JAIME ESPARZA
District Attorney
Thirty-Fourth Judicial District
(El Paso, Culberson and Hudspeth Counties)

February 1, 2006

Nancy Fuller
Chief, Opinions Committee
Office of the Attorney General of the State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Dear Ms. Fuller,

Pursuant to Section 402.043 of the Government Code, as the Elected District Attorney for the 34th Judicial District, I am requesting an Attorney General's Opinion concerning the following:

Question presented

Is it lawful for municipal police officers of the City of El Paso to set reasonable bail for both misdemeanor and felony arrestees pursuant to articles 17.05, 17.20, and 17.22 of the Code of Criminal Procedure, and for the Sheriff to accept such arrestees into the El Paso County Jail without the arrestee appearing before a magistrate for up to 24 hours in a misdemeanor case and for up to 48 hours in a felony case before the requirements of articles 14.06, 15.17, and 17.033 of the Code of Criminal Procedure must be satisfied?

I. Factual summary

DIMS (an acronym for "District Attorney's Information Management System") was created in 1994 by the District Attorney for the 34th Judicial District to allow prosecutors to screen warrantless-arrest cases presented by peace officers, initially City of El Paso municipal police officers. Under DIMS, El Paso police officers who arrested a person under the warrantless-arrest provisions of Chapter 14 and article 18.16 of the Code of Criminal Procedure would shortly thereafter (minutes up to an hour or two later) present the case for prosecution to the District Attorney's Office. If accepted, the arrestee, after completion of the supporting documentation and reports by the police officer and completion of initial intake of the case by the District Attorney's Office, would be taken to the county jail and accepted into the custody of the Sheriff of El Paso County. From the inception of

DIMS, and under the authority of articles 17.05, 17.20, and 17.22 of the Code of Criminal Procedure, if desired by the arrestee, the Sheriff would take reasonable bail from the arrestee (based upon information relayed from the arresting officer and the accepting assistant district attorney from a recommended bail schedule approved by the El Paso County Council of Judges) and release him from custody.

In November, 2005, the Sheriff ended this bail practice for warrantless arrest cases, and, in addition, now requires that all arrestees appear before a magistrate for the setting of bail by the magistrate and to receive from the magistrate all of the warnings, admonishments, and information required by articles 17.033, 14.06, and 15.17 of the Code of Criminal Procedure before being allowed into the county jail. Presently, the City of El Paso is willing for its police officers to set reasonable bail under the authority of the same statutes (articles 17.05, 17.20, and 17.22 of the Code of Criminal Procedure) in both misdemeanor and felony cases on a case-by-case basis, assisted by the recommended bail schedule approved by the El Paso County Council of Judges, in accordance with article 17.15 of the Code of Criminal Procedure. This would be accomplished by the assistant district attorney who accepts the case for prosecution relaying the recommended bond amount from the schedule to the arresting officer along with any other pertinent information such as any prior criminal history for the arrestee. The arresting officer would have final authority to set the bond for the arrestee before the arrestee is taken to county jail.

In support of the question presented, the following additional factual background and legal analysis is provided.

II. Factual background

1.A. DIMS and El Paso County's Response to the Fair Defense Act

In 2001, the Legislature passed the Texas Fair Defense Act (FDA), described as "landmark legislation designed to set standards of quality and improve the public defense system; (i)mplemented in January 2002, the FDA sets standards for improving the quality of indigent defense, while leaving counties with a great deal of discretion in determining how these standards (are to be) met".[1] The FDA also created a Texas Task Force on Indigent Defense (TFID) as a standing committee

[1] Policy Research Institute, Texas A&M University, Final Report to Office of Court Administration, Task Force on Indigent Defense, at 11 (January 2005) (hereinafter, the "Task Force Study of 2005"). Also: "With the passage of the FDA, a new imperative was created for counties to take defendant's requests for counsel within 48 hours of arrest. It was left to counties to determine when during post-arrest processing this function would be integrated, though it typically occurs in conjunction with magistration."

of the Texas Judicial Council.[2] The TFID is charged with developing policies and standards for providing legal representation and other defense services to indigent defendants.[3] It is also specifically charged with monitoring state-wide county compliance with the indigent defense standards contained in the Act.[4]

On implementation of the FDA in 2002, El Paso's DIMS and criminal law magistrate court positioned the county well for exercising its discretion in the design of a compliant system within the new statutory requirements already in existence in 1995 and in compliance with the law both before and after implementation of the FDA:

> DIMS cases went through a "Centralized Intake System" for booking.[5]
>
> The on-site criminal law magistrate was available to take requests for counsel at magistration conducted on-site within 24 hours of arrest.[6]
>
> DIMS design for warrantless-arrest cases, which number approximately 14,000 per year, accounted for bail such that the Sheriff for El Paso County, under the authority of articles 17.05, 17.20, and 17.22, took reasonable bail from the arrestee.[7]

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[2] Tex. Gov't. Code Ann. §71.051 (Vernon 2005).

[3] Tex. Gov't. Code Ann. §71.060 (Vernon 2005). The Task Force is also permitted to "issue other reports relating to indigent defense as determined to be appropriate by the task force." Tex. Gov't. Code Ann. §71.061(d)(Vernon 2005).

[4] Tex. Gov't. Code Ann. §71.061 (Vernon 2005). The task force is composed of ex officio members. Sec. 71.052. It is currently chaired by Hon. Sharon Keller (presiding judge of the Court of Criminal Appeals) and vice-chaired by Hon. Olen Underwood (Judge of the 284th District Court, Montgomery County, and Administrative Judge of the Second Administrative Region of Texas.

