.03.*

CHAPTER 3: IF THE DEFENDANT DOES NOT APPEAR

A justice court has several “tools in the toolbox” if a defendant does not appear by their appearance date to enter a plea in the case. These tools will vary in effectiveness from case to case and are never a “mandatory” step in securing the defendant’s appearance. As such, the procedures discussed below are more of a menu of possible options, rather than a step-by-step flowchart.

A. Courtesy Letters

One option that many justice courts use when a defendant doesn’t appear as directed is a courtesy letter. This is just a reminder notice to the defendant that they have a pending case that needs to be addressed. There are no specific requirements to send a courtesy letter, and no specific contents are required. However, note that there **is** a specific notice, discussed below, which must be sent before a warrant may be issued. This means that the court **may not** just send a basic courtesy letter that does not meet those requirements, and then issue a warrant.

B. Arrest Warrant or Capias

To secure the defendant’s presence in court, the judge can issue an arrest warrant. Generally, an arrest warrant results in a defendant being taken to jail and brought before a magistrate. For more information on that process, see the *Magistrate Duties* deskbook. However, whenever a warrant is issued on a case filed in a justice court, the warrant should direct the officer executing the warrant to bring the defendant directly to the court. *Code of Criminal Procedure Art. 45.014(b)(3)*.

A capias is an order to a peace officer to bring a defendant directly before the court issuing the capias. *Code of Criminal Procedure Art. 23.01*.

Note that there is a separate writ that a court may issue called a **capias pro fine**. This is **not** the same as a capias, though some people incorrectly use the terms interchangeably. A capias pro fine may only issue **after** a judgment has been rendered. See page 63 for more discussion of capias pro fines.

So, for cases filed in justice court, practically speaking, there isn’t a difference between an arrest warrant and a capias. Additionally, the Court of Criminal Appeals has ruled “that for purposes of constitutional scrutiny, there is no substantive difference between an arrest warrant and a capias...” *Sharp v. State*. Therefore, TJCTC recommends following all rules for issuance of a warrant when issuing a capias as well.



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Sworn Complaint Required Before Issuing Warrant or Capias

An arrest warrant or capias **may not** issue solely based on the filing of a citation or “ticket” in justice court. A sworn complaint **must** be filed before a warrant or capias may be issued.

1. Warrant Based on Defendant Not Appearing

A warrant **may not** be issued if the defendant fails to appear by their appearance date, even after a sworn complaint has been filed, until:

- 1) a notice is given to the defendant by telephone or by mail that includes:

- a date and time, occurring within the 30-day period following the date that notice is provided, when the defendant must appear before the justice or judge;
- the name and address of the court with jurisdiction in the case;
- information regarding alternatives to the full payment of any fine or costs owed by the defendant, if the defendant is unable to pay that amount; and
- an explanation of the consequences if the defendant fails to appear before the justice or judge as required by this article; **and**

2) the defendant fails to appear before the justice or judge as required by that notice.

Code of Criminal Procedure Art. 45.014(e).



KEY
POINT

Forms

Forms related to warrants, including the above notice, are available under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>. See also the flowchart located on page 22 of this volume.

A defendant who receives this notice may request an alternative date or time to appear before the justice or judge if the defendant is unable to appear on the date and time included in the notice. *Code of Criminal Procedure Art. 45.014(f)*. Additionally, if a defendant voluntarily appears to resolve the failure to appear, the judge **must** recall the warrant. *Code of Criminal Procedure Art. 45.014(g)*.

2. Contents of the Warrant

A warrant issued under Art. 45.014 is sufficient if:

- 1) it is issued in the name of "The State of Texas";
- 2) it is directed to the proper peace officer or some other person specifically named in the warrant;
- 3) it includes a command that the body of the accused be taken, and brought before the authority issuing the warrant, at the time and place stated in the warrant;
- 4) it states the name of the person whose arrest is ordered, if known, or if not known, it describes the person as in the complaint;
- 5) it states that the person is accused of some offense against the laws of this state, naming the offense; **and**
- 6) it is signed by the justice or judge, naming the office of the justice or judge in the body of the warrant or in connection with the signature of the justice or judge.

Code of Criminal Procedure Art. 45.014(b).

C. VPTA and FTA

In some situations, a defendant who fails to appear and enter a plea may be charged with a new criminal offense for that conduct. The two potential offenses are Violation of Promise to Appear (VPTA) and Failure to Appear (FTA). It is critical that courts understand what conduct makes up these offenses and apply the proper procedure if these charges are filed.



KEY POINT

VPTA and FTA are brand new criminal cases, with the defendant entitled to all of the protections that go along with that, not merely “late fees” or penalties tacked onto an existing case.

Often, VPTA or FTA charges are used as a “bargaining chip” in plea bargaining, with the offer being “plead guilty to the original offense and we will dismiss the VPTA/FTA” (or vice versa). Plea bargaining is the role of the prosecutor, and the judge must **never** participate in any plea bargaining or negotiating with the defendant.

1. VPTA

As discussed above, a peace officer has the right to arrest a defendant and take them to jail for most offenses, even those punishable by fine only. In fact, the U.S. Supreme Court, in a case originating in Lago Vista, TX, ruled that a person’s rights were not violated by being taken to jail following an arrest for not wearing a seat belt! *Atwater v. Lago Vista*. However, in practice, almost every incident where an officer is charging a defendant with a fine-only misdemeanor results in the defendant being released upon signing a citation and promising to appear in court.



FTA/VPTA vs. OMNI

Note that a new criminal charge of VPTA or FTA is unrelated to reporting a defendant to OMNI for failing to appear. Reporting defendants to OMNI is discussed on page 15.

Under Texas law, only three traffic offenses (speeding, open container, and the “texting ban” passed in 2017) **require** an officer to offer the option to sign a citation instead of being taken to jail and booked (as long as the defendant doesn’t have an out of state DL or vehicle registration). *Transportation Code § 543.004*.

The elements of the offense of Violation of Promise to Appear are:

- 1) being issued a citation for a Rules of the Road offense,
- 2) signing the citation, and
- 3) then “willfully violating” the promise to appear represented by that signature.

Transportation Code § 543.009.

What is a Rules of the Road Offense?

A common error is charging VPTA when the original offense which the defendant did not appear for was **not** a Rules of the Road offense. “Rules of the Road” refers to Subtitle C of Title 7 of the Transportation Code, which consists of Chapters 541-600. If an offense isn’t located in that range of chapters, it is **not** a Rules of the Road offense, and therefore the defendant does **not** commit VPTA by not appearing by their appearance date.



COMMON PITFALL

Many offenses that involve use of a motor vehicle are not included in Rules of the Road. These include:

- 1) No Insurance (Chapter 601)
- 2) DWLI and other DL Offenses (Chapter 521)
- 3) Registration Offenses (Chapter 502)
- 4) Weight Offenses (Chapter 622)

Note also that the defendant must have signed the citation promising to appear. A defendant who, for example, is mailed a citation and then never appears does **not** commit VPTA by not appearing by their appearance date. Keep in mind that the fact that VPTA is not an option does **not** stop a court from using the other tools described in this chapter to secure the defendant’s appearance.

2. FTA

Another often-misunderstood offense is the offense of Failure to Appear.

One source of confusion is that a defendant can “fail to appear” without committing the offense of Failure to Appear. In this volume, the offense title will be capitalized, so any discussions of “failure to appear” just means the fact that the defendant didn’t show up, and not the specific criminal offense of Failure to Appear.

Failure to Appear is also referred to as Bail Jumping, and has three elements under the Penal Code:

- The defendant must have been in custody;
- The defendant was released from custody on condition that they subsequently appear; **and**
- The defendant intentionally or knowingly failed to appear as required.

Penal Code § 38.10.

What Does “In Custody” Mean?

For purposes of this statute, a defendant is “in custody” when they have been detained by a peace officer, even if they are issued a citation rather than being booked into jail.

How is a Defendant Released on Condition That They Subsequently Appear?

The most common error regarding Failure to Appear is treating it as “the defendant didn’t show up when we told them to.” To commit the crime of Failure to Appear, the defendant must have secured their release on the condition that they subsequently appear. There are two main ways that a defendant can do that: by posting bail, or by signing a promise to appear. If a defendant hasn’t either posted bail (which can include a personal appearance bond as described on page 26) or signed a promise to appear that secured their release from custody, new criminal charges of Failure to Appear would **not** be applicable.

3. Initiating Charges of VPTA or FTA

The practice in most Texas counties is that the clerk will generate a sworn complaint when the defendant commits the offense of VPTA or FTA. The clerk does have personal knowledge of the offense, and the complaint is legally sufficient. However, as described above, the court filing criminal charges against the defendant, and then hearing the charges, raises at least the appearance of impropriety, and is best avoided. The best practice is for either law enforcement or a prosecutor to file the complaint for VPTA or FTA. If the clerk of the court does file the complaint, best practice is for the judge to either recuse or exchange benches on any matters regarding the VPTA or FTA.



What if VPTA and FTA Both Seem Appropriate?

In some situations, the defendant’s conduct matches the elements of both VPTA and FTA. Take the example of a defendant who is pulled over for speeding and signs the citation promising to appear in

court, and then subsequently does not appear. The elements of VPTA are met, since the defendant signed a citation for a Rules of the Road offense, and then subsequently failed to appear. The elements of FTA are also met, since the defendant was released from custody on condition that they subsequently appear, and then intentionally and knowingly failed to appear.

The issue of whether the defendant's failure to appear was "willful" for VPTA or "intentional or knowing" for FTA is an issue that must be proven beyond a reasonable doubt by the State at trial, but the fact that the defendant did not appear is sufficient evidence to charge them with the offense.

So Could the Defendant be Charged With Either Offense? No.

Since VPTA is a more specific offense, if the defendant's conduct matches VPTA, the defendant could **not** instead be charged with FTA. *Azeez v. State*. This is even more important due to the differing penalties. VPTA carries a maximum fine of \$200 plus court costs, while FTA is a Class C misdemeanor, with a maximum fine of \$500 plus court costs. Ironically, the court costs are higher on VPTA since it is a Rules of the Road offense and therefore carries the \$30 state traffic fee court cost. For more information on fines, fees, and court costs, see the *Fees & Costs* deskbook.

4. Common Situations Where VPTA or FTA Are Not Applicable

As discussed, courts sometimes incorrectly generate complaints for VPTA or FTA where the elements of the offense have not been met. This is another reason why it is better for law enforcement or a prosecutor to make the filing decision: so that the court is not implicated if a defendant is wrongly charged. Below are several of the more frequent scenarios where new criminal charges are not applicable.

The Defendant Was Charged Via Complaint and Never Appears

If, instead of a citation being issued to the defendant, the defendant is initially charged with an offense with the filing of a sworn complaint in justice court, the court should summon them to appear in court, [as discussed on page 9](#). If the defendant fails to appear as summoned, the elements of VPTA (defendant never signed a citation) or FTA (defendant was never in custody) have **not** been met, so it would be inappropriate for a new charge to be filed against the defendant. Instead, other tools, which could include an arrest warrant [as described on page 10](#), should be used to secure the defendant's appearance.

The Defendant Does Not Appear for a Pretrial Hearing to Negotiate with a Prosecutor

A defendant has no obligation to appear at a pretrial hearing and negotiate with a prosecutor before having a trial in their criminal case. If a defendant is set on a pretrial docket and doesn't appear for the pretrial hearing, the court could either reschedule the pretrial, or move forward with setting the defendant on the trial docket (which must be a jury trial unless the defendant has waived a jury trial in writing). It is not appropriate to charge the defendant with a criminal offense for failing to negotiate with the State.

The Defendant Pleads Not Guilty and Doesn't Appear on the Trial Date

Once a defendant appears and enters a plea, even if the plea is not guilty, they have satisfied their obligation to appear that was created when they posted bond or signed a citation. If they then

subsequently fail to appear for trial, the elements of FTA or VPTA have not been met. However, upon a plea of not guilty, the court may require the defendant to post a personal appearance bond, [as discussed on page 26](#). *Code of Criminal Procedure Art. 45.016*.

This appearance bond secures the defendant's release from custody, and is conditioned that they appear at trial. Therefore, if the defendant doesn't appear at trial in violation of the posted appearance bond, the elements of FTA have now been met and an FTA charge would be appropriate. Note that this situation meets the definition of FTA even if the original offense was a Rules of the Road offense, because the defendant honored the promise they made when they signed the citation with their original appearance. That means that only FTA, and not VPTA, has been committed, and so the discussion above about FTA vs. VPTA and *Azeez* would **not** apply.

On the other hand, if an appearance bond was **not** posted, the defendant was **not** released from custody on condition that they subsequently appear. That means that FTA would not be appropriate, and the court would have to take other action, most commonly issuance of a *capias*, as described above.

The Defendant is on Deferred Disposition/DSC and Does Not Appear for a Show Cause Hearing

To be placed on deferred disposition or DSC, a defendant must first appear and enter a plea of guilty or *nolo contendere*. *Code of Criminal Procedure Arts. 45.051, 45.0511*. Charges of VPTA or FTA for conduct after a defendant has pled guilty or *nolo contendere* are not appropriate, since the defendant met their obligation of appearance by entering their plea. If a defendant doesn't comply with the court's orders, and doesn't appear at a show cause hearing, the consequence is that they are convicted of the original offense. The judgment can then be enforced against the defendant as described in [Chapter 8](#) of this volume. For more information on deferred disposition and DSC, see [Chapter 5](#) of this volume.

The Defendant is on a Payment Plan and Misses a Payment

As discussed above, once a defendant has pled guilty or *nolo* (or been convicted at trial), any later conduct cannot meet the requirements for new VPTA or FTA charges. Tools to enforce criminal judgments are discussed in [Chapter 8](#), and VPTA and FTA are not among them.

D. Reporting to OMNI for Failure to Appear

Chapter 706 of the Transportation Code creates a mechanism, referred to as "OMNI," by which defendants who do not comply in criminal cases may have their driver's license flagged for non-renewal. The term "OMNI" comes from the company Omnibase, with whom DPS has contracted to administer this program. Omnibase then enters into contracts with individual counties to process referrals from those counties. If reported to OMNI, the defendant will not be able to renew their license until the issue is resolved and, in most cases, until the defendant pays a \$30 fee, commonly called the "OMNI fee." Note that OMNI applies to all criminal cases, not merely those arising under the Transportation Code.



KEY
POINT

1. When is a Defendant Reported to OMNI?

There are two reasons why a defendant may be reported to OMNI: they fail to appear pursuant to a citation or complaint or they fail to satisfy a judgment that has been rendered against them. *Transportation Code § 706.004(a)*. In this section, we are dealing with reporting defendants based on a failure to appear. [For information on OMNI as it applies to failure to satisfy a judgment, see page 61.](#)

A defendant fails to appear pursuant to a citation or complaint if:

- 1) They do not appear by an appearance date on the citation they received;
- 2) They do not appear by the appearance date on a summons issued when a complaint is filed;
or
- 3) They do not appear at trial following the filing of a sworn complaint.



KEY
POINT

How is OMNI Related to FTA or VPTA Charges?

Note that OMNI is completely independent from new charges of FTA or VPTA, [discussed on page 11](#). It is **not** required that a defendant first be charged with VPTA or FTA to be reported to OMNI. OMNI may be appropriate in many situations where new criminal charges of FTA or VPTA are not appropriate. Also, it **is** permissible for a defendant to be reported to OMNI and for new criminal charges of FTA or VPTA to be filed at the same time.

[It is **not** required that a sworn complaint is filed before a defendant is reported to OMNI for failing to appear.](#)

A defendant may **not** be reported to OMNI if:

- 1) They do not have a driver's license. OMNI is not a suspension order, or an order to not issue a DL, it is merely a tool to stop a defendant from renewing their DL.
- 2) They do not appear at a show cause hearing on deferred disposition/DSC. That is not a failure to appear based on a citation or complaint. The defendant's obligation to appear on the citation or complaint was satisfied by the defendant's plea of guilty or nolo.

What Must the Report to OMNI Contain?

The report to OMNI should contain the defendant's name, date of birth and DL number; the offense they are charged with; the reason they are reported to OMNI, and any other information required by OMNI or DPS. *Transportation Code § 706.004(b)*.

2. How Does a Defendant Get Out of OMNI?

When Release from OMNI is Required Upon Payment or Waiver of OMNI Fee:

The defendant must be released from OMNI upon payment of the \$30 OMNI fee (unless it is waived) **and**:

- 1) a plea of guilty or nolo contendere;
- 2) a plea of not guilty and the posting of an appearance bond [as described on page 26](#); or
- 3) dismissal of the case (other than dismissal with prejudice by prosecutor due to lack of evidence).

Transportation Code § 706.005(a).



Waiver of the OMNI Fee for Indigent Defendants

The \$30 OMNI fee **must** be waived if the court finds that the defendant is indigent.

Although a court has discretion regarding a finding of indigence, a defendant is presumed indigent for the purposes of OMNI if the person:

- is required to attend school full time under Section [25.085](#), Education Code;
- is a member of a household with a total annual income that is below 125 percent of the applicable income level established by the federal poverty guidelines; or
- receives assistance from certain governmental assistance programs.

Transportation Code 706.006(d).

When Release from OMNI is Required Without Payment or Waiver of \$30 OMNI Fee

The defendant must be released from OMNI without paying the \$30 OMNI fee if:

- the defendant is acquitted;
- the case is dismissed with prejudice by the prosecutor due to lack of evidence;
- the case was reported to OMNI in error; or
- the records of the underlying case no longer exist.

Transportation Code § 706.005(b).

Notifying OMNI

The court should immediately notify OMNI once the defendant has met one of the above conditions for release from OMNI. Upon receiving notice that the defendant is cleared, OMNI must immediately release the defendant's driver's license for renewal. *Transportation Code § 706.005.*

E. Pre-Trial Collections

Art. 103.0031 of the Code of Criminal Procedure authorizes a commissioner's court to enter into a contract with an entity to collect money due to the county in criminal cases. This section will discuss the applicability of Art. 103.0031 to cases where the defendant has failed to appear as directed and there is not a judgment in the case. [For information on cases where there is a judgment against the defendant, see page 61.](#)

When is a Case Eligible for Referral to Pre-Trial Collections?

The definition of failure to appear is broader under this section than what was discussed in the above sections on VPTA, FTA and OMNI, and covers **any** situation where the defendant has lawfully been directed to appear. *Code of Criminal Procedure Art. 103.0031(a)(2).* The defendant can be referred to collections once the case is 60 days past due, which for purposes of cases where the defendant hasn't appeared is the 61st day after the date on which the defendant was to appear. *Code of Criminal Procedure Art. 103.0031(f).*

Collection Fee

The collection entity may add a 30% fee to all amounts collected on cases that are referred for collections. However, this fee is only assessed on money actually collected. So if the defendant didn't appear, was referred to collections, and was later found not guilty or the case was dismissed, the collection entity would not be able to collect any money in the case.



KEY
POINT

Communications in Pre-Trial Collections Cases

It is critical to remember that a defendant doesn't actually owe money in a criminal case unless there is a judgment, which can only occur once a defendant pleads guilty or nolo contendere or is proven guilty beyond a reasonable doubt at trial.



COMMON
PITFALL

Communications to a defendant in a case that is referred to collections pre-judgment should **never** state that an amount is due, or that failure to pay will result in a warrant for the defendant's arrest. Any communications must also contain a notice that payment will result in a criminal conviction, and that the defendant has a right to plead not guilty and have a trial in the case. Additionally, they must contain information on alternative methods of satisfaction of fines and costs, such as community service and waiver. *Code of Criminal Procedure Art. 103.0031(j)*.

F. Scofflaw Program

The scofflaw program is a mechanism by which a defendant will not be allowed to renew registration of their motor vehicle until their outstanding criminal case is resolved, whether it be failure to appear or failure to satisfy the judgment. "Failure to appear" under this program is broadly defined, as it is under referral to collections. The court refers the case to DPS or the county assessor-collector if the defendant fails to appear as directed.

The referral to the scofflaw program expires two years after the referral, and the defendant may not be referred on new failures to appear or satisfy judgments unless the case prompting the original referral has been resolved. *Transportation Code § 502.010(a-1)*. This means that courts should remain active in pursuing compliance after referring a case to the scofflaw program, rather than passively sitting back and waiting for the matter to be resolved.



KEY
POINT

Removal from Scofflaw Program

The defendant must resolve the matter, and may be assessed a \$20 fee to be released from the program unless the court determines they are economically unable to pay, or otherwise finds good cause not to impose the fee. *Transportation Code § 502.010*.

G. Non-Resident Violators Compact (NRVC)

The Non-Resident Violators Compact (NRVC), found in Chapter 703 of the Transportation Code, is an agreement among 44 states to suspend the driver's license of individuals who receive citations while out-of-state, and then fail to appear to resolve the case. This was an attempt to resolve the issue of defendants assuming there would be no consequences for failing to respond to citations received while traveling out of state.

The states which do not participate in the NRVC are Alaska, California, Michigan, Montana, Oregon, and Wisconsin.

The NRVC only applies to traffic violations, which are not defined under the compact. TJCTC recommends treating "traffic violations" as equivalent to "Rules of the Road" violations. [For a definition of Rules of the Road violations, see page 12.](#)

If a defendant with an out-of-state license fails to appear by their appearance date on a traffic violation in justice court, the court must report that failure to DPS within six months of the date of the citation. DPS then reports the failure to the defendant's home jurisdiction. That jurisdiction then suspends the defendant's license until they receive a report that the defendant has complied with the terms of the citation. Additionally, the defendant will have to pay a reinstatement fee, which in Texas is \$100.

H. DL Nonrenewal on Failure to Appear for Driver's License Offenses

A justice court "shall report to the [Department of Public Safety] a person charged with a traffic offense under [Chapter 521 of the Transportation Code] who does not appear before the court as required by law." *Transportation Code § 521.3452*.

Therefore, if a defendant fails to appear for any of the following offenses, it shall be reported to DPS:

- No driver's license
- Expired driver's license
- Violation of license restriction
- Violation of occupational license requirements
- Fictitious driver's license
- DWLI

DPS may not renew the person's driver's license, or may not issue them one if they don't currently have one, until the matter is resolved. The court **shall** report the final disposition of the case to DPS.

I. Bond Forfeiture

Bond forfeiture is a procedure where a defendant suffers a financial penalty for failing to appear under the terms of their bond. A bond may have been set for the defendant's appearance in one of two situations: 1) by a magistrate while performing the Art. 15.17 hearing, where the magistrate informs the defendant of their rights, or 2) by the judge after the defendant enters a plea of not guilty to a criminal offense. For more information on setting bond at an Art. 15.17 hearing, please see the *Magistrate Duties* deskbook. [For more information on appearance bonds set by the judge, see page 26 of this volume.](#)



KEY
POINT

The amount of money forfeited is a penalty paid by the defendant, and does not result in a criminal conviction, and does not substitute for the fine and costs that will be due in the event that the defendant gets convicted of the criminal offense. *General Bonding & Casualty Ins. Co. v. State*. Cash bonds posted as a condition of deferred disposition may be used to pay the fine and costs under certain circumstances, [see page 31 for details](#).

The procedure for enforcing the bond forfeiture is different depending on if the bond is a personal bond, a cash bond, or a surety bond. For a full discussion of the various types of bonds, see the *Magistrate Duties* deskbook.

1. The Judgment Nisi

When the defendant has not appeared as directed, the name of the defendant shall be called distinctly at the courthouse door. *Code of Criminal Procedure Art. 22.02*. If the defendant does not appear within a **reasonable time** after the defendant's name is called, judgment shall be entered in favor of the State of Texas in the amount of the bond. How long the "reasonable time" is for the defendant to appear will depend upon the facts of the case, but is more than just being three to five minutes late. *Meador v. State*.

The judgment should state how much of the amount is owed by the defendant (called the **principal** on a surety bond), and how much is owed by any sureties. The judgment must state that it will be made final unless good cause is shown why the defendant did not appear. This first judgment entered forfeiting a bail bond is not a final judgment. It is temporary (interlocutory) and is referred to as a **judgment nisi**. *Jackson v. State*. *Nisi* is Latin for "unless", so this is literally a judgment that will be made final "unless" the defendant/surety can show good cause why they should not be bound for the forfeiture.

A. Issuance and Service of Citation

After rendering the judgment *nisi*, the court must issue a citation, in the same form as in civil cases, to the sureties, if any, notifying them of the judgment *nisi* and requiring them to appear and show cause why the judgment should not be made final. *Code of Criminal Procedure Art. 22.03*. A citation must be served upon the defendant if the defendant posted a cash bond. *Code of Criminal Procedure Art. 22.035*. The citation must have a copy of the bond and a copy of the judgment *nisi* attached. *Code of Criminal Procedure Art 22.04*.

Sureties are entitled to notice by service of citation in the same manner as in civil cases. After service, the surety must respond in the same time and manner required in civil cases. The officer executing the citation shall return the same as in civil actions. If the defendant posted a surety or personal bond, and the defendant's address appears on the bond, notice must be sent to the defendant by first class mail to that address, or to the last known address. *Code of Criminal Procedure Art. 22.05*. For more information on citations, answers, and returns in civil cases, please see the *Civil* deskbook.

The case then should be placed on either a *scire facias* (which means "to make known" or in other words "to show cause") docket or the civil docket. The case should be styled in the name of the State of Texas as plaintiff, and the principal (defendant) and any sureties as defendants. Except as otherwise provided, the proceedings shall be governed by the same rules governing other civil suits. *Code of Criminal Procedure Art. 22.10*.

3. Determination of Final Judgment

The defendant, the sureties, if any, and the state can reach a settlement on the liability on the bond, and the court may approve the settlement. *Code of Criminal Procedure Art. 22.125*. If there is no

settlement, the court should determine if the defendant and the sureties should be **exonerated**, or let off the hook, for the forfeited amount.

The statute is very clear that the following reasons, and no others, will support **exoneration** on the bond (meaning the principal and/or sureties are not liable) in a justice court case:

- 1) The bond is not valid and binding;
- 2) The principal (defendant) died before the forfeiture;
- 3) Sickness of the principal or other uncontrollable circumstance;
- 4) Incarceration of the defendant at the time of or within 180 days of the failure to appear.

Code of Criminal Procedure Art. 22.13.

The only area open for discretion is what would count as an “uncontrollable circumstance.”

Incarceration as a Defense

Incarceration is only a defense if the defendant was incarcerated at the time of the failure to appear, **and** has a legal excuse if they fail to appear at the time the forfeiture was made final. If the defendant has no excuse for the original failure to appear, and then becomes incarcerated and does not appear for the hearing on the judgment *nisi*, they may not later be exonerated. *Gourley v. State; Fernandez v. State.*

Final Judgment

If one of the above four excuses is not applicable, or the defendant or sureties fail to appear at the hearing, the judgment of forfeiture shall be made final, and is now a civil judgment which can be enforced via writs of execution and other tools used to enforce civil judgments. For more information on enforcing civil judgments, see the *Civil* deskbook.

Bonded sureties must pay the judgment within 31 days, or the bond they have posted will be used to satisfy the judgment. *Occupations Code § 1704.204.*

Other Issues – Remitting the Bond to the Surety

If the surety makes a written request for the return of the bond after the judgment *nisi* is entered (but before final judgment) **and** the defendant has been released on new bail or the original criminal case is dismissed, the court shall order the amount of the bond **remitted** (returned to the surety) after subtracting:

- 1) costs of court;
- 2) costs to the county for return of the principal; and
- 3) interest accrued on the bond amount.

Code of Criminal Procedure Art. 22.16.

Other Issues – Capias for the Defendant

If a forfeiture of bond is ordered, a capias shall be issued immediately for the re-arrest of the defendant. When the defendant is arrested, the court may require the defendant to make a cash bond in the amount set by the court. However, if the forfeiture is set aside due to sickness of the principal or “uncontrollable circumstance”, the defendant and the sureties shall remain bound under the original bond. *Code of Criminal Procedure Art. 23.05.*

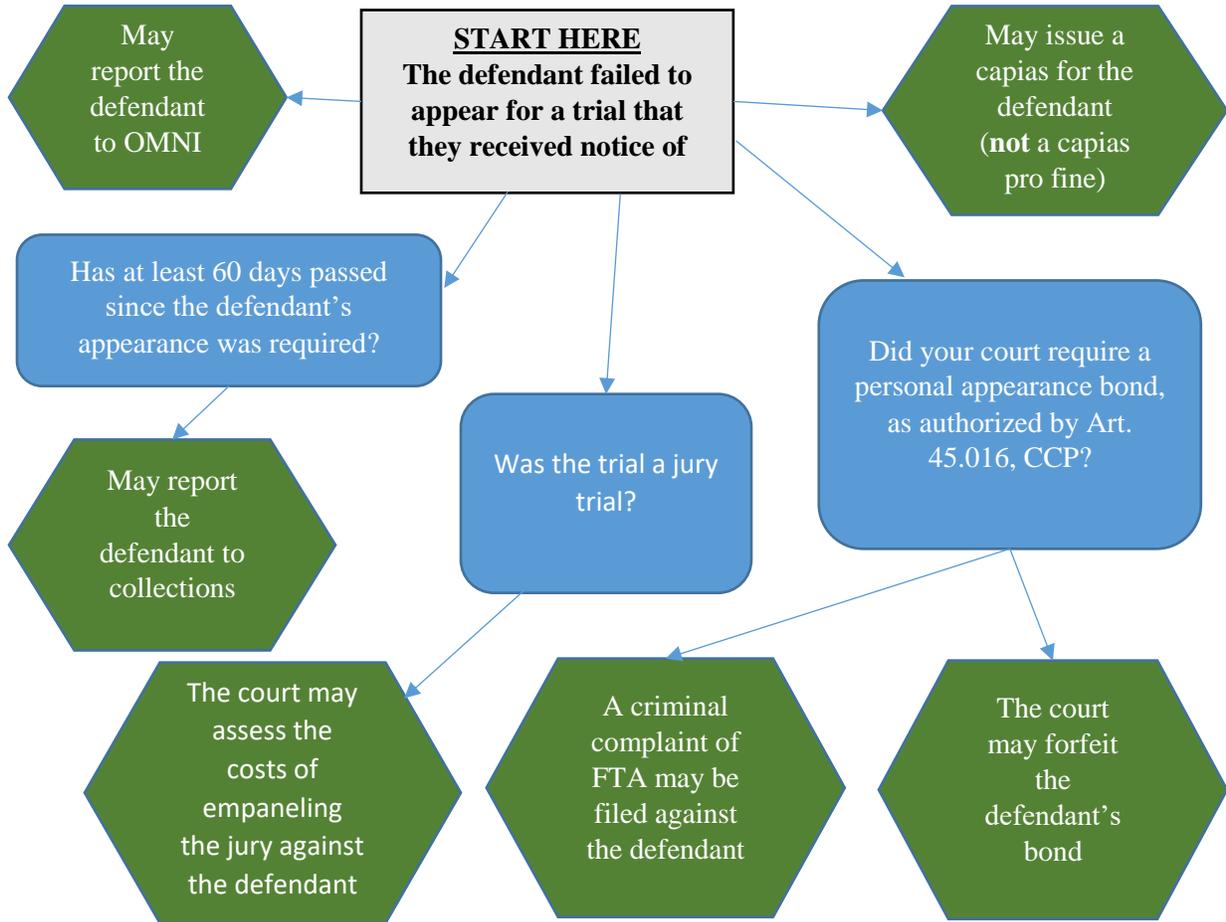
J. Flowchart – Failure to Appear to Enter a Plea

To use this chart, begin in the silver box. The blue boxes are a filter to see if the remedies in the green boxes can be used by the court.



K. Flowchart – Failure to Appear for Criminal Trial

To use this charts, begin in the silver box. The blue boxes are a filter to see if the remedies in the green boxes can be used by the court.



CHAPTER 4: THE DEFENDANT APPEARS AND ENTERS A PLEA

A defendant may appear in person, by mail, or through an attorney. *Code of Criminal Procedure Art. 45.020*. At the time of defendant's first appearance, the court should inform the defendant of the offense charged and the possible penalties; the defendant's plea options; the defendant's right to a jury trial unless waived in writing; and the option to take a Driving Safety Course if the defendant is eligible.

When the defendant appears, they need to enter a plea to the charges. They have three options:

- 1) Guilty – The defendant admits the allegations, and is convicted.
- 2) Nolo Contendere (No Contest) – The defendant isn't challenging the allegations, and is convicted.
- 3) Not Guilty – The defendant denies the allegations and wants a trial.



KEY
POINT

If a defendant refuses to plead, the judge must enter a plea of not guilty. *Code of Criminal Procedure Art. 45.024*.

Can a Defendant Change Their Plea?

It depends. A defendant can always withdraw a not guilty plea, and decide to plead guilty or nolo. If the defendant pleads guilty or nolo, they can only withdraw that plea if it was not given freely or voluntarily. For example, if the defendant pled guilty or nolo based on an offer from a prosecutor, and the judge declined to honor that plea bargain offer, the defendant can withdraw the plea and reinstate their not guilty plea.

A. Plea of Guilty or Nolo Contendere

From the perspective of the court, a plea of guilty and a plea of nolo contendere (often referred to simply as nolo) are the same thing. Although the law allows the court to accept oral pleadings in justice court, the plea of guilty/nolo should be in writing! *Code of Criminal Procedure Art. 45.021*. Do not accept a verbal plea in person or over the phone, because the court will have no way to later verify that the defendant pled to the offense. Caselaw holds that no plea of guilty shall be accepted by the court unless it is freely and voluntarily given. *Burke v. State* (quoting *Basham v. State* and *Ex parte Battle*.)

Additionally, a guilty or nolo plea should be accompanied with a waiver of jury trial (since they will not have a trial at all). This waiver should be in writing except that a plea via payment in full, discussed below, also constitutes a waiver of a jury trial. *Code of Criminal Procedure Art. 27.14(c)*.

After a guilty/nolo plea, the court should immediately generate a judgment of conviction (or an order placing the defendant on deferred disposition/DSC, see page 28).

For more information on judgments of conviction, including determination of alternative methods of satisfaction of the judgment, please see Chapters 7 and 8 of this volume.

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After accepting the plea, the court may take evidence from the state or the defendant before imposing the punishment. *Code of Criminal Procedure Art. 27.14(a)*.

1. Entry of Guilty or Nolo Plea Via the Mail

Art. 27.14(b) of the Code of Criminal Procedure authorizes a defendant to mail in a plea to a criminal case in justice court. If that plea is guilty or nolo, they may also request the court to respond in writing with the amount of the fine and costs as well as the amount of the appeal bond that is necessary to appeal the case up to county court.

A convicted defendant has the right to appeal their conviction, even if they pled guilty or nolo, unless they have paid the fine and costs in full. See page 68 for more information on appeals.



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That notice must be sent to the defendant by mail, and the defendant has 30 days from the **receipt** of that notice to pay the fine/costs or post the appeal bond. The notice must also notify the defendant of alternative methods of satisfaction of the fine and costs.

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The required notice that the court must send in response to a plea by mail and request for the appeal bond amount may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

How Does the Court Know When the Defendant Received the Notice?

Until September 2017, the court had to send this notice via certified mail, so the return receipt would make it quite clear when the defendant received this notice. However, this notice may now be sent regular mail, which doesn't have a return receipt. The statute is silent on this issue, but some possible ways to address it are:

- Send the mail with a delivery notification notice.
- Many higher courts follow a “**rebuttable presumption**” that mailed documents have been received on the third day after mailing. Since it is a rebuttable presumption, the defendant would be entitled to a hearing to show they didn't actually receive the document on this day.
- Follow the “mailbox rule” which allows 10 days from the due date for receipt of mailed documents to be timely, and therefore treat the date of receipt as the 10th day after mailing.

Whichever way the court handles the situation, if there is any “gray area” about whether an appeal is timely, TJCTC recommends sending the appeal up to the county court, and allowing the county court to make the determination on whether the appeal was perfected. **For more information on appeals, see page 68.**

2. Entry of Plea Via Payment of Fine and Costs

Art. 27.14(c) of the Code of Criminal Procedure provides that payment in full of the fine and costs due in a case constitutes a plea of nolo contendere by the defendant, even without a written plea. However, that only applies to payments made by the defendant in the case. Often, individuals such as relatives or significant others or employers (especially in cases involving commercial drivers) want



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to come in and pay the ticket for the defendant. It is critical that the court accepts payment only from the defendant unless there is a written plea of guilty or nolo by the defendant, or a judgment of conviction after a trial. A person’s spouse, parent, employer or anyone else (except the defendant’s attorney) does **not** have the right to enter a plea on behalf of the defendant, as this would not constitute a free and voluntary plea as is required.



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If a defendant pays the fine and costs in full, they are **unable to appeal** the case, unless the plea or payment was not made freely and voluntarily. *Fouke v. State; Crawford v. Campbell.*

3. Admonishments Given on Plea of Guilty or Nolo

The court should provide certain admonishments, or warnings, to defendants entering a plea of guilty or nolo. The defendant should be admonished that they have a right to a jury trial which they are waiving via a plea of guilty or nolo, and that the plea will result in a criminal conviction. Juveniles should be given specific admonishments, for more information see the *Juvenile Law* deskbook. Before accepting a plea of guilty or a plea of nolo contendere by a defendant charged with a misdemeanor involving family violence, as defined by Section 71.004, Family Code, the court shall admonish the defendant by using the following statement:

“If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. Section 922(g)(9) or Section 46.04(b), Texas Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.” *Code of Criminal Procedure Art. 27.14(e)(1)*. The court may provide this warning orally or in writing, and a warning printed on the defendant’s citation satisfies this requirement. *Code of Criminal Procedure Art. 27.14(e)(2)*.

B. Plea of Not Guilty

If the defendant pleads not guilty (or refuses to enter a plea), the case should be set either on the pretrial docket, or set for trial. A defendant is entitled to a trial by jury in a criminal case, so a trial setting must be a jury setting unless they have waived their right to a jury in writing. Do not discuss the facts of the case with the defendant, or any witnesses in the case (including peace officers!). **Remember also that a sworn complaint must now be filed with the court, as described on page 5.**



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1. Appearance Bond

A court may require the defendant to post a bond securing their appearance at trial. In justice court, the initial appearance bond setting **must** be a personal bond, meaning the defendant doesn’t have to put up cash up front, nor do they have to secure the bond using a surety (such as a bail bondsman). *Code of Criminal Procedure Art. 45.016.*

If the defendant doesn’t appear as required by their personal bond, the court can now require that the defendant post a bail bond. However, the court first must determine that the defendant is able to post a bail bond and determine that it is necessary order the bail bond to secure the defendant’s appearance. If the defendant then fails to post the bail bond and is held in custody, the court should presume that the defendant is unable to post the bond and hold a hearing to reconsider the matter. *Code of Criminal Procedure Art. 45.016.*



For more on the distinction among different types of bonds, see the *Magistrate Duties* deskbook.

In addition to making the defendant promise to appear, in the event that a defendant fails to appear at trial, an appearance bond allows the court to use the tool of bond forfeiture, [discussed on page 19](#), and allows the defendant to be charged with Failure to Appear if they do not appear for trial, [discussed on page 15](#).

2. Pretrial Hearing

Very frequently, following a plea of not guilty, a criminal case will be set for a pretrial hearing. Primarily, this is used as an opportunity for the defendant and the state to work out a plea agreement. This should be done outside of the court's presence, and without court involvement. Generally, the defendant can generally not be forced to attend a pretrial hearing. However, certain matters, mostly rare in justice court criminal cases, do require the defendant's presence at a pretrial hearing. These include:

- Pleadings of the defendant including special pleas, if any;
- Exceptions to the form or substance of the complaint;
- Motions to suppress evidence;
- Motions for change of venue by the State or the defendant;
- Discovery; and
- Motions for appointment of an interpreter.

Code of Criminal Procedure Art. 28.01, Sec. 1.

Other motions that may be filed before trial include motions for continuance and motions for speedy trial. A pretrial hearing is also a good opportunity for parties to identify which witnesses will need to be subpoenaed for the trial. [For more information on subpoenas and witnesses, discovery, and interpreters, please see Chapter 6 of this volume.](#)

CHAPTER 5: DEFERRED DISPOSITION, DSC & OTHER DISMISSALS

A court may not dismiss a criminal case that has been filed unless there is a statute giving the court authority to do so, or unless the state, through a prosecutor, has filed a motion to dismiss the case. *State v. Morales*. Many judges have been sanctioned by the Commission on Judicial Conduct for dismissing criminal cases unlawfully. Remember that a court does not “dismiss” criminal cases when, for example, the prosecutor doesn’t appear, or if the prosecutor fails to meet its burden at trial. The two main statutes authorizing dismissal of criminal cases without a motion from the prosecutor are Arts. 45.051 and 45.0511 of the Code of Criminal Procedure, which govern deferred disposition and driving safety course (DSC) dismissals. Additionally, several statutes allow judges to dismiss criminal cases when certain conditions have been met.



A. Deferred Disposition

Deferred disposition is a process, similar to probation, where the court imposes certain conditions on the defendant. If the defendant complies with the conditions, the criminal charge is dismissed, and no conviction is ever entered. However, if the defendant fails to comply, they will be convicted of the offense. *Code of Criminal Procedure Art. 45.051*. See the flowchart on page 34 for more information.

Forms

Forms related to deferred disposition may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.



1. Eligibility for Deferred Disposition

Courts generally have very broad discretion on whether or not to allow a defendant the option of deferred disposition. Unlike DSC dismissal, a defendant is generally not **entitled** to deferred disposition (one notable exception is minor tobacco offenses, see the *Juvenile Law* deskbook for more information).

Deferred disposition **may not** be granted on any Rules of the Road offenses occurring in construction or work zones with workers present, other than inspection and seat belt offenses and offenses committed by pedestrians. Additionally, deferred disposition **may not** be granted on any offense relating to motor vehicle control, other than a parking violation, committed by a person who holds a commercial driver’s license or who held one at the time of the offense. *Code of Criminal Procedure Art. 45.051(f)*. For more information on laws applicable to commercial driver’s license holders, see page 82 of this volume.

There is no statutory definition of “relating to motor vehicle control.” Some offenses, such as failing to have the required cab card in the vehicle as proof of registration, fall into a gray area. A good rule of thumb is that deferred disposition should not be allowed for a CDL holder for any Rule of the Road offense or any other offense that made the operation of the vehicle less safe for other vehicles or pedestrians should not be deferred.

Since placing a defendant on deferred disposition is entirely discretionary with the court, the defendant cannot appeal the decision to not grant deferral or a condition of the deferred disposition. Additionally, the court cannot “force” the defendant to do a deferred disposition if the defendant instead elects to simply pay the fine and costs. *Attorney General Opinion No. JM-526 (1986)*.

2. Deferred Disposition Procedure

(a) Creation of Written Order

When a defendant is placed on deferred disposition, the court should create a written order. The written order should indicate that there is a finding of guilt and that further proceedings in the case are being deferred. A fine should be assessed but **cannot** be collected at this point. Court costs **must** be imposed, and a **special expense fee** may be imposed at the court’s discretion (see below for more information). The court should list in writing **every** condition that is being imposed on the defendant.

(b) Finding of Guilt and Assessment of Court Costs

To be placed on deferred disposition, the defendant must either enter a plea of guilty or nolo or be found guilty of the offense at trial. *Code of Criminal Procedure Art. 45.051(a)*. Even though the defendant is being placed on deferred disposition, and might not ultimately be convicted of the offense, this initial finding of guilt constitutes a “conviction” for the purposes of court cost assessment. *Local Government Code § 133.101*.

Court costs **must** be assessed against the defendant in the initial order of deferred disposition, though the court may allow the defendant to pay them in intervals. Additionally, the court may allow the defendant to dispose of the court costs via community service or may waive them, as described in [Chapter 8](#) of this volume. *Code of Criminal Procedure Art. 45.051(a-1)*. If the defendant pays costs more than 30 days after the order assessing the costs, they must pay the \$25 Time Payment Fee. *Local Government Code § 133.103*. [For more information on the Time Payment Fee, please see page 59.](#)

(c) Special Expense Fee

Since the defendant is not yet convicted of the offense, there **cannot** be a fine imposed against the defendant. In place of a fine, when placing the defendant on deferred disposition, the judge may impose a “special expense fee” on the defendant in an amount that **must not** exceed the maximum amount of the fine for the offense charged.

This fee is sometimes called a “deferral fee” and some courts just call it a fine. It is important to use the proper terminology in addition to charging the correct amount for the special expense fee.

Some courts violate the law by having a policy such as “for deferred add \$50” to the “standard fine” on the sheet that the peace officer gives to the defendant, resulting in excessive special expense fees. For example, the maximum fine for an offense of not wearing a seat belt is \$50. If the court is adding \$50 to the fine amount to determine the amount of the special expense fee, even if the “standard fine” was \$1, they will be assessing a special expense fee (\$51) that exceeds the maximum allowed fine (\$50) for a seat belt offense.



The special expense fee may be collected at any time before the date on which the period of deferral ends. The judge may elect not to impose the special expense fee for good cause shown by the defendant. For more information, see the *Fees & Costs* deskbook.

(d) Imposition of Conditions

During the deferral period, the judge has a laundry list of conditions that may be imposed on the defendant. Except as described below, these conditions are up to the discretion of the judge. The defendant may be required to:

- post a bond in the amount of the fine assessed to secure payment of the fine;
- pay restitution to the victim of the offense in an amount not to exceed the fine assessed;
- submit to professional counseling;
- submit to diagnostic testing for alcohol or a controlled substance or drug;
- submit to a psychosocial assessment;
- participate in an alcohol or drug abuse treatment or education program;
- pay the costs of any diagnostic testing, psychosocial assessment, or participation in a treatment or education program either directly or through the court as court costs;
- complete a driving safety course approved under Chapter [1001](#), Education Code, or another course as directed by the judge;
- present to the court satisfactory evidence that the defendant has complied with each requirement imposed by the judge under this article; and
- comply with any other reasonable condition.

Code of Criminal Procedure Art. 45.051(b).

Note that restitution is limited in a deferred disposition case to the amount of the fine assessed for the offense. This is different than restitution awarded in a judgment of conviction, which is unlimited other than in Issuance of Bad Check cases, which have a cap of \$5000 in restitution.

What is a Reasonable Condition?

The court has wide discretion to impose conditions on a defendant in a deferred disposition order due to the clause that allows “any reasonable condition.” However, this discretion is not unlimited. Conditions that have gotten judges in trouble include: ordering a parent to spank their child; ordering a defendant to donate money to a specific charity; and ordering a defendant to provide personal services to the judge or to the county. Use common sense and discretion when imposing conditions under this clause.

Forfeiture of Cash Bond in Satisfaction of Fine and Costs

If the court orders the defendant to post a cash bond to satisfy payment of fine and costs as a condition of deferral, and the defendant does not appear at the show cause hearing, the court can, upon conviction of the defendant, use the cash bond to satisfy payment of any fine and costs that are still outstanding in the case. *Code of Criminal Procedure Art. 45.044(a)*.

The statute does **not** expressly authorize the court to forfeit the cash bond in this manner if the defendant **does** appear at the show cause hearing, but fails to show good cause for the failure to comply. Therefore, TJCTC does not recommend forfeiting the bond in that situation.

If a cash bond is forfeited as described above, the judge **shall** immediately notify the defendant by regular mail to the defendant's last known address that a judgment of conviction and forfeiture of bond was entered on a specific date and that the forfeiture satisfies defendant's fine and costs. The notice also **must** advise that the defendant has a right to a new trial if defendant applies for a new trial not later than the tenth day after the date of judgment and forfeiture. *Code of Criminal Procedure Art. 45.044(b)*.

As always, be aware that the "mailbox rule" means that as long as the defendant puts the motion for new trial in the mail by the due date, it must be considered timely filed if the court receives it within ten days of the due date. *Code of Criminal Procedure Art. 45.013*.

(e) Mandatory Conditions of Deferral

The requirement of a driving safety course is mandatory for any defendant under 25 years of age who is placed on deferred disposition for an offense classified as a moving violation. This does **not** mean that someone under 25 **must** be placed on deferred or that they can't just pay the fine or plead not guilty and go to trial. What it means is that if someone under 25 wants the court to dismiss a moving violation, they will have to take a DSC, whether the case is dismissed under the DSC dismissal statute or under the deferred disposition statute. The judge may also require the defendant to take an additional DSC designed for drivers under 25.

Note that the requirements that apply to dismissals under the DSC statute (see page 35 for details) do not apply to deferred disposition with DSC as a condition of deferral. For example, a person may be placed on deferred disposition with DSC as a condition even if they were going more than 25 mph over the speed limit, or if they do not have insurance, or if they have taken a DSC in the previous 12 months.

Also, a defendant who is under 18 and is placed on deferred disposition for a moving violation must be ordered to retake the driving test through DPS. *Code of Criminal Procedure Art. 45.051(b-1)*.

An order for a defendant placed on deferral for an age-based alcohol offense under Chapter 106 of the Alcoholic Beverage Code must include conditions to perform the community service and alcohol awareness

Definition of Moving Violation

DPS is granted the power to define which offenses are moving violations, and they have done so in the Texas Administrative Code. The section that defines moving violations may be found by clicking [here](#).



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course that the defendant would have to complete upon a conviction for the offense. *Alcoholic Beverage Code §§ 106.071, 106.115.*

3. If the Defendant Complies with the Order – Dismissal and Expunction Eligibility

If the judge determines that the defendant has complied with the conditions imposed, the judge shall dismiss the complaint, and it shall be clearly noted in the docket that the complaint is dismissed and that there is not a final conviction. *Code of Criminal Procedure Art. 45.051(c).* If a complaint is dismissed under this article, there is not a final conviction and the complaint may not be used against the person for any purpose. Records relating to a complaint dismissed via deferred disposition may be expunged under the procedure described in Chapter 10 of this volume. *Code of Criminal Procedure Art. 45.051(e).* Do **not** report the dismissal to DPS.



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4. If the Defendant Fails to Comply with the Order – Show Cause Hearing

If the defendant fails to present satisfactory evidence of compliance with the requirements imposed by the judge under this article within, the court shall notify the defendant in writing, mailed to the address on file with the court or appearing on the notice to appear, of that failure; and require the defendant to appear at the time and place stated in the notice to show cause why the order of deferral should not be revoked. *Code of Criminal Procedure Art. 45.051(c-1).*

Some courts try to “pre-schedule” the show cause hearing when placing the defendant on deferred disposition. Even if the court does this, the court still must send the defendant a show cause notice after the deferral period, since the statute mandates that the notice informs the defendant that they have failed to comply, which obviously can’t occur until the defendant actually fails to comply.

If the defendant shows good cause for failure to present satisfactory evidence of compliance with the requirements imposed by the judge, the court may allow an additional period during which the defendant may present evidence of the defendant’s compliance with the requirements. *Code of Criminal Procedure Art. 45.051(c-2).* The statute is not clear on whether another show cause hearing must be held at the end of the additional period if the defendant still has not complied, but TJCTC recommends holding one.

If the defendant does not appear at the show cause hearing or does not show good cause for the failure to present satisfactory evidence that the defendant complied with the requirements imposed, the judge may impose the fine originally assessed or impose a lesser fine. This constitutes a final conviction of the defendant. *Code of Criminal Procedure Art. 45.051(d, d-1).* TJCTC recommends sending a copy of the judgment of conviction to the defendant if they do not appear at the show cause hearing.

A court **may not** hold the defendant in contempt for not complying with the requirements imposed on a deferred disposition, or for not showing up at a show cause hearing. Charges of FTA or VPTA **may not** be filed against a defendant for not showing up at a show cause hearing. The consequence for those actions is the entering of a final conviction after the show cause hearing date.



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If the defendant is convicted and a fine imposed, any special expense fee that was paid by the defendant **must** be credited against the fine. *Code of Criminal Procedure Art. 45.051(a)*. For example, say a defendant is placed on deferred disposition for speeding. A fine of \$200 is assessed, but not imposed at the time of the deferral. A special expense fee of \$100 is imposed, as are the court costs for the offense. The defendant pays the \$100 plus the court costs. Later, the defendant fails to comply with the deferral conditions, and is convicted. The court imposes the \$200 fine. The defendant now owes \$100, because the \$100 special expense fee is credited against the fine. Note that court costs are **not** charged again, and that the **court costs** paid are **not** credited against the fine.

5. Dismissal of Charge on Commitment of Chemically-Dependent Person

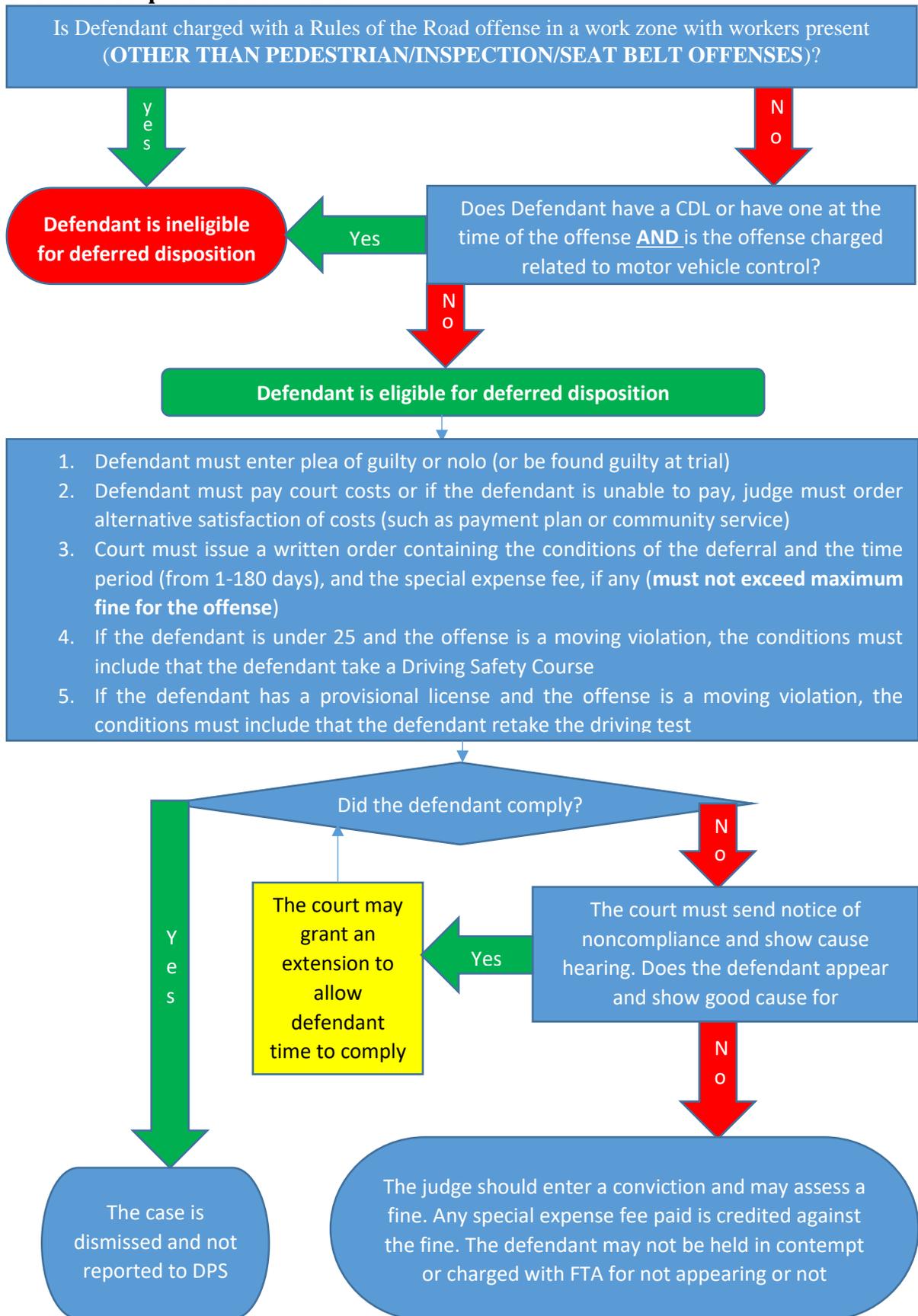
Art. 45.053 of the Code of Criminal Procedure provides a deferred disposition-type procedure whenever the court finds that the offense resulted from or was related to the defendant's chemical dependency (which includes addiction to alcohol and/or controlled substances) and an application for court-ordered treatment of the defendant is filed in accordance with Chapter 462, Health and Safety Code.

Note that the justice court does **not** have jurisdiction to enter an order for treatment under Chapter 462 of the Health and Safety Code.

At the end of the 90 day deferral period, the justice or municipal court shall dismiss the charge if satisfactory evidence is presented that the defendant was committed for and completed court-ordered treatment in accordance with Chapter 462, Health and Safety Code, and it shall be clearly noted in the docket that the complaint is dismissed and that there is not a final conviction. Records relating to a complaint dismissed under this article may be expunged under Article 55.01. [For more information on expunction, please see page 72 of this volume.](#)

If satisfactory evidence is not presented, the justice or municipal court may impose the fine assessed or impose a lesser fine. The imposition of a fine constitutes a final conviction of the defendant.

6. Deferred Disposition Flowchart



B. Driving Safety Course (DSC) Dismissals

Separate from deferred disposition, Art. 45.0511 lays out a procedure allowing a person to dismiss certain offenses by taking a driving safety course (DSC). One big difference between deferred disposition is that a defendant must be allowed to take DSC if they are eligible and request to do so, whereas deferred disposition is almost always at the discretion of the court. For a full comparison of deferred disposition and DSC dismissals, see the chart at the end of this section.

If a person comes into court to dispose of a case, the court must give them notice of the right to dismiss their case with the successful completion of a DSC (or a motorcycle operator's training course [MOTC] if the offense was committed on a motorcycle) if they meet the eligibility requirements, discussed below.

Forms

Forms related to DSC may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

1. Eligibility for “Mandatory” DSC

TJCTC refers to DSC dismissals where the court has no discretion on whether to grant the request as “mandatory” DSC. For a discussion on “discretionary” DSC, please see page 39. For a defendant to be eligible for “mandatory” DSC, the four conditions listed below must exist.

a. The Defendant is Charged with an Eligible Offense

First, the offense that the defendant is charged with must be an eligible offense for dismissal via DSC. Confusingly, the list of offenses is slightly different if the defendant is under 25 years of age. For defendants under 25 years of age, moving violations involving the operation of a motor vehicle are eligible offenses, minus the exceptions discussed below. For other defendants, all Rules of the Road offenses, minus the exceptions discussed below, plus the offense of disregarding warning signs or barricades, found in Transportation Code § 472.022, are eligible offenses. *Code of Criminal Procedure Art. 45.0511(a), (a-1)*. For a definition of Rules of the Road offenses and moving violations, see pages 12 and 31 of this volume.

Exceptions to Eligible Offenses

The following moving violations/Rules of the Road offenses are **not** eligible for dismissal via DSC:

- Any offense committed by a person who currently holds a Commercial Driver's License (CDL) or held one at the time of the offense. *Code of Criminal Procedure Art. 45.0511(s)*.
- Any offense committed in a work zone with workers present. *Code of Criminal Procedure Art. 45.0511(p)(3)*.
- Speeding at a speed of 25 mph or more over the posted speed limit, or at a speed of 95 mph or more. *Code of Criminal Procedure Art. 45.0511(b)(5)*.
- Passing a school bus while loading/unloading children, defined in Transportation Code § 545.066. *Code of Criminal Procedure Art. 45.0511(p)(1)*.

- Failing to remain at the scene of an accident involving damage to a vehicle or injury to a person, or failing to render aid or exchange information after such an accident, defined in Transportation Code §§ 550.022, 550.023. *Code of Criminal Procedure Art. 45.0511(p)(1)*.



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Two common misconceptions are that offenses in school zones are not eligible and that any offense where there is an accident involved is not eligible. The school zone confusion is likely based on the work zone exclusion coupled with the school bus exclusion. The accident confusion is likely due to the fact that the offense under Sec. 550.022 of the Transportation Code which is ineligible is entitled “Accident Involving Damage to Motor Vehicle.” However, the actual offense is in fact leaving the scene of such an accident. **Do not** deny DSC to an otherwise eligible defendant simply because the offense was in a school zone or involved an accident!

Although Article 45.0511 also contains an exclusion of “serious traffic violations,” the reference is moot, since that is a reference to a CDL violation, and CDL holders are not eligible for DSC dismissal, regardless of the offense.

b. The Defendant Enters a Plea and Requests DSC

The first step in the process of dismissing a charge via a DSC is that the defendant must enter a plea of either guilty or nolo, in person or in writing. Additionally, the defendant must request a DSC, either in person, through their attorney, or by certified mail, return receipt requested. The plea and request must occur on or before the defendant’s answer date. *Code of Criminal Procedure Art. 45.0511(b)(3)*.

What if the Court Doesn’t Have the Citation by the Appearance Date?

If a duplicate copy of the citation has not been filed with the court, there is no personal jurisdiction, so the court must not take action. Do not make a copy of the defendant’s citation and file a case using that copy as the charging instrument! **For a discussion on why the court should not do this, as well as a discussion of whether an electronic file is sufficient, please see page 5.**

For DSC purposes, the defendant should be sent a summons with a new appearance date once a charging instrument has been filed. If the defendant enters a plea and request by the new appearance date, the court should treat them as meeting the eligibility requirements, since the case wasn’t filed soon enough to allow the defendant to enter a plea by the original appearance date.

What if the Defendant Sends the DSC Request Regular Mail?

The requirement to send the request certified mail is there to protect a defendant in the event the request gets lost in the mail, so that they have proof they made a timely request. Sending it regular mail is a risk for the defendant. However, TJCTC’s position is that the court has authority to accept a request sent regular mail, as long as it was mailed by the due date. For mailings sent after the due date, see the discussion below about “discretionary” DSC.



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c. The Defendant Has Not Taken DSC in the Previous 12 Months

A defendant is only eligible for “mandatory” DSC once every 12 months. To determine eligibility, the defendant **must submit a copy of their driving record, along with an affidavit** that they are not currently taking a DSC to dismiss a different case, and that they have not taken a course in the previous 12 months that is not reflected on the driving record. *Code of Criminal Procedure Art. 45.0511(c)*.

The clock starts on the date that the defendant completed the previous DSC, which is why the court must report to DPS the actual date of completion noted on the defendant’s certificate. The date of the new offense must be at least 12 months past the prior course completion date. The date that the defendant is asking for a course, the date of the previous offense, and the date the court dismissed the previous offense are all irrelevant to the determination of eligibility. So, for example, if the new citation was issued to the defendant on January 31, 2018, the only relevant information is whether the previous DSC was completed before or after January 31, 2017.

Special requirements apply if the defendant is charged with a Child Safety Seat System offense under Transportation Code § 545.412. For more information, see Chapter 11.

d. The Defendant Has a Valid Driver’s License and Proof of Financial Responsibility

Generally, a defendant must have a valid Texas DL to qualify for “mandatory” DSC. An exception is made for active duty servicemembers and their dependents. If the defendant is using that exception, they must submit an additional affidavit stating that they are not currently taking a DSC in another state, and had not done so in the 12 months preceding the date of the offense. *Code of Criminal Procedure Art. 45.0511(b)(2), (c)(4)*.

What if the Defendant’s License is Currently Suspended or the Defendant Has an ODL?

A suspended license **would not** count as a “valid” DL. An Occupational Driver’s License **would** count as a “valid” DL. For more information on Occupational Driver’s Licenses, see the *Administrative Hearings* deskbook.

What if the Defendant Didn’t Have a License at the Time of the Offense But Does Now?

The statute doesn’t mandate that the defendant had a valid DL at the time of the offense. So if they have a valid DL at the time the request for DSC is made, the court should grant the request, as long as the defendant meets the other eligibility requirements.

Evidence of Financial Responsibility

The defendant must also “provide evidence of financial responsibility as required by Chapter 601, Transportation Code.” *Code of Criminal Procedure Art. 45.0511(b)(6)*. This requirement was created to give people an incentive to have insurance, so that if you don’t have insurance, you aren’t eligible for DSC. However, it is tricky to implement since insurance policies generally cover vehicles, not people.



For example, say Billy doesn't own a car. He does have a DL, he rents a car, and purchases the rental car company's insurance. He gets a speeding ticket. When he comes to court, he has returned the car, and doesn't have an insurance policy since he doesn't own a car. Is he eligible for "mandatory" DSC? One approach is to apply the standard of "was there valid insurance at the time of the offense that would have covered that driver?" Here the answer is yes, so Billy would be eligible.

Another approach would be that the driver must have a policy that they have purchased or that is provided by their family or employer as provided in Chapter 601 of the Transportation Code. If that approach is followed, Billy would not be eligible. However, the court certainly could grant deferred disposition to Billy if desired, and could include a condition of completing a DSC. For more information on deferred disposition, see page 28.

2. Eligibility for "Discretionary" DSC

A judge **may** waive the requirement that the defendant request the DSC before their first appearance. The judge **may** also grant DSC dismissal despite the defendant having taken a DSC within the last 12 months. If either of those requirements are waived, the standard DSC procedure, discussed below, is followed, except that the administrative fee is not capped at \$10, instead it is capped at the maximum fine for the offense. *Code of Criminal Procedure Art. 45.0511(d)*. The judge may not waive any other requirements and proceed under the DSC statute, although in many cases, the judge will be able to grant deferred disposition instead, and include DSC as a condition of deferral if desired. [For more information on eligibility for deferred disposition, see page 28.](#)



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3. DSC Dismissal Procedure

(a) The Court Issues a Written Order

If an eligible defendant requests DSC dismissal, the court should enter a written order laying out the conditions of dismissal, as well as the costs and fees that the defendant must pay. The defendant must take a DSC approved by the Texas Department of Licensing and Regulation, or a motorcycle operator and safety program approved under Chapter 662 of the Transportation Code, as appropriate. *Code of Criminal Procedure Art. 45.0511(b)*.

The order should include an order to pay the appropriate court costs for the offense, and may include an administrative fee not to exceed \$10 (administrative fee not to exceed amount of the fine if "discretionary" DSC). If the defendant is unable to pay the costs and fee, the court should allow the defendant to enter a payment plan, or satisfy the costs and fee via community service. [For more information on alternative satisfaction of costs, see page 58.](#)



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The order **must** give the defendant 90 days to complete the course and submit to the court:

- The certificate of completion of the course;
- The defendant’s driving record; **and**
- An affidavit that the defendant isn’t currently taking a DSC for another offense, and hasn’t taken one in the last 12 months not reflected on the driving record (this requirement may be waived by the court); **or**
- If the defendant is an active duty servicemember or the dependent of an active duty servicemember, and does not have a Texas DL, an affidavit that the defendant isn’t currently taking a DSC for another offense, and hasn’t taken one in the last 12 months in another state.

Code of Criminal Procedure Art. 45.0511(c).

What if the Defendant Loses Their Certificate?

If the defendant loses the certificate, the provider must issue a duplicate at reasonable cost. The court can require that the court’s name appears on the certificate, as a defendant is not allowed to use the same course to dismiss multiple cases in different courts. *Code of Criminal Procedure Art. 45.0511(m).*

(b) If the Defendant Complies with the Order – Dismissal and Expunction Eligibility

If the judge determines that the defendant has complied with the conditions imposed, the judge **shall** dismiss the complaint, and it shall be clearly noted in the docket that the complaint is dismissed and that there is not a final conviction. *Code of Criminal Procedure Art. 45.051(l).* If a complaint is dismissed under this article, there is not a final conviction and the complaint may not be used against the person for any purpose. Records relating to a complaint dismissed may be expunged under the procedure described in Chapter 10 of this volume. The court must report the completion of the DSC, including the date completed, to DPS for inclusion in the defendant’s driving record. *Code of Criminal Procedure Art. 45.0511(l).* As discussed above, the course completion date will be relevant in determining the date on which the defendant is again eligible for “mandatory” DSC. However, the charge itself is not included in the driving record. *Code of Criminal Procedure Art. 45.0511(n).*

Can DSC Providers or the Court Distribute Information About Available DSC Courses?

No person shall distribute any written information for the purpose of advertising a provider of a driving safety course within 500 feet of any court having jurisdiction over an offense discussed in this section. A violation of this shall result in loss of the provider’s status as provider of a course approved or licensed under the “Texas Driver and Traffic Safety Education Act.”

Transportation Code § 543.114. This does not prohibit distribution directly to the court for information purposes, or distribution by the court. A court may distribute materials, but should be sure to provide access to all lawful providers, and not “steer” defendants to certain courses.

(c) If the Defendant Fails to Comply with the Order – Show Cause Hearing

If the defendant fails to present satisfactory evidence of compliance with the requirements imposed by the judge under this article within 90 days, the court shall notify the defendant in writing that they have failed to comply. This notice should be mailed to the address on file with the court or the address appearing on the notice to appear, and must require the defendant to appear at the time and place stated in the notice to show cause why a final conviction should not be entered. *Code of Criminal Procedure Art. 45.0511(i)*.



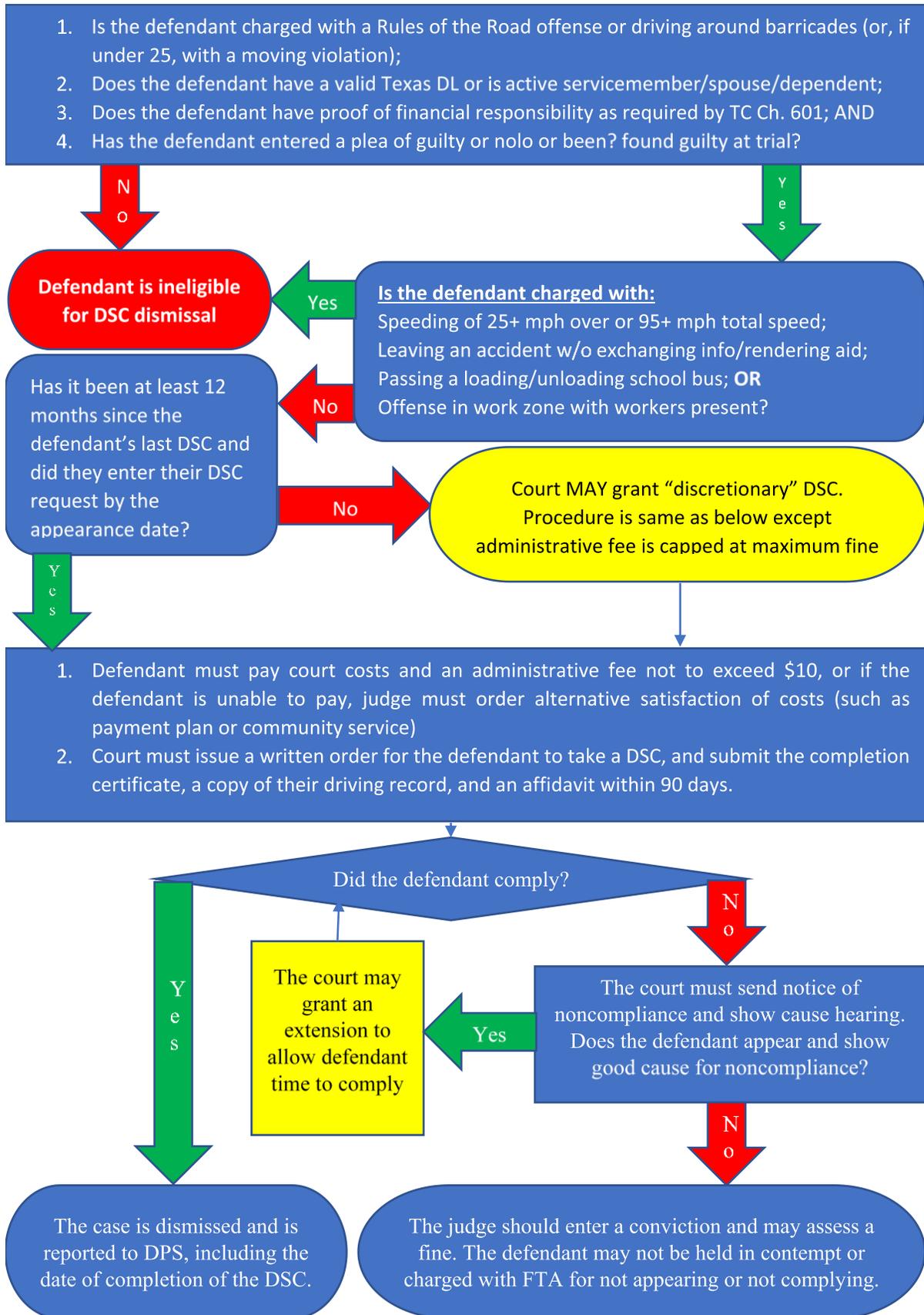
Some courts try to “pre-schedule” the show cause hearing when placing the defendant on deferred disposition or DSC. Even if the court does this, the court still **must** send the defendant a show cause notice after the deferral period, since the statute mandates that the notice informs the defendant that they have failed to comply, which obviously can’t occur until the defendant actually fails to comply.

If the defendant shows good cause for failure to comply with the requirements imposed by the judge, the court may allow an additional period during which the defendant may present evidence of the defendant’s compliance with the required conditions. *Code of Criminal Procedure Art. 45.051(k)*. The statute is not clear on whether another show cause hearing must be held at the end of the additional period if the defendant still has not complied, but TJCTC recommends holding one.

If the defendant does not appear at the show cause hearing or does not show good cause for the failure to present satisfactory evidence that the defendant complied with the requirements imposed, the judge enters a conviction against the defendant and may impose a fine against the defendant. *Code of Criminal Procedure Art. 45.0511(j)*.

A court may not hold the defendant in contempt for not complying with the requirements of a Driving Safety Course, or for not showing up at a show cause hearing. Charges of FTA or VPTA may not be filed against a defendant for not showing up at a show cause hearing. The consequence for those actions is the entering of final conviction after the show cause hearing date.

4. DSC Flowchart



C. Comparison of Deferred Disposition and Driving Safety Course Dismissals

	Deferred Disposition	Driving Safety Course
Authorizing Statute	CCP Art. 45.051	CCP Art. 45.0511
Up to Court's Discretion?	Yes	Not if defendant meets "mandatory" eligibility requirements
Eligible Offenses	Everything except Disqualified Offenses listed below	Rules of the Road except Disqualified Offenses listed below For Defendants <25 years old, Moving Violations except Disqualified Offenses below
Disqualified Offenses	Offenses related to motor vehicle control committed by CDL holders Rules of the Road offenses other than seat belt offenses committed in work zones with workers present	Speeding <25 mph over limit Speeding <95 mph total speed Passing school bus loading/unloading children Leaving scene of accident without exchanging info Failing to stop and render aid after injury accident Any offense committed by CDL holder Any offense committed in a work zone with workers present
Length of Deferral Period	1-180 days	90 days
Costs and Fees	Court Costs + "Special Expense Fee" which may not exceed the maximum fine for the offense	Court Costs + "Administrative Fee" which is capped at \$10 unless court is proceeding under "discretionary" DSC, in which case capped at maximum fine for the offense
Texas DL required?	No	Yes, unless active duty U.S. servicemember or dependent
Proof of Insurance required?	No	Yes

D. Dismissals on Motion from the Prosecutor

The attorney representing the State may, by permission of the court, dismiss a criminal action at any time by filing a motion to dismiss setting out the reasons for the dismissal. The prosecutor's motion must be referred to in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge. *Code of Criminal Procedure Art. 32.02*; *Smith v. State*. Although the judge is not obligated to sign the motion to dismiss, refusal to do so should be based on a specific ethical or legal objection.



E. Compliance Dismissals

Certain offenses provide explicit permission for the court to dismiss the offense on its own without a motion from the prosecutor, generally upon proof of correction of the defect, or compliance with the legal requirement, by the defendant. Many of these offenses carry “administrative fees” that the court may assess when dismissing these offenses. It is not necessary to get a plea from the defendant when dismissing an offense as provided by statute.



Below is a chart summarizing the most common Transportation Code offenses that may be dismissed without a motion from the prosecutor, once the defendant meets certain conditions. For more information on dismissal of Parent Contributing to Nonattendance and Parks & Wildlife Code offenses, please see Chapter 11 of this volume.

<u>OFFENSE</u>	<u>CONDITIONS OF DISMISSAL</u>	<u>DISMISSAL FEE</u>
Failure to Maintain Financial Responsibility (FMFR) (No Insurance) – TC 601.191	Defendant shows insurance policy valid at the time of the offense	None
Expired License Plate TC 502.407	Defendant remedies no later than 20 working days after offense or by appearance date, whichever is later and pays to DMV the delinquent registration fee required by TC 502.045	Not to exceed \$20
Operation of Vehicle with No Registration Insignia (No Registration Sticker) TC 502.473	Defendant remedies the defect by appearance date, or shows that a registration insignia was issued for that time period and has been attached to the vehicle	Not to exceed \$10
Wrong Registration Insignia (Wrong Registration Period) TC 502.475 (a) (3)	Defendant remedies the defect by appearance date	Not to exceed \$10
Operation of Vehicle with No License Plate (Includes Improper Placement, and Failure to Display Two Plates) TC 504.943	Defendant remedies the defect by appearance date	Not to exceed \$10
Wrong, Altered, or Obscured License Plate – TC 504.945	Defendant remedies the defect before the defendant's first court appearance and shows that the vehicle was issued a plate by the department that was attached to the vehicle, establishing that the vehicle was registered for the period during which the offense was committed.	Not to exceed \$10
No Driver License – TC 521.025	Defendant produces in court a driver's license issued to that person, appropriate for the type of vehicle operated, and valid at the time of the arrest for the offense.	Not to exceed \$10
Expired Driver License TC 521.026	Defendant remedies no later than 20 working days after offense or by appearance date, whichever is later	Not to exceed \$20
Failure to Change Name/Address on DL TC 521.054	Defendant remedies the defect within 20 working days of the offense	Not to exceed \$20
Violation of DL Restriction TC 521.221	Court may dismiss if (1) physical condition has been medically or surgically corrected before the date of the offense; or the restriction was imposed in error and that fact established by defendant; (2) The department removes the restriction or endorsement by the defendant's 1st court appearance	Not to exceed \$10

CHAPTER 6: CRIMINAL TRIAL ISSUES

The Texas Constitution ensures that “in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.” *Texas Constitution Art. 1, § 10*. Although the accused has a right to a trial by jury, it is a right that the defendant may waive. While the basic trial procedure remains the same whether a jury or a judge tries the case, there are some procedural differences between the two. For scripts, oaths and general trial procedure, please see the *Trial Procedure* deskbook.



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What if the Defendant Won’t Pick Jury or Bench Trial?

Remember that a defendant doesn’t have to make a selection between jury or bench trial. They are entitled to a jury trial, so it **must** be a jury trial unless they waive that right in writing. If a “sovereign citizen” or other defendant refuses to enter a plea or decide which type of trial they want, the court **must** enter a plea of not guilty for them, and set them for a jury trial. *Code of Criminal Procedure Art. 45.024*.

A. Subpoenas and Witnesses

It is the duty of the prosecuting attorney to determine who is a necessary party to the trial of the offense.

It is not the responsibility of the court to summon the complaining peace officer for trial if the prosecutor doesn’t request the court to do so. Summoning the prosecution’s witnesses without request, but not the defendant’s witnesses, calls into question the neutrality of the court.

Each side may ensure that their witnesses will appear at the trial through subpoenas, and if needed, by requiring the witness to post a bond, or by issuing a writ of attachment for that witness. *Code of Criminal Procedure Arts. 24.01, 24.11*. Subpoenas can also be issued for evidence. *Code of Criminal Procedure Art. 24.02*.

1. Issuing Subpoenas

A **subpoena** is a writ issued to a peace officer or other proper person commanding that officer or person to summon one or more named individuals to appear to testify in a criminal case (or before an examining court, coroner’s inquest, or any other proceeding in which the testimony of a witness may be required in accordance with the Code of Criminal Procedure).



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The subpoena shall be dated and signed officially by the court or clerk issuing it, but does not have to be under seal. *Code of Criminal Procedure Arts. 24.01(a), 45.012(g); Government Code § 27.059(b)*.

The court must issue a subpoena on request, and does not have discretion on whether or not to issue a subpoena. There is no legal limit on the number of witnesses that can be properly subpoenaed by the State or the defendant. *Averitt v. Gutierrez*.

However, there is no authority for issuing a subpoena on behalf of the State or the defendant in a fine-only misdemeanor case to secure a witness who resides out of the county in which the case is pending. An out-of-county subpoena may be issued only in felony cases or misdemeanor cases in which confinement in jail is a permissible punishment. *Code of Criminal Procedure Art. 24.16*.

Application for a Subpoena

The State or the defendant may make a written, sworn application to the clerk of the court for the issuance of a subpoena. The application should be filed with the other papers of the case, and must be made available to the State and the defendant. The application shall state:

- the name of each witness desired;
- the location and occupation of the witness, if known; and
- that the testimony of the requested witness is material to the case.

Code of Criminal Procedure Art. 24.03(a).

Who Serves the Subpoena?

The subpoena should name someone to summon the requested witness.

The person named to serve the subpoena must be a peace officer, or a person who is not a participant in the case and is at least 18 years old at the time the subpoena is issued. *Code of Criminal Procedure Art. 24.01(b)*. A person who is not a peace officer **may not** be forced to accept the duty to serve a subpoena, **but** if they agree in writing to accept that duty and fail to serve or return the subpoena, they may be held in contempt and fined between \$10 and \$200. *Code of Criminal Procedure Arts. 24.01(c), 2.16*.

How is a Subpoena Served?

A subpoena may be served by:

- reading the subpoena to the witness in person (reading the subpoena to the witness over the telephone is not sufficient. *Ex parte Terrell*);
- delivering a copy of the subpoena personally to the witness;
- electronically transmitting a copy of the subpoena to the last known electronic address of the witness, with read receipt requested; or
- mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness.

An applicant for a subpoena may request in writing that the subpoena not be served by certified mail, and certified mail **may not** be used if the proceeding will begin within 7 business days of the subpoena being mailed. *Code of Criminal Procedure Art. 24.04(a)*.

**Procedure When
Witnesses Are
Incarcerated**

In a criminal case where an inmate in the custody of the Texas Department of Criminal Justice is required to testify as a witness, any deposition or testimony of the inmate witness may be conducted by electronic means, in the same manner as permitted in civil cases under Sec. 30.012, Civil Practice and Remedies Code. *Code of Criminal Procedure Art. 38.073*.



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Return of the Subpoena

The person who serves the subpoena must file a return showing how and when it was served, which must include the read receipt or return receipt, if applicable. If the subpoena is served electronically, and the read receipt is not received within a reasonable amount of time, or a mailed subpoena is returned as undeliverable, the person serving the subpoena must use due diligence to locate and serve the person by other means. *Code of Criminal Procedure Art. 24.04(b)*.

Subpoenas for Child Witnesses

If a witness is younger than 18 years old, a subpoena may be issued directing a person having custody, care, or control of the child to produce the child in court. *Code of Criminal Procedure Art. 24.011(a)*. If the person, without legal cause, fails to produce the child in court, the court may hold the person in contempt and may also issue a writ of attachment for the person and the child. *Code of Criminal Procedure Art. 24.011(b)*. However, the judge **must** first hold a hearing, and determine that the issuance of the attachment is in the best interest of justice. *Code of Criminal Procedure Art. 24.111*.

Subpoena for Documents and Things (Subpoena Duces Tecum)

If a witness is in possession of any instrument of writing or other thing desired as evidence, an order called a **subpoena duces tecum** may specify such evidence and direct that the witness bring it and produce it in court. *Code of Criminal Procedure Art. 24.02*. A subpoena duces tecum may not be used as a “fishing expedition”, but should give reasonably accurate description of the papers wanted either by date, title, substance, or subject. *Ex parte Gould*.

Disobedience of Subpoenas

It is disobedience of a subpoena if the witness:

- is not in attendance at court on the date directed;
- is not in attendance at any other time named in the subpoena; **or**
- refuses without legal cause to produce evidence in the person’s possession which the court has directed the person to bring and produce in court.

Code of Criminal Procedure Art. 24.06.

Enforcement of Subpoena - Procedure

If a witness refuses to obey a subpoena in a misdemeanor case, the witness may be fined at the direction of the court in an amount not exceeding \$100. *Code of Criminal Procedure Art. 24.05*.



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When a fine is entered against a witness for failure to appear and testify, the judgment shall be conditional (as in bond forfeiture proceedings, also known as a judgment *nisi*). The judge has no authority to enter a final judgment until after the witness has been served with citation and given an opportunity to show cause for failure to appear. *Ex parte Terrell*.

A citation ordering the witness to appear and show cause for their failure to appear shall be served upon the witness as in civil cases. *Code of Criminal Procedure Art. 24.07*. For more information on serving civil citations, please see the *Civil* deskbook.

After being served with the citation, the witness may show cause under oath, in writing or verbally, at any time before final judgment is entered against the witness. If the witness fails to show cause

within 14 days, a final judgment by default shall be entered against the witness. *Code of Criminal Procedure Art. 24.08.*

The sufficiency of the witness's excuse for failing to obey the subpoena is determined by the judge exercising judicial discretion. After hearing the witness's excuse, the judge shall render judgment against the person for all or any part of the fine, or the judge may remove the fine completely. If a fine is imposed, it is collected in the same manner as fines in misdemeanor cases. *Code of Criminal Procedure Art. 24.09.* For more information on collecting fines in misdemeanor cases, see Chapter 8.

2. Attachment of Witnesses

An “**attachment**” is a writ issued in any criminal case, commanding a peace officer to take the body of a witness and bring the witness before the court or magistrate immediately, or on a day named in the writ, to testify. The attachment must be dated and signed by the officer issuing it, which may either be the judge or the clerk under the seal of the court. *Code of Criminal Procedure Art. 24.11.*

Note that this is different from the writ of attachment issued in civil cases to ensure satisfaction of a judgment. For more information on attachments in civil cases, see the *Civil deskbook*.

Grounds for Attachment

When a witness who resides in the county where the case is pending has been properly served with a subpoena and fails to appear and testify, the State or the defendant may request to have an attachment issued for that witness. *Code of Criminal Procedure Art. 24.12.* If the defendant or State's attorney has good reason to believe and does believe that a material witness is about to move out of the county, the court **may** issue an attachment for the witness upon filing of an affidavit with the court. *Code of Criminal Procedure Art. 24.14.*

Hearing Held Before Issuance of Attachment

Before an attachment can issue in either of the above situations, or in the situation where an attachment is requested for a child witness, [discussed on page 47](#), the court must hold a hearing. An attorney must be appointed for the witness for the hearing. *Code of Criminal Procedure Art. 24.111.*



B. Interpreters

When Must I Have an Interpreter?

In a criminal proceeding, if a defendant or a witness does not understand and speak the English language, the court **must** swear in an interpreter to interpret for that person. This can be done on the motion of a party or on the court's own motion, when necessary. An interpreter can be summoned, subpoenaed or attached just like any other witness. If the only available interpreter does not possess adequate skills for the situation or doesn't understand slang, the defendant or witness may nominate another person to be an intermediary between themselves and the interpreter. *Code of Criminal Procedure Art. 38.30.*

If a defendant or witness is deaf, the court **shall** appoint a qualified interpreter to interpret the proceedings in a language the person can understand, which is almost always sign language. *Code of Criminal Procedure Art. 38.31*. An appointment **must** be made if the defendant or witness is hearing-impaired, regardless of whether the individual also has a speech impairment that inhibits the individual's comprehension of proceedings or communication with others. *Government Code §§ 57.001(4), 57.002*.

How Do I Find an Interpreter?

The Office of Court Administration (OCA) offers the Texas Court Remote Interpreter Service (TCRIS), which provides:

- **Free** Spanish language interpreting services, by advanced scheduling or on demand, as available. The service is provided by state licensed court interpreters in *all* types of cases, but only for short, non-contested and non-evidentiary hearings that would typically last 30 minutes or less.

To schedule a court interpreter through this program, go to this link: <http://www.txcourts.gov/tcris/>. A bench card with information about this program is available at <http://www.txcourts.gov/tcris/bench-card/>.

If you need an interpreter for a full trial, or for a language other than Spanish, the court must secure an individual interpreter. A list of certified interpreters may be found by going to <http://www.txcourts.gov/lap/interpreters/>, clicking on the Licensed Court Interpreters link, then clicking the Generate Excel button. Also, there are many for-profit telephonic interpreter services available, which may be found by doing a Google search for “telephone interpreter services Texas” or similar.

A “**qualified telephone interpreter**” may be sworn to interpret for the person in the trial of a Class C misdemeanor or a proceeding before a magistrate if:

- an interpreter is not available to appear in person before the court, **or**
- if the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or is unfamiliar with the use of slang.

“Qualified telephone interpreter” means a telephone service that employs **licensed court interpreters** as defined by Section 57.001, Government Code, or federally certified court interpreters. *Code of Criminal Procedure Art. 38.30(a-1)*.

Additional resources and information about court interpreters and translators are available at <http://www.txcourts.gov/programs-services/interpretation-translation/>.

For information on issues related to finding an interpreter for Art. 15.17 hearings, please see the *Magistrate Duties* deskbook.

Who Pays for the Interpreter?

In criminal cases, the county will be required to pay for the costs of an interpreter, though those costs can be taxed against the defendant if the defendant is convicted. For interpreters for languages other than English, the interpreter is entitled to at least \$15 and not more than \$100 per day, plus travel expenses. The commissioners court of a county may set a payment schedule that exceeds this amount.



Code of Criminal Procedure Art. 38.30(b), (c). For interpreters for hearing-impaired individuals, the interpreter must be paid a “reasonable” fee, plus travel expenses. *Code of Criminal Procedure Art. 38.31(f).*

Does the Interpreter Have to be a Licensed Court Interpreter?

The court **must appoint a “licensed court interpreter** for an individual who can hear but does not comprehend or communicate in English if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a ... criminal proceeding in the court.” *Govt. Code § 57.002(b-1).* But a court may appoint a spoken language interpreter **who is not a licensed court interpreter:**

- In a county with less than 50,000;
- In a county with more than 50,000 if the language is not Spanish and the court finds that there is no licensed court interpreter within 75 miles who can interpret in that language; or
- In a county that:
 - is part of two or more judicial districts, that has two or more district courts with regular terms, and that is part of a district in which a county borders on the international boundary of the United States and the Republic of Mexico; OR
 - borders on the international boundary of the United States and the Republic of Mexico and that is in a judicial district composed of four counties; OR
 - borders on the international boundary of the United States and the Republic of Mexico and that has three or more district courts or judicial districts wholly within the county; OR
 - borders on the Gulf of Mexico and that has four or more district courts or judicial districts of which two or more courts or districts are wholly within the county.

Govt. Code §§ 57.002, 57.002(d-1); Civil Practice and Remedies Code § 21.021.

What are the Requirements for a Licensed Interpreter?

The requirements for a licensed interpreter are explained at this link:

<http://www.txcourts.gov/jbcc/licensed-court-interpreters/frequently-asked-questions.aspx>

There are two different types of certifications (Basic and Master), however, both types permit a person to interpret in justice court, so the court doesn’t have to worry about which type the interpreter has. *Government Code § 157.101(d).*

What are the Requirements for an Interpreter who is not Licensed?

A person who is not a licensed interpreter:

- Must be qualified by the court as an expert;
- Must be at least 18 years old; and
- May not be a party.

Government Code § 57.002(e).

What are the Requirements for a Sign Language Interpreter?

A sign language interpreter must be a “certified court interpreter” which means:

- A qualified interpreter under Art. 38.31 of the Code of Criminal Procedure;
- A qualified interpreter under Civil Practice and Remedies Code § 21.003;
- Certified by the Department of Assistive and Rehabilitative Services; or

- A sign language interpreter certified as a CART provider.

Government. Code §§ 57.001, 57.002.

C. Discovery

Unlike in civil cases, the court is generally **not** involved in the discovery process in criminal cases in justice court. Additionally, discovery requests are fairly rare in justice court.

The defendant can request that the state permit inspection and electronic duplication of documents, photographs, and other things that are in the possession, custody, or control of the state or any person under contract with the state. The state remains in possession of the items, although they may provide electronic duplicates to the defendant. Additionally, a representative of the state is entitled to be present during the inspection. *Code of Criminal Procedure Art. 39.14(a).*

The state is not required to allow pro se defendants to make electronic duplicates, though they may allow it, or may provide electronic duplicates to pro se defendants. *Code of Criminal Procedure Art. 39.14(d).*

When is the Court Involved in Discovery?

The state may object to the defendant's discovery request. If so, the court **must** hold a hearing to determine if the items are subject to discovery. Additionally, the state must notify the defendant if they redact any information from any requested items. If that occurs, the defendant may request the court to hold a hearing to determine if redaction is proper, and the court **must** hold a hearing upon such a request. *Code of Criminal Procedure Art. 39.14(c).*

What if the Defendant Submits a Discovery Request to the Court?

The Code of Criminal Procedure doesn't provide a mechanism for the defendant to request the court to provide materials associated with discovery. If a defendant submits such a request to the court, TJCTC recommends that the court forward the request to the prosecutor.

Costs Associated with Discovery

A court may order the defendant to pay costs related to discovery under this article, provided that costs may not exceed the charges for providing copies of public information as prescribed by Subchapter F, Chapter 552, Government Code.

Exculpatory Evidence and the Michael Morton Act

The state **shall** disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. This information must be provided to the defendant without necessity of a discovery request from the defendant.

This legal requirement arose after the conviction of Michael Morton who was convicted and sentenced to life in prison in 1987 for the murder of his wife. He was exonerated in 2011 after DNA evidence revealed that someone else had murdered his wife. Morton's lawyers discovered that the original prosecutor had withheld evidence that could have proven Morton's innocence. The U.S. Supreme Court's 1963 decision in *Brady v. Maryland* already required prosecutors to hand over to defendants any evidence that is "material either to guilt or to punishment," but the Michael Morton Act codified it in Texas law and required that all witness statements and police reports must be provided to the defendant on demand.

D. Jury Trial Issues

1. Costs Associated with Jury Trials

The court **may not** charge the defendant up front for a jury trial in a criminal case. There is a \$3 court cost that is additional if the defendant is convicted by a jury, or if the defendant is ultimately convicted or placed on deferred disposition after waiving a jury less than 24 hours before a scheduled jury trial. *Code of Criminal Procedure Art. 102.004*. For example, this fee would apply to a defendant who showed up on the day of their jury trial, and then took an offer from a prosecutor and changed their plea to nolo or guilty. For more information on court costs, please see the *Fees & Costs* deskbook.



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If the defendant fails to appear for their jury trial, the cost of empaneling the jury may be assessed against them. These costs could include the pay that the jurors receive, as well as the cost of mailing the jury summons, etc. The judge can release the defendant from this obligation upon a showing of good cause. *Code of Criminal Procedure Art. 45.026*. Although a defendant may be held in contempt for failing to pay this amount, the court must take full precautions to not jail a defendant who does not pay due to an inability to pay.



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If a citizen summoned for jury service fails to answer to the jury summons, or falsifies information, they may be fined not less than \$100 or more than \$500, and an attachment may issue to have them brought to court. *Code of Criminal Procedure Art. 35.01*.

2. Selecting the Jury (*Voir Dire*)

In justice court, the jury consists of six qualified jurors. *Code of Criminal Procedure Art. 33.01(a)*.

Can We Just Use the Same Jury for Multiple Cases?

No. The system of *voir dire* is a method of jury selection designed to allow both sides jointly to select an impartial jury. The process of jury selection is the main difference between trial procedure for a jury trial and a bench trial. The details of this process are found in the *Trial Procedure* deskbook.



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To ensure an impartial jury, the parties in each case must be allowed to go through the process of jury selection. To allow the parties in one case to select a jury, and use that same jury for multiple cases would be a violation of due process.

There is, however, nothing wrong with the court using the same venire, or jury panel, for multiple cases, as long as there is a separate voir dire process in each case.

3. Jury Deliberation and Verdict

The **jury charge** may be made orally or in writing. *Code of Criminal Procedure Art. 45.033.*

The jury shall be kept together until they reach a verdict, are discharged, or until the court recesses. *Code of Criminal Procedure Art. 45.034.* A jury shall be discharged if it fails to agree to a verdict after being kept together a reasonable time. If a jury is discharged because it fails to agree to a verdict, the judge may impanel another jury as soon as practicable to retry the case. *Code of Criminal Procedure Art. 45.035.*

While a jury is deliberating a person may not use any device to produce or make an audio, video, or audio-visual broadcast, recording, or photograph of any juror. *Code of Criminal Procedure Art. 36.215.*

The verdict in a criminal case must be unanimous. The judge renders a judgment on the jury's verdict. *Code of Criminal Procedure Art. 45.036.* If the state fails to put on any evidence to support one or more elements of the offense, the judge may direct (order) the jury to return a verdict of 'not guilty'. This is called a **directed verdict**. *Code of Criminal Procedure Art. 45.032.*

Who Determines the Punishment in a Jury Trial?

In justice court cases, there are not separate guilt/innocence and punishment phases of a trial, as there are in higher courts. *Code of Criminal Procedure Art. 37.07, Sec. 2(a).* If the jury determines that the defendant is guilty, the judge assesses punishment, unless the defendant elects in writing before voir dire for the jury to assess punishment. *Code of Criminal Procedure Art. 37.07, Sec. 2(b).*

E. Bench Trial Issues

Although a criminal defendant has the right to a trial by jury, the defendant may waive the right in writing. *Code of Criminal Procedure Art. 45.025.* If the defendant waives the right to a jury trial, then the judge, rather than a jury, will hear the evidence and pronounce judgment. Since the judge will be determining guilt or innocence, best practice is to have a list of the elements of the offense at the bench, and make notes as to what evidence is presented on each element.

F. The Burden of Proof

In criminal cases, the state must prove the defendant guilty beyond a reasonable doubt. In 1991, the Court of Criminal Appeals enacted a required jury instruction defining reasonable doubt. However, less than a decade later, the court found that the better practice is to give no definition of reasonable

“Jury Charge”

The judge's instructions to the jury concerning the law that applies to the facts of the case on trial. The judge asks the jury if they feel the elements of the offense have been proven by the state. **Note that the court does not give a jury charge to the jury in civil cases.**



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doubt at all to the jury. *Paulson v. State*. Subsequent rulings support an explanation of the burden of proof so long as the court does not attempt to define “reasonable doubt.”

The following is a suggested general instruction for the jury before they begin deliberation: “All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant. It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution’s proof excludes all reasonable doubt concerning the defendant’s guilt.” *Woods v. State; Geesa v. State; Freeman v. State*.

G. Right to a Speedy Trial

For a court to address the issue of whether a defendant has been deprived the right to a speedy trial, there must first be a delay that is “presumptively prejudicial.” There is no set time frame that triggers the presumption, but a delay approaching one year is sufficient. *Orand v. State*. Once it has been determined that there **is** a presumptively prejudicial delay, the court will apply a test developed by the Supreme Court to determine whether the defendant was deprived of a speedy trial. If the defendant was deprived of a speedy trial, **they are entitled to a dismissal**.



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Under the “*Barker* balancing test”, there are four factors that the court assesses:

- 1) Whether the length of the delay was uncommonly long;
- 2) Whether the reason for the delay was justified;
- 3) Whether the accused asserted his right; and
- 4) Whether the delay resulted in prejudice to the accused.

Barker v. Wingo.

These four factors are not elements that must all be checked off, but instead are factors which must all be weighed by the court to determine if the right to a speedy trial has been violated.

There is no particular period of delay that constitutes a violation of the right to a speedy trial. Also, the defendant may have contributed to the delay, which would be a factor in favor of finding no violation. *Kelly v. State*. Deliberate delays by the state would be heavily weighed in favor of the defendant, while delays due to factors such as overcrowded dockets would be less likely to support a finding of speedy trial violation. Common neutral events, such as overcrowded dockets, weigh less heavily against the state. *Starks v. State; Zamorano v. State*.

The defendant must have asserted the right to a speedy trial in order to claim a violation. The defendant may assert the right by clear and unambiguous communications to the court or prosecution seeking a speedy trial. *Cantu v. State*.

H. Motions for Continuance



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Generally, it is up to the court whether to grant a motion for continuance.

A court should use discretion in determining whether there is good cause for the continuance. Factors that may be weighed would include the amount of notice, the reason for the continuance, and the number of previous continuances granted. The only exception is that if a party received less than three business days' notice of the trial setting, the court **must** grant the motion for continuance, which may be oral or written. *Code of Criminal Procedure Art. 29.035. See also Code of Criminal Procedure Arts. 29.04-29.08.*

I. What if There is No Prosecutor?



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The State's case must be conducted by the prosecutor. *Code of Criminal Procedure Art. 45.101.*

A police officer, other witness, or the judge is **not** allowed to put the State's evidence on for it. The State must prove its case beyond a reasonable doubt or the defendant must be found not guilty.

No prosecutor is needed just to take a plea or to assess a punishment on a defendant who pleads guilty or nolo.

If no prosecutor is present when the case is called for trial, there are 3 options:

- Continue the case to another date
- The judge appoints a **prosecutor pro tem**, which is another attorney to prosecute the case, who must be paid by the county
- Proceed to trial. However, this does **not** mean the court will hear evidence. When the court proceeds to trial without a prosecutor, the State puts on no evidence, therefore they do not prove the case beyond a reasonable doubt. This means that the defendant **must be** found not guilty.

Code of Criminal Procedure Art. 45.031.



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Finding the defendant not guilty when the State fails to put on evidence is **not** the same as dismissing the case. Courts generally have no authority to dismiss criminal cases without a motion from the prosecutor. [For more information on dismissals, see Chapter 5.](#)

J. Rules of Evidence

The Rules of Evidence govern criminal cases in justice court, just as in county or district court. *Code of Criminal Procedure Art. 45.011.* For a full discussion of evidentiary rules and their application in criminal cases, please see the *Trial Procedure* deskbook.

CHAPTER 7: THE JUDGMENT IN CRIMINAL CASES

Every criminal case that is filed in a justice court should ultimately result in a judgment, which may be either a judgment of dismissal (for more information, see Chapter 5), a judgment of acquittal, or a judgment of conviction.



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Forms

Judgment forms may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

A. Judgment of Acquittal

A judgment of acquittal is proper if a trial has occurred and the defendant was found not guilty because the state failed to prove every element of the offense beyond a reasonable doubt. The judgment should reflect that the defendant was acquitted, **not** that the case was dismissed. Often, judges use the two outcomes of acquittal and dismissal interchangeably, since neither result in a conviction. However, this is improper, and could result in improper process moving forward, and improper collateral consequences for the defendant. For example, after an acquittal, the court must inform the defendant of their right to an expunction, which they may request within 30 days of the acquittal. See page 73 for more information.



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B. Judgment of Conviction

A judgment of conviction should be generated every single time that a defendant either pleads guilty, pleads nolo contendere, or is found guilty at trial. *Code of Criminal Procedure Art. 45.041*. The judgment should be rendered in open court, and also reduced to writing (an electronic writing is sufficient). *Code of Criminal Procedure Art. 45.041(d)*. Many courts fail to create a written judgment after the defendant pleads guilty by mail, or by payment in full of the fine and costs, as discussed beginning on page 25. Also, many judges fail to create a judgment when taking a plea while performing magistrate duties at the jail. For more information on jailhouse pleas, see the *Magistrate Duties* deskbook.



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Failing to create a written judgment will create confusion as to appeal deadlines, and also results in the defendant not being obligated to pay any fine or costs associated with the case. Many courts have had difficulty resolving cases where predecessors failed to generate written judgments.



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If the defendant is present when the judgment is pronounced, the court **must** hold a hearing to determine if the defendant is able to pay the fine and costs and, if necessary, determine alternative methods of satisfaction of the judgment (such as community service or a payment plan). *Code of Criminal Procedure Art. 45.041(a-1)*. If the defendant is not present, the court must be aware of these alternative methods, and the various procedural protections that prevent defendants from being jailed due to inability to pay fines and costs. For a full description of this topic, please see page 58.

1. Fine & Court Costs

The judgment of conviction should contain an order that the defendant pay the fine and costs to the State of Texas. The court costs are determined by statute, along with some optional court costs adopted by individual counties. A fine range is established by statute, and the judge (or jury) can assess a fine against a defendant within that range, but never outside of it. For more information on assessment and distribution of fines and costs, please see the *Fees & Costs* deskbook.

The Bill of Costs

A court cost is not payable by the person charged with the cost until a written bill is produced or is ready to be produced, containing the items of cost, signed by the officer who charged the cost or the officer who is entitled to receive payment for the cost. *Code of Criminal Procedure Art. 103.001*. It is not necessary to produce a written bill of costs in each case, though there is nothing wrong with that practice. However, in addition to the judgment, a “bill of costs” needs to be at minimum in the court’s software system, ready to be produced on demand. A digital signature should be affixed at the time the bill of costs is created in the software system. If new costs are incurred by a defendant, such as a warrant fee, the court should generate a supplemental bill of costs to reflect the new costs.

2. Restitution

In addition to the fine and costs that are ordered paid to the state, the court may order restitution to be paid to the victim of the offense, if any. This restitution is unlimited, except in Issuance of Bad Check cases, where the limit on restitution is \$5000. *Code of Criminal Procedure Art. 45.041(b-1)*.

Issuance of Bad Check is always a Class C misdemeanor, unless the check is for court-ordered child support. A more serious offense of Theft (often called Theft by Check when the theft occurs by passing a fraudulent check) is only a Class C misdemeanor if the amount stolen is less than \$100. *Penal Code § 31.03(e)*.



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An order of restitution is treated like a civil judgment, and enforced as a civil judgment. This means that most of the tools described in [Chapter 8](#) of this volume, including community service, capias pro fines, and commitment to jail may not be used to discharge restitution orders. Instead, the victim would be responsible for pursuing remedies to enforce the restitution order. However, a case may be referred to post-judgment collection to collect restitution. For more information on enforcement of civil judgments, please see the *Civil* deskbook.

3. Other Sanctions

Some offenses that a justice court has jurisdiction over authorize the imposition of additional sanctions on the defendant. These sanctions should be put in writing and included in the judgment.

For example, conviction of an offense under Chapter 106 of the Alcoholic Beverage Code may include an order to perform community service, an order to attend an alcohol awareness course, and a driver license suspension. *Alcoholic Beverage Code §§ 106.071, 106.115*. For more information on these sanctions, please see the *Juvenile Law* deskbook.

CHAPTER 8: ENFORCING CRIMINAL JUDGMENTS

When a defendant fails to satisfy a criminal judgment, the court has several tools at its disposal to compel the defendant to comply with the judgment. Eventually, the court may be able to order the defendant committed to jail to “lay out” the fine and costs. However, it is **absolutely critical** that the court avoids committing an indigent defendant to jail for being unable to pay the fine and costs. That concept is called “**debtor’s prison**.” Debtor’s prison is in violation of Texas law, and has been declared by the Supreme Court to be in violation of the United States Constitution. *Tate v. Short*; *Bearden v. Georgia*.



A. “Indigence” vs. “Unable to Immediately Pay”

It is important to draw a distinction between an indigent defendant and a defendant who is unable to immediately pay. Indigence refers to a more long-term view of a defendant’s financial picture, whereas “inability to immediately pay” looks at a snapshot at that moment. Certain protections apply only to indigent defendants, and often the law gives criteria that courts should look at when considering whether or not a defendant is indigent.

One example is the court’s ability to waive surcharges imposed on a defendant under the Driver Responsibility Program. That waiver can only happen when a defendant is indigent. To prove indigence under this section, a defendant **must** provide information to the court in which the person is convicted of the offense that is the basis for the surcharge to establish that the person is indigent. The defendant must provide either tax returns or wage statements showing that their income or household income does not exceed 125% of the applicable federal poverty level guidelines, or documentation that the person or the taxpayer claiming the person as a dependent receives assistance from certain state or federal assistance programs. *Transportation Code § 708.358*.

By contrast, the discussion below about alternative satisfaction of fines and costs applies to defendants who might not be indigent by legal definition, but nonetheless are unable to immediately pay. For example, a person may be in court on November 27th, has no cash on hand, and doesn’t get paid until December 1st. They do not meet any of the above criteria often used to determine indigence, but will not be able to pay the fine and costs until after their next paycheck. The court **must** allow this defendant to make alternative arrangements to satisfy the judgment.

When reviewing statutes or other material regarding criminal cases, always pay close attention to whether the protection applies to all criminal defendants who are unable to immediately pay, or only to those who are indigent.



B. Alternative Satisfaction of Fines and Costs

In 2017, the Texas Legislature added several procedural safeguards to ensure that not only must courts allow defendants who are unable to pay alternative methods of satisfying criminal judgments, but that defendants **must** be made aware of these methods. Documents from the citation, to pre-trial collection notices, to notices of failure to appear, to notices of failure to satisfy the judgment, all **must** contain a statement notifying the defendant of alternative methods of satisfaction.



Forms

A form laying out the various methods of satisfying a judgment may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

Many courts also take other steps to ensure that defendants are aware of these rights, such as publicly posting the methods of alternative satisfaction of fines and costs.

When the court renders a judgment against a defendant who is present, the judge **must** immediately determine if the defendant is unable to immediately pay the fine and costs. If so, the court **must** enter an order allowing alternative satisfaction of the fine and costs. *Code of Criminal Procedure Art. 45.041*.



The defendant does not have to specifically raise the issue of inability to pay. Failure of a defendant to satisfy the judgment is sufficient to raise the issue, and the court **must** hold a hearing after failure to satisfy the judgment in order to determine the defendant's ability to pay.

If the court allows alternative methods of satisfaction at the time of judgment, those methods should be included in the judgment. If the determination occurs after the judgment, the court should issue a separate written order, specifying exactly how the fine and costs shall be discharged.

1. Payment Plans

When imposing a fine and costs, if the justice or judge determines that the defendant is unable to immediately pay the fine and costs, the justice or judge **shall** allow the defendant to pay the fine and costs in specified portions at designated intervals. *Code of Criminal Procedure Art. 45.041(b-2)*. The court may designate the terms of the payment plan in the judgment itself, or may create a separate payment plan order.

Never allow a defendant to begin a payment plan without having a written judgment.

Time Payment Fee

If any portion of an ordered payment is made more than 30 days after the judgment or order to pay is entered, the court must assess the \$25 Time Payment Fee. *Local Government Code § 133.103*. The fee should not be assessed until the 30 days have actually passed. For example, John Doe is convicted on January 29th. Doe and the court agree that he will pay \$50 a month for four months to satisfy the \$200 judgment. The Time Payment Fee should not be assessed until March 1st (the 31st day after the judgment), even though the payment plan, if followed, would result in more than 30 days elapsing between the order and payment in full. After all, Doe could hit the lottery February 2nd and come pay the entire judgment, and so wouldn't owe the Time Payment Fee. For more information on the Time Payment fee, see the *Fees & Costs* deskbook.

The Defendant Fails to Comply with the Payment Plan

If a defendant fails to comply with a payment plan, the court should use methods discussed in this chapter to continue to enforce the judgment. The defendant **should not** be held in contempt for failing to make the required payments. Additionally, it is OK for the court to call the defendant in for



a hearing to discuss the failure to comply, but the defendant **cannot** be held in contempt for not appearing at the hearing, **nor** can they be charged with FTA or VPTA.

2. Community Service

The court may require a defendant who fails to pay a previously assessed fine or costs, or who is determined by the court to be unable to pay the fine or costs, to discharge all or part of the fine or costs by performing community service. *Code of Criminal Procedure Art. 45.049(a)*. The court **must** give the defendant a written order to perform the community service, which should specify:

- the number of hours defendant is required to work; **and**
- the date by which the community service is required to be completed.

Code of Criminal Procedure Art. 45.049(b).

A judge may not order a defendant to perform more than 16 hours per week of community service unless the judge determines that requiring the defendant to perform additional hours does not impose an undue hardship on the defendant or the defendant's dependents. *Code of Criminal Procedure Art. 45.049(d)*.

The defendant receives a **minimum of \$100 credit toward the judgment for each eight hours of community service performed**. *Code of Criminal Procedure Art. 45.049(e)*. The court has discretion to give more than \$100 credit per eight hours if desired.

Allowable Community Service

The judge may order the community service performed by attending:

- a work and job skills training program;
- a GED prep class;
- an alcohol or drug abuse program;
- a rehabilitation program;
- a counseling program, including a self-improvement program;
- a mentoring program; **or**
- any similar activity;

Or by performing work for:

- a governmental entity;
- a nonprofit or other organization that provides services to the general public that enhance social welfare and the general well-being of the community, as determined by the justice or judge; **or**
- an educational institution.

Code of Criminal Procedure Art. 45.049(c).

An entity that accepts a defendant to perform community service must agree to supervise the defendant in the performance of defendant's work and report on the defendant's work to the judge who ordered the community service. *Code of Criminal Procedure Art. 45.049(c-1)*.



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Forms

Forms with the proper language, and containing lists of appropriate community service options may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

Special rules exist for community service in juvenile criminal cases. For more information, please see the *Juvenile Law* deskbook.

3. Waiver of Fine and Costs

A justice court may waive payment of a fine or costs imposed on a defendant if:

- the court determines that discharging the fine or costs through community service or as otherwise authorized by the Code of Criminal Procedure would impose an undue hardship on the defendant or the defendant's dependents; **and**
 - that the defendant either is indigent,
 - does not have sufficient resources or income to pay all or part of the fine or costs, **or**
 - was under 17 years of age at the time the offense was committed.

Code of Criminal Procedure Art. 45.0491.

C. Post-Judgment Collections

Art. 103.0031 of the Code of Criminal Procedure authorizes a commissioners court to enter into a contract with an entity to collect money due to the county in criminal cases, including fines, fees, costs, forfeited bonds, and restitution. This section will discuss the applicability of Art. 103.0031 to cases where the defendant has been convicted of the offense and there is a judgment in the case. [For information on cases where the defendant has failed to appear, see page 17.](#)

The defendant can be referred to collections once the case is 60 days past due, which for purposes of cases where the defendant has been convicted is considered to be the 61st day after the court has determined the amount must be paid in full. *Code of Criminal Procedure Art. 103.0031(f).*

The collection entity may add a 30% fee to all amounts collected on cases that are referred for collections. However, this fee is only assessed on money actually collected. So if the defendant satisfies the judgment through community service or jail credit, or the fines or costs are waived entirely, the collection entity would not be able to collect any money in the case. Additionally, the defendant does not owe a collection fee if the court determines the defendant to be indigent or unable to pay the fee. *Code of Criminal Procedure Art. 103.0031(d).*

D. Post-Judgment OMNI Reporting

Chapter 706 of the Transportation Code creates a mechanism, referred to as "OMNI", by which defendants who are not compliant in criminal cases may have their driver's license flagged for non-renewal. The term "OMNI" comes from the company Omnibase, with whom DPS has contracted to administer this program. Omnibase then enters into contracts with individual counties to process referrals from those counties. If reported to OMNI, the defendant will not be able to renew their license until the issue is resolved and, in most cases, until the defendant pays a \$30 fee, commonly called the "OMNI fee." Note that OMNI applies to all criminal cases, not merely those arising under the Transportation Code.



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1. When is a Defendant Reported to OMNI?

There are two reasons why a defendant may be reported to OMNI: they fail to appear pursuant to a citation or complaint or they fail to satisfy a judgment that has been rendered against them. *Transportation Code § 706.004(a)*. In this section, we are dealing with reporting defendants based on a failure to satisfy the judgment against them. **For information on OMNI as it applies to failure to appear, see page 15.**

A defendant **may not** be reported to OMNI if:

- 1) They do not have a driver's license. OMNI is not a suspension order, or an order to not issue a DL, it is merely a tool to stop a defendant from renewing their DL.
- 2) They fail to pay restitution or comply with sanctions that have specific consequences such as attending an alcohol awareness course.

The report to OMNI should contain the defendant's name, date of birth and DL number; the offense they are charged with; the reason they are reported to OMNI, and any other information required by OMNI or DPS. *Transportation Code § 706.004(b)*.

2. How Does a Defendant Get Out of OMNI?

To be released from OMNI, the defendant must satisfy the condition that triggered the report **and**, if applicable, pay the \$30 OMNI fee. To satisfy the condition of failing to satisfy the judgment, the defendant may:

- 1) Perfect an appeal of the case for which the judgment arose;
- 2) Pay or otherwise discharge the fine and cost owed on an outstanding judgment of the court;
or
- 3) Make other suitable arrangement to discharge the fine and cost within the court's discretion.

Transportation Code § 706.005(a).

Note that perfection of an appeal will almost never be an option since the court will generally be waiting longer than 10 days after judgment to place the defendant into OMNI. However, if instead the defendant had 30 days to appeal due to following the procedure under Art. 27.14(b) of the Code of Criminal Procedure, as described on page 25, or if the court inadvertently failed to generate a judgment at the time of conviction, this could come into play.



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Waiver of the OMNI Fee for Indigent Defendants

The \$30 OMNI fee **must** be waived if the court finds that the defendant is indigent.

Although a court has discretion regarding a finding of indigence, a defendant is presumed indigent for the purposes of OMNI if the person:

- is required to attend school full time under Section [25.085](#), Education Code;
- is a member of a household with a total annual income that is below 125 percent of the applicable income level established by the federal poverty guidelines; or
- receives assistance from certain governmental assistance programs.

Transportation Code 706.006(d).

When Release from OMNI is Required Without Payment or Waiver of \$30 OMNI Fee

The defendant must be released from OMNI without paying the \$30 OMNI fee, even if it was not waived due to indigence, if:

- the case was reported to OMNI in error; or
- the records of the underlying case no longer exist.

Transportation Code § 706.005(b).

Notifying OMNI

The court should immediately notify OMNI once the defendant has met one of the above conditions for release from OMNI. Upon receiving notice that the defendant is cleared, OMNI must immediately release the defendant's driver's license for renewal. *Transportation Code § 706.005.*

E. Capias Pro Fines, Commitment, and Jail Credit

One of the more commonly misunderstood tools available to courts is a **capias pro fine**. Frequently, it is incorrectly used as an order to either "pay or lay", that is, pay the fine and costs, or remain in jail until the judgment has been satisfied via jail credit. Instead, it is supposed to be a mechanism that a court can use to secure a defendant's presence in front of the judge, determine why the defendant has not satisfied the judgment, and order alternative methods of satisfaction of the judgment, if needed. In limited circumstances a judge may then issue an order of commitment, which commits the defendant to jail until the judgment is discharged.

1. Capias Pro Fines

Forms

Capias Pro Fine and return forms may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

Notice Required Before Issuance of Capias Pro Fine

A capias pro fine **may not issue** until notice is sent to the defendant of their failure to satisfy the judgment, and commanding them to appear before the court and show cause why a capias pro fine should not issue. If the defendant does not appear at the hearing, the court may issue the capias pro fine. If the defendant appears and shows good cause, the court should continue to work with the defendant in resolving the judgment. If the defendant appears and does not show good cause, the court should hold an indigency hearing as described below, and issue an order of commitment if appropriate. *Code of Criminal Procedure Art. 45.045(a-2).*

Defendant Must Be Brought Before the Court

The capias pro fine shall state the amount of the judgment and sentence, and command the appropriate peace officer to bring the defendant before the court. Only if the defendant cannot be



Capias Pro Fine

A **capias pro fine** is a writ issued by a court having jurisdiction of a case **after judgment** and sentence for unpaid fines and costs, directing "any peace officer of the State of Texas" to arrest a person convicted of an offense and bring the arrested person before that court.

brought before the court, the officer is authorized to place the defendant in jail until the defendant can be brought before the court. *Code of Criminal Procedure Art. 45.045(a)*.



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Defendant Must Be Released Within One Business Day

If the defendant is taken to jail, they must be released within one business day. They may **not** be left in jail to lay out the judgment! The sheriff, jail staff, or on-duty magistrate is **not** authorized to collect fines and costs on behalf of your court unless the magistrate is a justice of the peace in the same county you are in.



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If the issuing court is unavailable, the officer may take the defendant before any other justice of the peace or county criminal magistrate located in the same county as the issuing court. *Code of Criminal Procedure Art. 45.045(a-1)*.

Alternative Procedure on Capias Pro Fine (Payment to Peace Officer)

The issuing court **may** approve a procedure where the officer arresting the defendant on the capias pro fine may, in lieu of arresting the defendant, take payment in full of the fine and costs via credit or debit card. The officer **must** inform the defendant of their right to dispose of the fine and costs via other means, including community service and the possibility of waiver. *Code of Criminal Procedure Art. 103.0025*. A peace officer may not take payment on a capias pro fine if the court has not specifically approved this procedure.

Recall of Capias Pro Fine

The court **shall** recall a capias pro fine if, before the capias pro fine is executed, the defendant voluntarily appears to resolve the amount owed and the amount owed is resolved in any manner authorized by this chapter. *Code of Criminal Procedure Art. 45.045(a-3)*.



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Capias Pro Fines in Juvenile Cases

A capias pro fine may **never** be issued for someone who has not yet turned 17. If the offense occurred before the defendant's 17th birthday, but the defendant has turned 17, and the court already proceeded under Art. 45.050 (the juvenile contempt statute) to compel the defendant to satisfy the judgment, a capias pro fine may be issued if the court finds that the issuance of the capias pro fine is justified after considering:

- 1) the sophistication and maturity of the individual;
- 2) the criminal record and history of the individual; **and**
- 3) the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court.

Code of Criminal Procedure Art. 45.045(b).

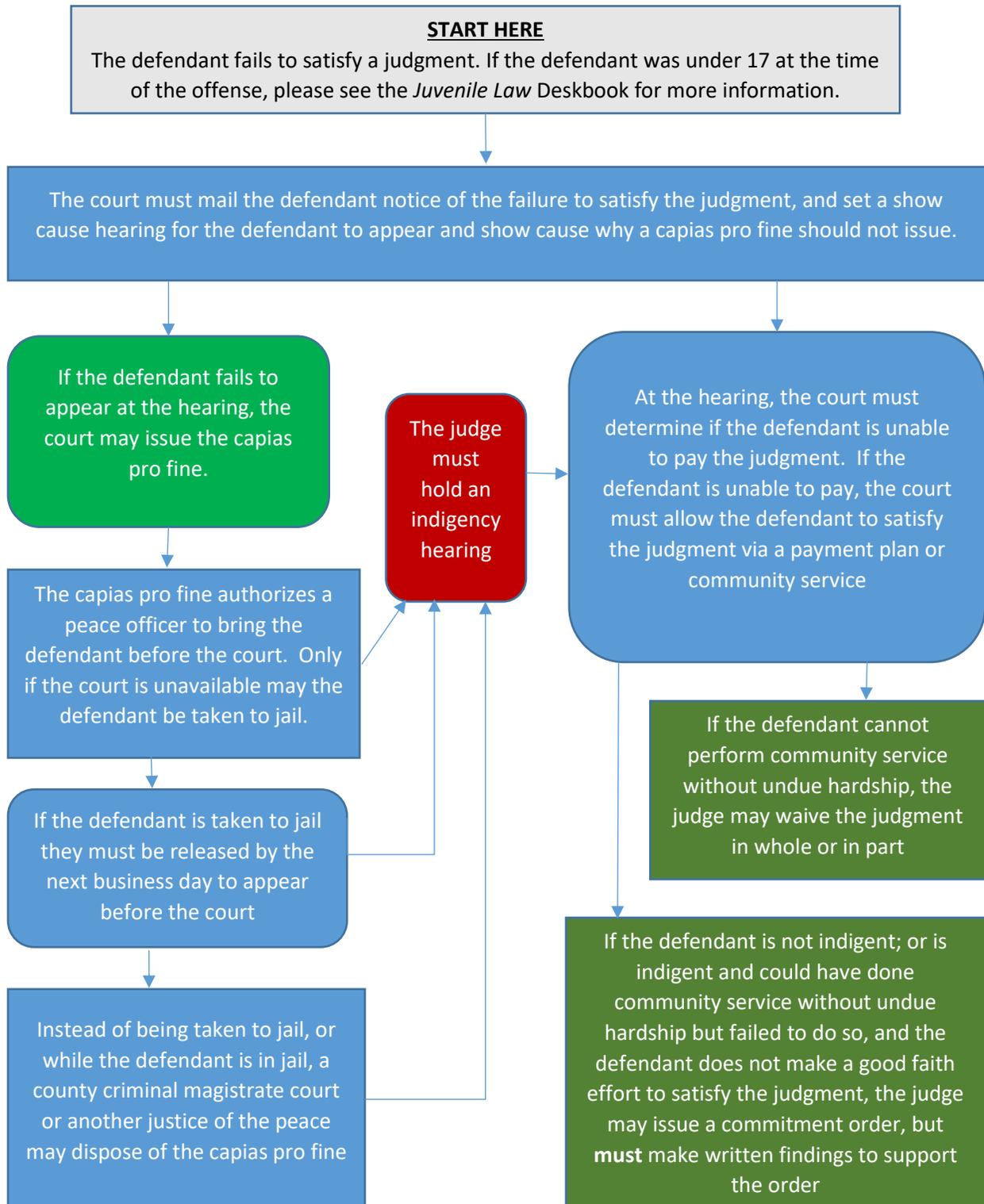


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The statute doesn't require the above findings to be made in writing, but TJCTC strongly suggests it.

For more information, see the *Juvenile Law* deskbook.

(a) Capias Pro Fine flowchart



2. Order of Commitment

An **order of commitment** is the tool that is used to confine a defendant in jail to lay out the fine and costs via jail credit. A defendant **may not** be ordered to be confined in jail to discharge a monetary judgment against them, until the judge determines **in writing** at an **indigency hearing** either:

- 1) that the defendant is not indigent and intentionally failed to make a good faith effort to discharge the judgment; **or**
- 2) that the defendant **is** indigent; **and**
 - has failed to make a good faith effort to discharge the fines and costs via community service; **and**
 - could have discharged the fines and costs via community service without experiencing any undue hardship.

Code of Criminal Procedure Art. 45.046(a).

A certified copy of the judgment, sentence, and order is sufficient to authorize the defendant's confinement. *Code of Criminal Procedure Art. 45.046(b).*



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Forms

An order of commitment form may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

Indigency Hearing

To secure the defendant's presence at an indigency hearing, the court may issue a summons or a capias pro fine, following the procedure described above. The hearing may be conducted via a two-way electronic broadcast system. *Code of Criminal Procedure Art. 45.046(c).* If a capias pro fine was issued, the hearing may be conducted by the justice of the peace who issued the capias pro fine, by any other justice of the peace located in the same county as the issuing court, or by a county criminal law magistrate located in the same county as the issuing court. *Code of Criminal Procedure Art. 45.046(d).*

3. Jail Credit

A defendant earns credit toward the fine and costs assessed for any time spent in jail for the offense charged, whether before or after final conviction. *Code of Criminal Procedure Art. 42.03, Sec. 2.* The judge determines the dollar amount of credit the defendant gets, as well as how often the defendant earns the credit. The minimum dollar amount that may be awarded is \$100, and the award must be made no more frequently than every 8 hours and no less frequently than every 24 hours. *Code of Criminal Procedure Art. 45.048.*

What About Inmates Who Want Jail Credit?

Many inmates who are incarcerated for serious offenses also have fine-only misdemeanors pending in justice court. They often will contact the court seeking jail credit toward their misdemeanor for the time they are spending in jail or prison for the more serious offense. A defendant is only entitled to jail credit for time actually spent in jail on the given offense. *Code of Criminal Procedure Art. 42.03, Sec. 2.* So, technically, an inmate would not be entitled to jail credit toward their justice court fine and costs for time spent incarcerated on other offenses.

However, it often does not make sense to continue to hold a fine-only misdemeanor case open for months or even years while waiting for a defendant to be released. A way that the court can dispose of the case legally would be to first ensure that there is a judgment. This means that if the defendant hasn't pled guilty or nolo, the court **must** get such a plea in writing and generate a judgment. The court could then determine that the defendant is unable to immediately pay, and that community service would be an undue hardship, and then waive the fine and costs entirely under Art. 45.0491, [as described on page 61](#).

F. Scofflaw Program

The scofflaw program is a mechanism by which a defendant will not be allowed to renew registration of their motor vehicle until their outstanding criminal case is resolved, whether it be failure to appear or failure to satisfy the judgment. The court refers the case to DPS or the county assessor-collector if the defendant fails to satisfy the judgment. The defendant must resolve the matter, and may be assessed a \$20 fee to be released from the program unless the court determines that the defendant is economically unable to pay, or otherwise finds good cause not to impose the fee. *Transportation Code § 502.010*.

The referral to the scofflaw program expires two years after the referral, and the defendant may not be referred on new failures to appear or satisfy judgments unless the case prompting the original referral has been resolved. *Transportation Code § 502.010(a-1)*. This means that courts should remain active in pursuing compliance after referring a case to the scofflaw program.

G. Civil Enforcement of Judgments

If the defendant defaults in payment of a fine, the justice of the peace may order the fine and costs collected by execution against the defendant's property in the same manner as a judgment in a civil suit. *Code of Criminal Procedure Art. 45.047*. Of course, the court may discover the same thing that many civil plaintiffs do – it can be very difficult to enforce civil judgments! Many defendants will lack non-exempt property that may be taken and sold to satisfy the judgment. For more on methods of enforcing civil judgments, please see the *Civil* deskbook.

Jail Credit Order

The jail credit order should read “The defendant will receive \$__ credit for every __hours spent in jail”, with the first blank being a number that is at least 100 and the second blank being a number that is at least 8 and not more than 24. For example, “the defendant will receive \$200 credit for every 24 hours spent in jail.”



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CHAPTER 9: MOTIONS FOR NEW TRIAL AND APPEALS

When a judgment and sentence have been rendered against a defendant, the defendant has two methods of seeking relief from judgment. The defendant may either make a motion for a new trial, which may result in another trial in the same justice court, or appeal the case, which will result in a new trial in a higher court, almost always the county court.

A. Motions for New Trial



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A motion for new trial generally must be made within five days after the judgment. *Code of Criminal Procedure Art. 45.037*. If the motion is not made within five days after the judgment, the court loses jurisdiction to set the judgment aside and grant a new trial. *Chatfield v. State*. The new trial must be granted before the 11th day after the judgment, otherwise the motion is automatically considered to be denied. *Code of Criminal Procedure Art. 45.038*.



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Motion for New Trial Procedure When Plea Taken in Jail

However, following a plea of guilty or nolo contendere entered while the defendant is in custody, the defendant has **10** days to make a motion for new trial, and such a motion **shall** be granted. *Code of Criminal Procedure Art. 45.023(d)*.

Only one new trial may be granted to a defendant in the same case. When a new trial has been granted, the judge shall proceed, as soon as possible, to try the case again. *Code of Criminal Procedure Art. 45.039*. Only the defendant is entitled to request a new trial. The State is never entitled to a new trial. *Code of Criminal Procedure Art. 45.040*.



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Ruling on the Motion for New Trial

Other than when a plea is entered by a defendant in custody as described above, the decision on a motion for a new trial rests in the sound discretion of the trial court. The judge should grant the motion if the judge considers that justice has not been done to the defendant in the trial of the case. *Hill v. State*.

B. Appeal

The defendant has a right to appeal in criminal cases once there is a judgment of conviction. *Code of Criminal Procedure Art. 45.042*. A judgment may be final and appealable even though no written judgment was entered. If a defendant was charged by complaint, convicted and ordered to pay a fine, there is a final judgment from which an appeal can be taken. *Golson v. State*.



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In all appeals from justice courts and municipal courts, other than municipal courts of record, to the county court, the trial is **de novo** in the county court and **the judgment of the justice court judgment is vacated**. *Code of Criminal Procedure Art. 44.17*.

If the county court doesn't have appellate jurisdiction in a county, the appeal goes to the court having appellate jurisdiction. *Code of Criminal Procedure Arts. 4.08, 4.09, 45.042(a)*. All the original papers in the case including the appeal bond, if there is one, together with a certified

De Novo

“De novo” means from new, meaning that the appeal takes the form of a brand new trial from scratch, rather than a review of the original court's decision, as occurs in higher appellate courts.

transcript of all the proceedings had in the justice court shall be delivered without delay to the clerk of the court to which the appeal is taken. *Code of Criminal Procedure Art. 44.18.*

Can the State Appeal?

The State has a very limited right to appeal in criminal cases. The only issues that would arise in a justice court case that trigger the State's right to appeal would be an order dismissing the complaint, granting a motion for new trial, or sustaining a claim of **double jeopardy** by the defendant. *Code of Criminal Procedure Art. 44.01.*

Double jeopardy is the concept prohibiting a defendant from being prosecuted twice for the same offense.

Appeal Bond

To appeal, a defendant is **not** required to give a formal notice of appeal. *Code of Criminal Procedure Art. 45.0426.* All that is needed is for the defendant to timely file an appeal bond with the court. *Code of Criminal Procedure Art. 45.042.* The bond must be payable to the State of Texas in an amount no less than double the amount of fine and costs adjudged against the defendant, with a minimum of \$50.00. *Code of Criminal Procedure Art. 45.0425.*

The appeal bond must be given within ten days after the "sentence" of the court has been rendered, unless the defendant mails to the court a plea of guilty or of nolo contendere and a waiver of jury trial, and requests notification of the amount of an appeal bond the court will approve. In that case, the appeal bond must be filed before the 31st day after the defendant received the notice of the appeal bond amount. *Code of Criminal Procedure Art. 27.14(b).* For more information on entering a plea by mail and requesting the appeal bond amount, see page 25.

The court does not have the authority to require a cash bond. A bond on a misdemeanor may be surety or cash, at the defendant's election. *Code of Criminal Procedure Art. 17.02; Ex parte Deaton; Attorney General Opinion JM-526 (1986).*

If a judge improperly refuses to permit the defendant to appeal, the defendant may obtain a writ of mandamus from the county court compelling the judge to perform the judge's duty. *Fouke v. State; Hogan v. Turland.*

Unlike motions for new trial in district and county courts (and in civil cases in justice courts), filing a motion for new trial in a criminal case in justice court **does not** extend the timeframe for filing an appeal bond. *Searcy v. Sagullo.*

Can the Defendant Appeal Immediately Following a Not Guilty Plea?

No. There must be a judgment of conviction for the defendant to appeal. Sometimes defendants and attorneys get confused because they want a trial at the county level instead, so they plead not guilty and appeal. The proper mechanism is to plead guilty or nolo and then appeal.

Can the Defendant Appeal Even Though They Pled Guilty/Nolo?

Yes! This seems counterintuitive since a plea of guilty or nolo basically either admits the offense or says the defendant will not contest the charge. However, the defendant may, as mentioned above,



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simply wish to have the county court adjudicate the case, so they may plead guilty or nolo and then appeal the conviction to county court for a trial de novo.

Can the Defendant Appeal Even Though They Paid the Fine and Costs in Full?



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If a defendant pays the fine and costs in full, they are unable to appeal the case. *Fouke v. State*. However, the defendant **may** appeal even though the fine and costs assessed have been paid if either their plea or payment of the fine and costs was not “purely voluntary.” Unless the facts and circumstances clearly show that the defendant acted voluntarily, the defendant should be permitted to appeal.

What is a Writ of Procedendo and Can an Appeal be Remanded to Justice Court?



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A **writ of procedendo** is a tool used by courts of appeal to send a case back to the trial court to “proceed” on the original judgment. Sometimes, county courts attempt to use this tool to send a case back to a justice court following an appeal. However, this is improper.

When the appeal is perfected, all proceedings in the justice court shall cease. *Code of Criminal Procedure Art. 45.043*. The judgment of conviction by the justice court is **vacated**. *Deal v. State; Ex parte Hoard; McNamara v. Druse*.

The court cannot enforce the judgment as described in Chapter 8 of this volume, even if the case is dismissed in the county court by the State, and it cannot be relied upon by the defendant for a plea of double jeopardy. *McIntosh v. Watts*.



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If the appeal was never perfected, the judgment of the justice court survives, so the county court **may** send the case back to justice court on the ground that the appeal was never perfected. If an appeal bond is not timely filed, the appellate court does not have jurisdiction over the case and shall remand the case to the justice or municipal court for execution of the sentence. *Code of Criminal Procedure Art. 45.0426*.



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But, once the county court assumes jurisdiction over the case, it **may not** be sent back to the justice court via a remand or writ of procedendo or other tool. The only way for the case to come back to justice court is for the prosecutor to file a motion to dismiss at the county court, and then the case may be refiled in the justice court. As discussed above, the previous judgment does not trigger double jeopardy, since the judgment was vacated.

CHAPTER 10: RECORDS & EXPUNCTION

A. Maintenance of Case Records

For information about how long to maintain records, and on responding to record requests, please see the *Officeholding* deskbook, and visit the Texas State Library and Archives Commission (TSLAC)'s record management page, located at <https://www.tsl.state.tx.us/landing/records-mgt.html>.

1. Electronic Records and E-Filing

TSLAC has a publication entitled *Bulletin B: Electronic Records Standards and Procedures*, which may be downloaded at <https://www.tsl.state.tx.us/slrn/recordspubs/lgbullb.html>.

An electronically transmitted document is a written document for all purposes and exempt from any additional writing requirement. A complaint, or other charging instrument or a related document in a criminal case may be filed in electronic form with a judge or a clerk of the court authorized to receive the document. *Code of Criminal Procedure Art. 21.011(a)*.



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Remember that an electronic data file summarizing the information contained in a citation is not sufficient to give a court jurisdiction over a criminal case, [as discussed on page 5](#).

A document that is issued or maintained by a justice court or a notice or a citation issued by a law enforcement officer may be created by electronic means that does not permit changes, additions, or deletions to the originally created document. *Code of Criminal Procedure Art. 45.012(a)*.

The court may use electronic means to:

- produce a document required by law to be written;
- record an instrument, paper, or notice that is permitted or required by law to be recorded or filed; or
- maintain a docket.

Code of Criminal Procedure Art. 45.012(b).

An electronically recorded judgment has the same force and effect as a written signed judgment. *Code of Criminal Procedure Art. 45.012(d)*.

A justice court shall have a court seal, the impression of which must be attached to all papers issued out of the court except subpoenas, which may be created by electronic means. *Code of Criminal Procedure Art. 45.012(g)*. A statutory requirement that a document contain the signature of any person, including a judge, clerk of the court, or defendant, is satisfied if the document contains that signature as captured on an electronic device. *Code of Criminal Procedure Art. 45.012(h)*.

2. Confidential Records

Most confidential records in justice court are records relating to juvenile cases. For more information on records in those cases, please see the *Juvenile Law* deskbook. Additionally, mental health records, which may come before a magistrate, are confidential. For more information on records in those cases, please see the *Magistrate Duties* deskbook. For other issues related to record maintenance, redaction, and confidentiality, please see the *Officeholding* deskbook.

Fine-only misdemeanor records are confidential 5 years after the date of conviction or dismissal via deferred disposition. After the expiration of that time period, all records relating to the case are confidential and may not be disclosed to the public. *Code of Criminal Procedure Art. 45.0218(a)*. These records remain open to inspection by:

- 1) judges or court staff;
- 2) a criminal justice agency for a criminal justice purpose, as those terms are defined by Section 411.082, Government Code;
- 3) the Department of Public Safety;
- 4) the attorney representing the state;
- 5) the defendant or the defendant's counsel;
- 6) **if the offense is a traffic offense**, an insurance company or surety company authorized to write motor vehicle liability insurance in this state; **or**
- 7) necessary parties for the purpose of complying with a requirement under federal law or if federal law requires the disclosure as a condition of receiving federal highway funds.

Code of Criminal Procedure Art. 45.0218(b).

Records, files, and information that relate to an offense that is sexual in nature, as determined by the holder of the records, files, or information **do not** become confidential after five years. *Code of Criminal Procedure Art. 45.0218(c)*.

B. Expunction Rights

Prior to the passage of HB 557 in 2017, justice court judges could only expunge certain **conviction records** (along with all records related to dismissals for defendants under 17). Expunging **records related to an arrest** was the sole province of district judges. However, justice courts may now expunge records related to an arrest in certain situations in fine-only misdemeanor cases.

Many juvenile cases in justice court feature the ability to expunge court records related to conviction, dismissal or arrest in certain scenarios. For more information on juvenile case expunctions, please see the chart at the end of this section, as well as the *Juvenile Law* deskbook.

Not every person who is arrested for a fine-only misdemeanor can have their records expunged. Chapter 55 of the Code of Criminal Procedure lays out the triggering events that can occur which entitle the defendant to that remedy. In order to have a right to an expunction under Chapter 55, a person must be tried and acquitted; or tried, convicted, and subsequently pardoned, with a few exceptions. There are specific procedures for expunction, based on which triggering event has occurred.



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Also note that the below procedures apply to both custodial and noncustodial arrests, so they can be used even if the person was never booked into jail, and was simply issued a citation for the offense.

1. Eligibility for Expunction

Post-Acquittal Expunction

We will first address the defendant being acquitted (found not guilty at trial) of the offense. A defendant who is acquitted is generally entitled to have their arrest records expunged. *Code of Criminal Procedure Art. 55.01(a)(1)(A)*. If a defendant is acquitted, the trial court must inform the defendant of the right to have the records related to the arrest expunged. *Code of Criminal Procedure Art. 55.02, Sec. 1*. Be sure that your court implements this procedure.



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These records can be expunged if the trial resulting in the acquittal began on or after September 1, 2017. All other records described below may be expunged if the petition is filed on or after September 1, 2017, regardless of the arrest date.

The defendant cannot have the records expunged if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode. For example, a defendant is pulled over and receives a citation for DWLI, and also is arrested for Possession of a Controlled Substance. The defendant is acquitted of DWLI. Despite the acquittal, the defendant cannot have the arrest records expunged if they were convicted of the POCS offense, or if the case is still open.

Once the defendant has been acquitted, either the defendant or the prosecutor can request the expunction. If the defendant requests expunction, the state **must** be notified. If the prosecutor requests expunction, they must have the consent of the acquitted person. The requesting party must provide to the court all of the necessary information for an expunction petition, listed below.

If the defendant has an attorney, the attorney must prepare the order for the court's signature. If the defendant was pro se, the prosecutor must prepare the order for the court's signature. The court must enter the order within 30 days of the acquittal. *Code of Criminal Procedure Art. 55.02, Sec. 1*.

Expunction When the Charge is No Longer Pending, and No Conviction Resulted from Arrest

A person is entitled to have arrest records expunged if:

- 1) the charge is no longer pending and did not result in a conviction,
- 2) the person doesn't face any current felony charges resulting from the arrest, **and**
- 3) at least 180 days has elapsed from the arrest.

Code of Criminal Procedure Art. 55.01(a)(2)(A)(i)(a).

This sounds confusing at first blush, but is designed to prevent the following situation: Jack Daniels is pulled over and charged with DWLI and possession of controlled substance. If the DWLI gets dismissed, Jack cannot have the arrest records expunged, because there were other felony charges resulting from the arrest. The 180 day window is to give law enforcement and prosecutors adequate time to initiate charges before allowing the arrest records to be expunged.

Expunction Upon Request of the Prosecutor

Regardless of other eligibility, the court can also expunge arrest records upon the request of the prosecutor, if the request is made before the offense is tried. *Code of Criminal Procedure Art. 55.01(b)(2).*

Expunction After Pardon or Acquittal by Court of Appeals or Court of Criminal Appeals

Finally, although exceptionally rare in justice court, the defendant would be eligible for expunction of arrest records if they are convicted of an offense, but ultimately acquitted by the court of criminal appeals, or the court of appeals, or are subsequently pardoned. *Code of Criminal Procedure Arts. 55.01(a)(1)(B), 55.01(b)(1).* The prosecutor must prepare, and the court must sign, the order of expunction within 30 days after receiving notice of the pardon or acquittal. *Code of Criminal Procedure Art. 55.02, Sec. 1a(b).*

2. Requisites of the Expunction Petition

The petition to expunge arrest records for a fine-only misdemeanor **may** be filed in a justice court in the county in which the petitioner was arrested **or** in the county in which the offense was alleged to have occurred. *Code of Criminal Procedure Art. 55.02, Sec. 2(a-1).*

The petition can be filed by the arrested person, or by the grandparent, parent, spouse, or adult brother, sister, or child of the arrested person if the arrested person is deceased, and would otherwise be entitled to expunction as outlined above. *Code of Criminal Procedure Art. 55.011.*

Filing Fee

There is a **\$100** fee for filing the petition for expunction, except that there is no fee for requesting the expunction in cases where the defendant was acquitted, if the request is made within 30 days of the acquittal. The court **may** order the return of all or a portion of the \$100 to the defendant after granting the petition. *Code of Criminal Procedure Art. 102.006.*

Contents of the Petition

The petition must be verified and the following information must be included, **or** the petition **must** contain an explanation for why any information is not included:



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- 1) the petitioner's full name, sex, race, date of birth, driver's license number, social security number, and address at the time of the arrest;
- 2) the offense charged against the petitioner;
- 3) the date the offense charged against the petitioner was alleged to have been committed;
- 4) the date the petitioner was arrested;
- 5) the name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;
- 6) the name of the agency that arrested the petitioner;
- 7) the case number and court of offense; and
- 8) together with the applicable physical or e-mail addresses, a list of all:
 - law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
 - central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction; and
 - private entities that compile and disseminate for compensation criminal history record information that the petitioner has reason to believe have information related to records or files that are subject to expunction.

Code of Criminal Procedure Art. 55.02, Sec. 2(f).



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Forms

A sample expunction petition may be found under the Criminal Procedure tab at <http://www.tjctc.org/tjctc-resources/forms.html>.

3. Expunction Hearing

Upon receiving a petition for expunction on grounds **other than acquittal at trial**, the court **shall** set a hearing on the matter no sooner than 30 days from the filing of the petition and shall give reasonable notice to each official or agency or other governmental entity named in the petition by certified mail, return receipt requested or secure electronic mail, electronic transmission, or facsimile transmission. *Code of Criminal Procedure Art. 55.02, Sec. 2(c).*



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If the court finds that the petitioner is entitled to expunction of any records and files that are the subject of the petition, it **shall** enter an order directing expunction. The person who is the subject of the expunction order or an agency protesting the expunction may appeal the court's decision in the same manner as in other civil cases. *Code of Criminal Procedure Art. 55.02, Sec. 3(a).* For more information on appeals in civil cases, please see the *Civil* deskbook.

4. Expunction Order



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If the expunction is based on an acquittal, the court's expunction order **must** refer to the acquittal and the judgment of acquittal must be attached.

In an order of expunction issued under this article, the court **shall** require any state agency that sent information concerning the arrest to a central federal depository to request the depository to return all records and files subject to the order of expunction.

The order of expunction must contain:

- 1) the subject of the expunction order's full name, sex, race, date of birth, driver's license number, and social security number;
- 2) the offense charged against the person who is the subject of the expunction order;
- 3) the date the person who is the subject of the expunction order was arrested;
- 4) the case number and court of offense; and
- 5) the tracking incident number (TRN) assigned to the individual incident of arrest under Art. 60.07(b)(1) by the Department of Public Safety.

Effect of the Expunction Order

If an order of expunction is issued, the court records concerning expunction proceedings are not open for inspection by anyone except the person who is the subject of the order unless the order permits retention of a record by law enforcement and prosecutors as described below. The clerk of the court issuing the order **shall** obliterate all public references to the proceeding and maintain the files or other records in an area not open to inspection. *Code of Criminal Procedure Art. 55.02, Sec. 5(c).*

When the order of expunction is final, the release, maintenance, dissemination, or use of the expunged records and files for any purpose is **prohibited**. Also, the person arrested may deny the occurrence of the arrest and the existence of the expunction order. If the person is questioned under oath in a criminal proceeding about the arrest for which the records have been expunged, the person may state only that the matter in question has been expunged. *Code of Criminal Procedure Art. 55.03.*

The court or other entity may maintain receipts, invoices, vouchers or other records of financial transactions related to the expunction proceeding or the underlying criminal cause. However, all portions of the record that identifies the person who was the subject of the order **must** be obliterated. *Code of Criminal Procedure Art. 55.02, Sec. 5(g).*



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It is a Class B misdemeanor to knowingly release, disseminate, or otherwise use the records or files subject to an expunction order or to knowingly fail to return or to obliterate identifying portions of an expunged record or file. *Art. 55.04, Code of Criminal Procedure.*

Notification of Expunction Order

When the order of expunction is final, the clerk of the court **shall** send a certified copy of the order to the Crime Records Service of the Department of Public Safety and to each official or agency or other governmental entity of this state or of any political subdivision of this state named in the order. This

copy of the order must be sent either by secure electronic mail, electronic or facsimile transmission or by certified mail, return receipt requested. The order may be hand-delivered to a governmental entity named in the order, but the clerk must receive a receipt for that hand-delivered order. *Art. 55.02, Sec. 3(c), Code of Criminal Procedure*. Any certified mail return receipts received by the clerk from notices of the hearing and copies of the order **shall** be maintained in the file.

Retention of Records by Law Enforcement and Prosecutors

The court's order **can** allow law enforcement and prosecuting attorneys to retain necessary records and files **if** the state establishes that there is reasonable cause that they will proceed against the person on an offense arising out of the transaction for which the person was arrested. The court's order **must** allow law enforcement and prosecuting attorneys to retain arrest records and files if the person is eligible for expunction due to the expiration of 180 days from arrest with no pending charges, as described above. *Code of Criminal Procedure Art. 55.02, Sec. 4(a), (a-1)*.

In the case of a person who is the subject of an expunction order on the basis of an acquittal, the court **may** provide in the expunction order that the law enforcement agency and the prosecuting attorney retain records and files if:

- the records and files are necessary to conduct a subsequent investigation and prosecution of a person other than the person who is the subject of the expunction order; **or**
- the state establishes that the records and files are necessary for use in another criminal or civil case.

Code of Criminal Procedure Art. 55.02, Sec. 4(a-2).

Return or Destruction of Expunged Records Held by Other Entities

On receipt of the expunction order, each official or agency or other governmental entity named in the order **shall either return to the court all records and files** that are subject to the expunction order **or obliterate all portions of the record or file that identify the person who is the subject of the order**, and notify the court of its action. Additionally, they must delete from its public records all index references to the records and files that are subject to the expunction order.

If records are returned to the court instead of obliterated, the court may give the records and files to the person who is the subject of the order, except on expunctions on the basis of acquittal. *Code of Criminal Procedure Art. 55.02, Sec. 5(a), (b)*. If the records and files are not returned to the defendant, the clerk of the court **shall** destroy all the files or other records returned under this provision not earlier than the 60th day after the date the order of expunction is issued or later than one year after that date. *Code of Criminal Procedure Art. 55.02, Sec. 5(d)*. The clerk shall certify to the court the destruction of files or other records.

Notice to Prosecutor Before Destroying Files and Records

Before destroying files and records, the clerk shall provide notice by mail, electronic mail, or facsimile transmission to the attorney representing the state in the expunction proceeding. This notice must be provided no less than 30 days prior to the date on which the records are to be destroyed. If the prosecutor objects within 20 days of receiving notice, the records may not be destroyed until the one year anniversary of the expunction order. *Code of Criminal Procedure Art. 55.02, Sec. 5(d-1)*.

5. Expunction Chart

Record Type	Requirements and Procedure	Fee	Authorizing Statute
Dismissals/ Acquittals (Defendant under 17)	The case has been dismissed or the defendant was acquitted and the defendant was under 17 years of age at the time of the offense. Applicant files with the court in which the offense was pending. Application must be sworn and written.	\$30	Art. 45.0216(h), Code of Criminal Procedure
Arrest Records Related to ABC Offense	The defendant is now 21 years of age and has only one arrest for an offense under Ch. 106, ABC. Noncustodial arrests (citations) count as arrests. Applicant files sworn application with the convicting court.	\$30	Sec. 106.12, Alcoholic Beverage Code
Convictions of ABC Offense	The defendant is now 21 years of age and has only one conviction under Ch. 106, ABC. Deferrals do not count as convictions. Applicant files sworn application with the convicting court.	\$30	Sec. 106.12, Alcoholic Beverage Code
Convictions of fine-only misdemeanor (Defendant under 17)	The defendant had only one conviction of a fine-only misdemeanor before their 17 th birthday (other than ABC or tobacco offenses) and is now 17. Applicant files with the convicting court. Application must be sworn and written.	\$30	Art. 45.0216(b), Code of Criminal Procedure
Convictions of tobacco- related offense	The defendant complied with the court's order to take a tobacco awareness course or perform tobacco-related community service. Applicant files with the convicting court.	\$30	Sec. 161.255, Health & Safety Code
Conviction of "sexting" offense	The defendant has only one conviction of an offense under Penal Code Sec. 43.261, was never adjudicated by a juvenile court as having engaged in the same conduct, and is now 17. Applicant files with the court in which the offense was pending. Application must be sworn and written.	\$30	Art. 45.0216(b), (f), Code of Criminal Procedure
Arrest Records Related to Fine-Only Misdemeanors Not Resulting in Conviction	1) Offense is no longer pending, did not result in conviction, no felony charges are pending and at least 180 days has elapsed since arrest; 2) Prosecutor recommends expunction before trial of offense; or	\$100 *	Arts. 55.01, 55.02, 102.006, Code of Criminal Procedure

or Acquittal (Adult defendants)	3) Defendant convicted is subsequently acquitted by court of appeals or court of criminal appeals or pardoned. Applicant files petition described by Art. 55.02, Sec. 2(b) with any court in the county in which the defendant was arrested or in which the offense was alleged to occur.		
Arrest Records Related to Acquittals (Adult defendants)	Trial court must notify defendant of right to expunction upon acquittal. Defendant or prosecutor can make request. Defendant's attorney prepares expunction order, if defendant is pro se, prosecutor does. Request can be made with trial court or petition described by Art. 55.02, Sec. 2(b) with any court in the county in which the defendant was arrested or in which the offense was alleged to occur.	\$0^	Arts. 55.01, 55.02, 102.006, Code of Criminal Procedure

* Court may return all or a portion of this fee to the applicant.

^ Fee is only waived if petition is filed within 30 days of acquittal. If not, fee is \$100, though the court may return all or a portion of this fee to the applicant.

CHAPTER 11: APPENDIX: SPECIFIC CRIMINAL OFFENSE NOTES & PROCEDURES

This appendix is to provide notes on specific criminal offense procedures. It will not encompass every offense that may be filed in justice court. As always, TJCTC recommends reviewing the statute creating the offense when processing criminal cases. The Texas Constitution and all Codes are available at <http://www.statutes.legis.state.tx.us/>.

A. Parks & Wildlife Offenses

There are two primary sources of Parks and Wildlife law, the Parks and Wildlife Code, and the regulations in the Parks and Wildlife section of the Administrative Code, found by going to <http://texreg.sos.state.tx.us>, then clicking on Title 31 Natural Resources and Conservation, then Part 2 Texas Parks and Wildlife.

Notice to Appear

Any peace officer or authorized employee of the Parks & Wildlife Department who arrests a person for a violation of the P&W Code or a P&W Administrative Code regulation may deliver to the alleged violator a written notice to appear before the justice court having jurisdiction of the offense not later than 15 days after the date of the alleged violation. *Parks & Wildlife Code § 12.106(a)*.

A person who fails to appear within the time specified in the written notice commits a Class C Parks and Wildlife Code misdemeanor, and a warrant for the arrest of the alleged violator may be issued. *Parks & Wildlife Code § 12.106(b)*. TJCTC recommends issuing the notice required by Art. 45.014 of the Code of Criminal Procedure before issuing a warrant. Additionally, a sworn complaint must be filed, as always, before issuing a warrant. **For more information on required notices and warrants, see page 10.**



Fines and Disposition of Fines

A Parks & Wildlife Class C misdemeanor has a fine range of \$25-\$500. *Parks & Wildlife Code § 12.406*. 85% of all **fines** collected on Parks & Wildlife offenses must be remitted to the P&W Department within 10 days of collection, along with a statement containing the docket number of the case, the name of the person fined, and the section of this code or the regulation violated. *Parks & Wildlife Code § 12.107*.

In court cases filed as the result of an arrest by a marine safety enforcement officer other than a game warden, the amount to be remitted to the game, fish, and water safety account shall be 60 percent of the fine. *Parks & Wildlife Code § 31.128(c)*.

Remember that a special expense fee collected on a deferred disposition is **not** a fine, and is **not** subject to these requirements. Also remember that court costs are separate from fines, and the court would not send a percentage of the costs to Parks and Wildlife.

Required Boater Education Course

A judge shall require a person who is found guilty of an offense resulting from the violation of a provision of Sections 31.094-31.103 or 31.106 to successfully complete a boater education course



approved by the department not later than the 90th day after the date the person is found guilty. Failure by the person to do so is a Class A Parks & Wildlife Misdemeanor. *Parks & Wildlife Code 31.131.*

Parks & Wildlife Offense Dismissal Chart

<u>OFFENSE</u>	<u>CONDITIONS OF DISMISSAL</u>	<u>DISMISSAL FEE</u>
Operating a Vessel with an Expired Certificate of Number – PWC 31.021	Defendant remedies the defect by their appearance date. Certificate must have been expired less than 60 days.	Not to exceed \$10
Failing to Have Photo ID and identification card and either: (1) a boater identification card issued by the department; or (2) proof of completion of the requirements to obtain a vessel operator's license issued by the United States Coast Guard. – PWC 31.109	Defendant produces document that was valid at the time of the offense; OR Defendant requests orally or in writing, not later than the 10th day after the date of the alleged offense, permission to take a boater education course. The court shall defer proceedings and allow the person 90 days to present written evidence that the person has successfully completed the course.	No fee
Failing to Display Required Hunting License – PWC 42.024	Defendant produces document that was valid at the time of the offense	No fee
Fails or Refuses to Show Fishing License or Tag on Request – PWC 46.015	Defendant produces document that was valid at the time of the offense	No fee
Failing to Possess the Required Hunter’s Education Certificate – PWC 62.014	Defendant requests orally or in writing, not later than the 10th day after the date of the alleged offense, permission to take a boater education course. The court shall defer proceedings and allow the person 90 days to present written evidence that the person has successfully completed the course. NOTE: Presenting a document that was valid at the time of the offense is a defense to prosecution, but does not allow the court to dismiss on its own motion.	No fee
Fails or Refuses to Show Proper Trapping License – PWC 71.011	Defendant produces document that was valid at the time of the offense	No fee

Additional Information

Information on Violation Codes for Disposition Reports as well as Game Wardens listed by county can be found by going to <http://tpwd.texas.gov>, then click on upper tab "Game Warden" and then click on link "Game Warden Home". On the left-hand section, click on Court Information, Statutes & Regulations, which contains:

- TPWD Violation Codes/Cites
- Arrest Citation Disposition Report- Court (PWD 460A)
- Court Citation Disposition Report- Court (PWD 1102)

B. Commercial Driver & Vehicle (CDL & CMV) Laws

Texas Law Regarding Commercial Vehicles and Drivers

Multiple chapters of the Transportation Code deal with Commercial Driver's Licenses (CDLs) and Commercial Motor Vehicles (CMVs), including:

- Chapter 522 (Commercial Driver's Licenses)
- Chapter 621 (Vehicle Size & Weight)
- Chapter 643 (Motor Carrier Registration)
- Chapter 648 (Foreign Commercial Motor Transp.)

Federal Law Regarding Commercial Vehicles and Drivers

All operators of Commercial Motor Vehicles must comply with the Federal Motor Carrier Safety Regulations (F.M.C.S.R.), found in Title 49 of the United States Code (U.S.C.) and Title 49 of the Code of Federal Regulations (C.F.R.), and available online at: <https://www.fmcsa.dot.gov/regulations>

So What Happens When Texas Drivers Violate Federal Law?

Transportation Code 644.051 allows DPS to adopt regulations related to, among other things, the safe operation of commercial vehicles, which must be consistent with federal safety regulations. The FMCSR has been adopted in large part under this provision. *Texas Administrative Code Title 37, Part 1, Chapter 4, Subchapter B, Rule 4.11*. Transportation Code 644.151 makes violation of such regulations a Class C misdemeanor.

Who is Required to Have a CDL?

Any person operating a Commercial Motor Vehicle. *Transportation Code § 522.011*.

So What is a Commercial Motor Vehicle?

"Commercial motor vehicle" means a motor vehicle or combination of motor vehicles **used to transport passengers or property** that:

- has a gross combination weight or a gross combination weight rating of 26,001 or more pounds, including a towed unit with a gross vehicle weight or a gross vehicle weight rating of more than 10,000 pounds;
- has a gross vehicle weight or a gross vehicle weight rating of 26,001 or more pounds;
- is designed to transport 16 or more passengers, including the driver; **or**
- is transporting hazardous materials and is required to be placarded under federal law.

Transportation Code § 522.003.

CDL Exemptions

A CDL is not required for an operator of a farm vehicle which is:

- Controlled and operated by a farmer;
- Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;
- Not used in the operations of a common or contract motor carrier; and is
- Used within 241 kilometers (150 miles) of the farmer's farm.

Other exemptions include:

- Operators of fire trucks, hook and ladder trucks, foam or water transport trucks, police SWAT team vehicles, ambulances, or other vehicles that are used in response to emergencies
- A military vehicle or a commercial motor vehicle, when operated for military purposes by military personnel
- Recreational vehicles used for personal use

Transportation Code § 522.004.

Failure to Display Proper CDL

Failure to hold or have in one's possession a valid CDL appropriate for the class of vehicle being driven is punishable by a fine of up to \$500, unless they have a previous conviction in the past year, in which case the maximum fine is \$1,000. *Transportation Code § 522.011.* If a person produces the proper type of CDL that was valid at the time of the offense, it is a defense to prosecution. However, the court does not have authority to dismiss the offense on its own.

Whenever a statute prescribes enhanced penalties or sanctions if the defendant has previous offenses, the previous offenses must be alleged in the complaint or citation. The court may not rely on personal knowledge and should not investigate to determine if prior convictions exist.

A standard DL is Class C, there are also Class A and Class B licenses that authorize driving larger vehicles. There are CDL versions of Class A, B and C licenses. So if someone is driving a CMV, they **must** have a CDL **and** it must be appropriate for the class of vehicle they are driving. Classifications are found at Transportation Code § 522.041.

CDL Endorsements and Restrictions

The Transportation Code lays out endorsements (additional types of vehicles that can be driven) and restrictions (limitations on types of vehicles and geographical areas where the vehicles can be driven) for CDL holders. Driving without the appropriate endorsement or in violation of a restriction is a Class C misdemeanor.

These charges may not be dismissed by the court on its own motion. *Transportation Code §§ 522.042, 522.043.*

Motor Carrier Registration and Cab Card Violations

A Motor Carrier may not operate a commercial motor vehicle on a road or highway of this state unless the carrier registers with the Department of Motor Vehicles (DMV). Failure to register is a Class C misdemeanor for the first offense, justice courts lack jurisdiction for subsequent offenses since they carry the possibility of jail time. *Transportation Code § 643.253.*

DMV shall issue a cab card for each vehicle requiring registration. A cab card must:

- 1) show the registration number of the certificate issued under Section 643.054(b);
- 2) show the vehicle unit number;
- 3) show the vehicle identification number; and
- 4) contain a statement that the vehicle is registered to operate under this subchapter.

Transportation Code § 643.059.

A motor carrier required to register under this subchapter **must** keep the cab card in the cab of each vehicle requiring registration the carrier operates. Failing to do so is a Class C misdemeanor for the first offense, justice courts lack jurisdiction for subsequent offenses since they carry the possibility of jail time. *Transportation Code § 643.253.*



KEY
POINT

The court has no authority to dismiss a cab card violation upon the defendant presenting one that was valid at the time of the offense, since it is required to remain in the cab of the vehicle. This does not prevent a prosecutor from presenting a motion to dismiss.

CMV Insurance Violations

A motor carrier that is required to register must file evidence of insurance in the amounts required or evidence of financial responsibility (self-insurance) with DMV. A motor carrier shall keep evidence of insurance in the cab of each vehicle. *Transportation Code § 643.103.* Failing to do so is a Class C misdemeanor for the first offense, justice courts lack jurisdiction for subsequent offenses since they carry the possibility of jail time. *Transportation Code § 643.253.*

Note that this is not the same statute that provides that the court may dismiss the charge upon proof of insurance. **Which statute applies depends on the type of vehicle, not the type of license.** So, any citation for not providing proof of insurance in their personal vehicle (CDL holder or not) **is dismissible** by the court upon proof of insurance valid at the time of the offense, but not having proof of insurance in a CMV, regardless of whether the driver is a CDL holder, **is not dismissible** without a motion to dismiss from the state.

CMV Weight Laws

Convictions of weight offenses must be reported to DPS. *Transportation Code § 621.506(d).* Below is a chart summarizing the fines for various weight laws that apply to CMVs. A fine may not be imposed that exceeds the minimum dollar amount that may be imposed unless the vehicle's weight was determined by a portable or stationary scale furnished or approved by the Department of Public Safety. *Transportation Code § 621.506(i).*

See the notes below the chart for additional information on CMV weight cases.

<u>OFFENSE</u>	<u>FINE RANGE</u>														
Operation of a CMV at a weight greater than stated in the registration application – TC 502.412	This is a registration violation, not a “weight violation”, so the penalty is the same as any other registration violation - \$1-\$200 fine.														
<p>Operation of a vehicle or combination of vehicles if the vehicle or combination has:</p> <p>(1) a single axle weight heavier than 20,000 pounds, including all enforcement tolerances; or</p> <p>(2) a tandem axle weight heavier than 34,000 pounds, including all enforcement tolerances - TC 621.101(a)(1), (2)*^</p>	<table border="1"> <thead> <tr> <th data-bbox="695 489 954 520"><u>Pounds Overweight</u></th> <th data-bbox="1224 489 1365 520"><u>Fine Range</u></th> </tr> </thead> <tbody> <tr> <td data-bbox="743 522 906 554">less than 2,500:</td> <td data-bbox="1240 522 1349 554">\$100 to \$500</td> </tr> <tr> <td data-bbox="743 556 906 588">2,500-5,000:</td> <td data-bbox="1208 556 1382 588">\$500 to \$1,000</td> </tr> <tr> <td data-bbox="743 590 954 621">more than 5,000:</td> <td data-bbox="1192 590 1398 621">\$1,000 to \$2,500</td> </tr> </tbody> </table>	<u>Pounds Overweight</u>	<u>Fine Range</u>	less than 2,500:	\$100 to \$500	2,500-5,000:	\$500 to \$1,000	more than 5,000:	\$1,000 to \$2,500						
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<p>Operation of a vehicle or combination of vehicles if the vehicle or combination has an overall gross weight on a group of two or more consecutive axles heavier than the weight computed via the formula in the statute - TC 621.101(a)(3)</p>	Fine of \$100 - \$250														
<p>Operation of a vehicle or combination of vehicles if the vehicle or combination has tires that carry a weight heavier than the weight specified and marked on the sidewall of the tire, unless the vehicle is being operated under the terms of a special permit. - TC 621.101(a)(4)</p>	Fine of \$100 - \$250														
<p>Operating a vehicle or combination of vehicles, with the overall gross weight on a group of two or more consecutive axles heavier than 80,000 pounds, including all enforcement tolerances, regardless of tire ratings, axle spacing (bridge), and number of axles. - TC 621.101(b)*</p>	<table border="1"> <thead> <tr> <th data-bbox="727 1585 971 1617"><u>Pounds Overweight</u></th> <th data-bbox="1208 1585 1333 1617"><u>Fine Range</u></th> </tr> </thead> <tbody> <tr> <td data-bbox="776 1619 922 1650">less than 2,500</td> <td data-bbox="1224 1619 1317 1650">\$100 to \$500</td> </tr> <tr> <td data-bbox="776 1652 922 1684">2,500-5,000</td> <td data-bbox="1208 1652 1333 1684">\$500 to \$1,000</td> </tr> <tr> <td data-bbox="776 1686 938 1717">5,001-10,000</td> <td data-bbox="1192 1686 1349 1717">\$1,000 to \$2,500</td> </tr> <tr> <td data-bbox="776 1719 954 1751">10,001-20,000</td> <td data-bbox="1192 1719 1349 1751">\$2,500 to \$5,000</td> </tr> <tr> <td data-bbox="776 1753 954 1785">20,001-40,000</td> <td data-bbox="1192 1753 1349 1785">\$5,000 to \$7,000</td> </tr> <tr> <td data-bbox="743 1787 954 1818">more than 40,000</td> <td data-bbox="1127 1787 1349 1818">\$7,000 to \$10,000</td> </tr> </tbody> </table>	<u>Pounds Overweight</u>	<u>Fine Range</u>	less than 2,500	\$100 to \$500	2,500-5,000	\$500 to \$1,000	5,001-10,000	\$1,000 to \$2,500	10,001-20,000	\$2,500 to \$5,000	20,001-40,000	\$5,000 to \$7,000	more than 40,000	\$7,000 to \$10,000
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* On conviction of a third offense within one year of a previous conviction of any offense marked with a * in this chart, the maximum fine may be doubled. *Transportation Code § 621.506(b-1)*.

^ On conviction of a violation of an axle weight limitation, the court may assess a fine less than the applicable minimum amount if the court finds that when the violation occurred, the vehicle was registered to carry the maximum gross weight authorized for that vehicle under Section 621.101; **and** the gross weight of the vehicle did not exceed that maximum gross weight. *Transportation Code § 621.506(c)*.

Fine Enhancements for Failure to Get Permit

A defendant convicted of operating a vehicle or combination of vehicles at a weight for which an issued permit could have authorized the operation, but who does not hold the permit, shall be punished, in addition to the above fine, by a fine of not less than \$500 or more than \$1,000, except that for a second or subsequent conviction under this section, the offense is punishable by an additional fine of not less than \$2,500 or more than \$5,000. *Transportation Code § 621.506(b-2)*.

Fine Enhancements for Reasonably Dismantlable Load

A defendant convicted of operating a vehicle or combination of vehicles at a weight in excess of 84,000 pounds with a load that can reasonably be dismantled shall be punished, in addition to the above fine, by a fine of not less than \$500 or more than \$1,000, except that for a second or subsequent conviction under this section, the offense is punishable by an additional fine of not less than \$2,500 or more than \$5,000. *Transportation Code § 621.506(b-3)*.

Fines Sent to Comptroller for Certain Offenses

50% of the amount of fines collected for an offense involving a vehicle having a single axle weight, tandem axle weight, or gross weight that is more than 5,000 pounds heavier than the vehicle's allowable weight shall be sent to the comptroller in the manner provided by Subchapter B, Chapter 133, Local Government Code, except that if the offense occurred within 20 miles of an international border, the entire amount of the fine shall be deposited for the purposes of road maintenance in the county treasury. *Transportation Code § 621.506(g), (h)*.

Specific rules for many different types of vehicles, including milk trucks, timber trucks, concrete mixers, trucks hauling recyclables, and vehicles transporting seed cotton or chili pepper modules may be found in the statutes listed in Sec. 621.506(a)(1) of the Transportation Code.

“Masking”, CDLs, Deferrals and DSC

“Masking” refers to any practice aimed at keeping a conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) off of a CDL holder’s driving record. *49 C.F.R. 384.226*

The bottom line on the issue of “masking” and CDL holders:

- No DSC for CDL holders (prohibited by Texas law)
- No deferred disposition for CDL holders for offenses related to motor vehicle control (prohibited by Texas law and Federal law). [See page 28 for a discussion of what “related to motor vehicle control” means.](#)
- Plea bargaining by the defendant with prosecutors for reduced charges is permissible. (A judge can never be involved in plea bargaining, whether or not the defendant has a CDL)
- Filing a motion to dismiss charges by the State is permissible



What if the CDL Holder Was in a Personal Vehicle?

No. The law is explicit that it applies to CDL holders in their personal vehicles as well. The reason is that studies indicate that driving is a very habit-based behavior. So if a CDL holder develops bad habits like speeding or tailgating in their personal vehicle, they are more likely to engage in those behaviors while behind the wheel of the more dangerous commercial vehicle.



Why is the Law So Tough on CDL Holders?

NHTSA data indicates that, of all fatalities involving large CMVs, 16% of the individuals who died were occupants of large trucks, while 84% were pedestrians or occupants of other vehicles. Most CDL drivers are very safe, but the law is designed to identify and remove the drivers that are unable or unwilling to follow the laws before other people get injured or killed.

Can a County Court Give a CDL Holder Deferred Disposition on Appeal?

No. A recent appeals court ruling held that “[W]e conclude the Legislature intended county court at law judges to have the same authority, **with the same limitations**, that justices of the peace have with respect to the granting of deferred adjudication in cases appealed from justice courts.” *In re the State of Texas*, 489 S.W.3d 24 (Tex. App.—Amarillo 2016, orig. proceeding).



C. Traffic Offenses, Including the “Texting Ban” and Seat Belt Offenses

Reporting to DPS

Not later than the seventh day after the date of conviction or forfeiture of bail of a person on a charge of violating a law regulating the operation of a vehicle on a highway, the judge or clerk of the court in which the conviction was had or bail was forfeited **shall** immediately submit to DPS a written record of the case containing the information required by Section 543.202(b) of the Transportation Code. *Transportation Code § 543.203*. For more information on the court’s reporting requirements, please see the TJCTC Reporting Guide.

Child Passenger Safety Seat Offenses

It is an offense, punishable by a fine of \$25 to \$250, to transport a child under 8 years of age while operating a motor vehicle without the child in a child safety seat system, unless the child is 4’8” or taller. *Transportation Code § 545.412*. Half of the fines collected on this offense must be remitted to the state comptroller for funding of trauma centers. *Transportation Code § 545.412(h)*.

It is a defense to prosecution if the defendant obtains a child safety seat system and provides proof to the court or the prosecutor. This is **not** a compliance dismissal, so any dismissal would require a



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motion from the prosecutor. *Transportation Code § 545.4121*. This defense does not apply if the defendant was charged with another offense at the time or was involved in an accident related to the offense.

A judge **shall** allow dismissal of a Child Safety Seat offense by requiring the defendant to attend and present proof that the defendant has successfully completed a specialized driving safety course that includes four hours of instruction that encourages the use of child passenger safety seat systems and the wearing of seat belts. The defendant is eligible if the defendant has not taken a DSC containing this specialized training in the previous 12 months. *Transportation Code § 545.412(g)*.

Seat Belt Offenses

It is an offense, punishable by a fine of \$25-\$50, for any person at least 15 years of age to not be wearing their own seatbelt while a vehicle is being operated. *Transportation Code § 545.413(a)*.

It is an offense, punishable by a fine of \$100-\$200, for any person driving a vehicle allowing any person under the age of 17 (who is not required to be in a child passenger safety seat system) to ride in the vehicle while not wearing their seatbelt. *Transportation Code § 545.413(b)*.

50% of fines collected on seat belt offenses must be remitted to the comptroller for funding of trauma care centers. *Transportation Code § 545.413(j)*.

It is a **defense** to a seat belt offense that:

- the person possesses a written statement from a licensed physician stating that for a medical reason the person should not wear a safety belt;
- the person presents to the court, not later than the 10th day after the date of the offense, a statement from a licensed physician stating that for a medical reason the person should not wear a safety belt;
- the person is employed by the United States Postal Service and performing a duty for that agency that requires the operator to service postal boxes from a vehicle or that requires frequent entry into and exit from a vehicle;
- the person is engaged in the actual delivery of newspapers from a vehicle or is performing newspaper delivery duties that require frequent entry into and exit from a vehicle;
- the person is employed by a public or private utility company and is engaged in the reading of meters or performing a similar duty for that company requiring the operator to frequently enter into and exit from a vehicle;

Seat Belt Offense Example

18-year-old Rob is driving and 15-year-old Steve is in the passenger seat. Neither is wearing their seat belt. Note that three citations could be given in this situation (one to each for not wearing a seat belt, **and** one to Rob for driving with an unbelted passenger under 17).

- the person is operating a commercial vehicle registered as a farm vehicle under the provisions of Section 502.433 that does not have a gross weight, registered weight, or gross weight rating of 48,000 pounds or more; **or**
- the person is the operator of or a passenger in a vehicle used exclusively to transport solid waste and performing duties that require frequent entry into and exit from the vehicle.

Transportation Code § 545.413(e).

A judge **shall** allow dismissal of a seat belt offense by requiring the defendant to attend and present proof that the defendant has successfully completed a specialized driving safety course that includes four hours of instruction that encourages the use of child passenger safety seat systems and the wearing of seat belts. The defendant is eligible if the defendant has not taken a DSC containing this specialized training in the previous 12 months. *Transportation Code § 545.413(i).*

“Texting Ban” – Electronic Messaging While Driving

It is an offense for an operator to use a portable wireless communication device to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped. To be charged with the offense, the behavior must be committed in the presence of or within the view of a peace officer or be established by other evidence. *Transportation Code § 545.4251.* There are several affirmative defenses listed in Sec. 545.4251(c), such as using hands-free devices, using GPS or listening to music.

The offense is a misdemeanor punishable by a fine of at least \$25 and not more than \$99 unless shown at trial that the defendant has been previously convicted of at least one offense, in which case the fine is at least \$100 and not more than \$200. *Transportation Code § 545.4251(e).* The officer must issue the violator a citation to appear instead of taking them into custody if they sign a promise to appear (just like speeding and open container). *Transportation Code § 543.004.*

Electronic Message

“Electronic message” means data that is read from or entered into a wireless communication device for the purpose of communicating with another person. This includes not just texting, but communications through Facebook, Twitter or other applications or websites.

The offense is a Class A misdemeanor punishable by a fine not to exceed \$4,000 and confinement in jail for up to one year if it is shown at trial that the defendant caused the death or serious bodily injury of another person. *Transportation Code § 545.4251(f).*

D. Parent Contributing to Nonattendance

In 2015, the Texas Legislature turned Failure to Attend School into Truant Conduct, making it no longer a criminal offense. However, it **is** still a criminal offense for a parent, with criminal negligence, to contribute to the non-attendance of their child, if the child misses 10 days or parts of days in a six-month period. *Education Code § 25.093*. Parent includes someone “standing in parental relation”, for example, a grandparent that the child is living with. *Education Code § 25.093(i)*.



Criminal Negligence by the Parent Must Be Shown

Criminal negligence must be alleged in the complaint and proven.

Many school districts, discouraged by what they see as downfalls to the truancy process, have resorted to just filing on the parent. However, it is possible that the parent is not criminally negligent. For example, a parent who drops their child at school and then goes on to work may not be criminally negligent if the child subsequently ditches at lunch.

Fine Ranges

The maximum fine depends on the number of prior offenses:

- \$100 for a first offense;
- \$200 for a second offense;
- \$300 for a third offense;
- \$400 for a fourth offense; or
- \$500 for a fifth or subsequent offense.

Education Code § 25.093(c).

As always, to be considered in determining the penalty range, previous offenses must be alleged in the charging instrument.

Half of the fine collected goes to the school district or charter school that the child attends. *Education Code § 25.093(d)*.

Orders to the Parent

Upon conviction, the judge can order the parent to attend a program for parents of students at risk of dropping out. *Education Code § 25.093(f)*. Failure to attend the program is punishable by contempt. *Education Code § 25.093(g)*.

Dismissal of Parent Contributing to Nonattendance Cases

The judge does have discretion to dismiss a Parent Contributing to Nonattendance charge without a motion from the prosecutor. The judge must find that the dismissal is in the best interest of justice, because there is a low likelihood of repeating the offense or there was ‘sufficient justification’ for the underlying failure to attend school. *Code of Criminal Procedure Art. 45.0531*.

Criminal Negligence

Criminal negligence means that the actor “ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.” *Penal Code § 6.03*. This means that the parent must either have done something that a reasonable person would not have done, or failed to do something that a reasonable person would have done.



As always, to be considered in determining the penalty range, previous offenses must be alleged in the charging instrument.

Half of the fine collected goes to the school district or charter school that the child attends. *Education Code § 25.093(d)*.

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E. Hot Check Cases (Theft/Issuance of Bad Check)

Writing a check which subsequently does not clear can be two different offenses, either Issuance of Bad Check (IBC) under Penal Code Sec. 32.41 or Theft under Penal Code Sec. 31.03. Issuance of Bad Check is always a Class C misdemeanor, regardless of the value of the check, unless the check is for court-ordered child support, where Theft by Check is only a Class C if the value of the check is under \$100.

Theft by Check requires an intent by the check writer to deprive the seller of the good or service without paying. IBC can be a failed attempt to “float” a check, where the writer had no intention of not actually paying for the item.

Law enforcement or the prosecutor will determine what type of offense to file, not the court. The judgment in a criminal case can include restitution awarded to the victim of the offense. The victim would enforce that judgment like a civil judgment (it cannot be paid off through jail credit or community service). Ordinarily, justice courts have no cap on the amount of restitution, but restitution in IBC cases is limited to \$5,000. *Code of Criminal Procedure Art. 45.041(b-1)*. The merchant can also pursue a small claims case, if desired.

F. “Sexting” Offenses

A person **who is a minor** commits an offense if the person intentionally or knowingly:

- 1) by electronic means promotes to another minor visual material depicting a minor, including the actor, engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material; **or**
- 2) possesses in an electronic format visual material depicting another minor engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material.

Penal Code § 43.261.



KEY
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The offense may only be filed in justice court against 17-year-olds, since if they are under 17, it must be filed in juvenile court, and they are no longer “minors” once they turn 18. The offense is a Class C misdemeanor, unless the minor has previous convictions (including prior adjudications in the juvenile court), or promotes the material to harass, annoy, alarm, abuse, torment, embarrass, or offend another person. *Penal Code § 43.261(c)*.

Dating Relationship

“Dating relationship” means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of the length and nature of the relationship and the frequency and type of interaction between the persons involved in the relationship.

Defenses

It is an affirmative defense to prosecution under 1) above that the visual material:

- depicted only the actor or another minor:
 - who is not more than two years older or younger than the actor and with whom the actor had a dating relationship at the time of the offense; or
 - who was the spouse of the actor at the time of the offense; and
- was promoted or received only to or from the actor and the other minor.

It is a defense to prosecution under 2) above that the actor:

- did not produce or solicit the visual material;
- possessed the visual material only after receiving the material from another minor; and
- destroyed the visual material within a reasonable amount of time after receiving the material from another minor.

Penal Code §§ 46.231(e), (f).

Order of Educational Program

If a justice or municipal court finds that a defendant has committed an offense under Section 43.261, Penal Code, the court **may** enter an order requiring the defendant to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program. *Code of Criminal Procedure Art. 45.061(b).*

A court **shall** require the defendant or the defendant's parent to pay the cost of attending the educational program if the court determines that the defendant or the defendant's parent is financially able to make payment. *Code of Criminal Procedure Art. 45.061(c).*

Educational Programs under Sec. 37.218 of the Education Code are aimed at informing minors of:

- 1) the possible legal consequences, including criminal penalties, of sharing visual material depicting a minor engaged in sexual conduct;
 - 2) other possible consequences of sharing visual material depicting a minor engaged in sexual conduct, including:
 - a. negative effects on relationships;
 - b. loss of educational and employment opportunities; and
 - c. possible removal, if applicable, from certain school programs or extracurricular activities;
 - 3) the unique characteristics of the Internet and other communications networks that could affect visual material depicting a minor engaged in sexual conduct, including:
 - a. search and replication capabilities; and
 - b. a potentially worldwide audience;
 - 4) the prevention of, identification of, responses to, and reporting of incidents of bullying; and
 - 5) the connection between bullying, cyberbullying, harassment, and a minor sharing visual material depicting a minor engaged in sexual conduct.
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CHAPTER 12: APPENDIX: RESOURCES

The primary resource a justice court needs for procedure in criminal cases is **Chapter 45 of the Texas Code of Criminal Procedure**, which lays out the specific procedures for justice court. The other chapters of the code apply as well, but if there is any conflict between those chapters and Chapter 45, you should follow Chapter 45.

Criminal offenses that may be filed in justice court are found in many different codes, but they are mainly found in the Penal Code, Transportation Code and Chapter 106 of the Alcoholic Beverage Code. Note that offenses under the Alcoholic Beverage Code are discussed in the *Juvenile Law* Deskbook. A court also needs to have the Rules of Evidence available, as they apply to criminal cases.

Legal Resources

Texas Statutes – <http://www.statutes.legis.state.tx.us/>.

Federal Motor Carrier Safety Regulations (F.M.C.S.R.) – <https://www.fmcsa.dot.gov/regulations>

Criminal Forms – <http://www.tjctc.org/tjctc-resources/forms.html>.

Texas Administrative Code – <https://www.sos.state.tx.us/tac/index.shtml>.

Parks and Wildlife Resources

Parks and Wildlife regulations found by going to <http://texreg.sos.state.tx.us>, then clicking on Title 31 Natural Resources and Conservation, then Part 2 Texas Parks and Wildlife.

Information on Violation Codes for Disposition Reports as well as Game Wardens listed by county can be found by going to <http://tpwd.texas.gov>, then click on upper tab “Game Warden” and then click on link “Game Warden Home”. On the left-hand section, click on Court Information, Statutes & Regulations, which contains:

- TPWD Violation Codes/Cites
- Arrest Citation Disposition Report- Court (PWD 460A)
- Court Citation Disposition Report- Court (PWD 1102)

Interpreter Resources

OCA Program Information - <http://www.txcourts.gov/tcris/bench-card/>.

OCA Program Scheduling – <http://www.txcourts.gov/tcris/>.

List of Certified Interpreters – <http://www.txcourts.gov/lap/interpreters/>, clicking on the Licensed Court Interpreters link, then clicking the Generate Excel button.

Additional resources and information about court interpreters and translators are available at <http://www.txcourts.gov/programs-services/interpretation-translation/>, with FAQs at <http://www.txcourts.gov/jbcc/licensed-court-interpreters/frequently-asked-questions.aspx>

Record Management Resources

For information about how long to maintain records, and on responding to record requests, please see the *Officeholding* deskbook, and visit the Texas State Library and Archives Commission (TSLAC)'s record management page, located at <https://www.tsl.state.tx.us/landing/records-mgt.html>.

TSLAC has a publication entitled Bulletin B: Electronic Records Standards and Procedures, which may be downloaded at <https://www.tsl.state.tx.us/slrn/recordspubs/lgbullb.html>.

CHAPTER 13: APPENDIX: LIST OF CASE LAW REFERENCES

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Ex parte Hoard, 140 S.W. 449 (Tex. Crim. App. 1911).
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