[5] The Task Force Study of 2005 noted that a similar book-in system that was the subject of the study (Webb County's, as opposed to "Decentralized Intake Systems" in operation in the two other counties studied) "has proved to be the easiest system to adapt to accommodate indigent case processing." (p. 17).

[6] Compare to Webb County, where the Task Force Study of 2005 favorably notes the use of "six justices of the peace ... taking requests for counsel at magistrations conducted on-site (in the jail) within 24 hours of arrest." (p. 17).

[7] The Task Force Study of 2005 notes that:

> "Bond can potentially be set at many different points between arrest and indictment. Liberal access to bond review helps ensure defendants are not unlawfully detained – a basic component of justice. Bond procedures also hold practical cost implications for counties. ... Not all county justice systems are structured to provide equal access to the full array of bonding opportunities. ..." (p. 21).

If the arrestee did not post the bond allowed by these provisions,[8] the arrestee was transferred before the on-site criminal law magistrate pursuant to the requirements of article 17.033 of the Code of Criminal Procedure, and local El Paso practice.[9]

El Paso's response to the FDA, through its DIMS procedures, is in line with the recommendations made in the Task Force Study of 2005. On the issue of "creating opportunities for early access to bond", the Study summarizes:

> "The experience of the study sites shows that system efficiency is greatly increased where defendants have early and repeated opportunities to make bond. Multiple bond-setting opportunities also serve justice by guarding against excessively high bonds.
>
> "Though bond has traditionally been set through magistration at municipal jails, county jails, or both, counties should be encouraged to take advantage of the laws allowing peace officers to set and take bond. Because the

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The Study identifies a "single bond-setting authority in a decentralized intake system", such as observed in Cameron County, as "the most restrictive bond policy found (in the study)". (p. 22). Also identified is a "multiple bond-setting authority in a decentralized intake system", such as observed in Dallas and Collin Counties, as offering "somewhat more generous bond review options". (p. 22).

El Paso's bonding structure was most-similar to that of Webb County's, identified in the study as one having "multiple bond-setting authorities in a centralized intake system". The Study found that "Webb County has the most well-established and inclusive early bond program of the four counties studied .... Webb County's proactive use of pre-magistration bond-setting authority achieves fast and efficient release for a large volume of both misdemeanants and felons almost immediately after arrest. In addition, individuals not released under the sheriff's program have a second bond review during magistration held a few hours later. ..." (p. 24-25).

[8] The given arrestee who did not enjoy the benefit of bonding out in the interim between booking and the next scheduled Jail Magistration session, was taken to the Jail Magistrate within 24 hours of the arrest for a determination of probable cause, the setting of bond (or ratification of the Sheriff's bond, or creation of a new magistrate bond), and full magistration as provided by articles 14.06 and 15.17 of the Code of Criminal Procedure (meeting all of the requirements of articles also encompassed in 17.033). The arrestee who enjoyed the benefit of bonding out before a scheduled setting with the Jail Magistrate was not compelled, while free and not under detention, to receive the intended protections that underlie the magistration process. Such valid protections that yet existed by the arrestee's first appearance and arraignment once his case was filed, were met beginning with the arraignment process of the filed case. (The freed arrestee whose case had not been formally filed could have presumably scheduled an insisted-upon magistration in the criminal law magistrate court during the case-filing interim, but the exercise of such a right is not recalled from the past 130,000+ bookings in the 12 years that the District Attorney's DIMS process has been in effect.)

[9] This on-site transfer also provided the arrestee with a new bonding opportunity. See footnote 12, *supra*.

sheriff's staff is responsible for jail intake, they are in a position to release a large number of bondable defendants very soon after arrest before further processing costs are incurred. Counties that fail to offer generous opportunities pay increased costs associated with book-in and magistration, as well as detention costs for eligible individuals who remain stuck in jail."[10]

The District Attorney's DIMS procedure is currently the subject of a grant-funded study by the Texas Task Force on Indigent Defense.[11]

1.B. The District Attorney's DIMS Procedure

DIMS was created by the District Attorney for the 34th Judicial District in 1994 to allow prosecutors to screen warrantless-arrest cases presented by peace officers in El Paso County. An expansion plan to include all El Paso County law-enforcement agencies in DIMS has, since the inception of the program, been contingent on participation in the procedure by the Sheriff of El Paso County.

In its present format, and for purposes of this request, City of El Paso municipal police officers present cases to DIMS, and the District Attorney makes a charging decision within minutes or hours of a person's arrest instead of weeks or months later. In other words, DIMS allows an arresting law-enforcement agency to submit criminal cases[12] for screening within minutes or hours of a person's arrest and then allows the filing of cases in the state court criminal-justice system within 24-72 hours of the offense of any given case accepted for prosecution.

Under DIMS, the District Attorney provides duly qualified attorneys and clerical staff to operate a 24-hour screening unit accessible to the El Paso Police Department every hour of the day, every day of the year. [13]

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[10] Policy Research Institute, Texas A&M University, Final Report to Office of Court Administration, Task Force on Indigent Defense, at 25 (January 2005) (emphasis added).

[11] The Task Force has commissioned the Policy Research Institute, Texas A&M University, to conduct the study. A preliminary letter-report of this study notes: "[t]here are strong preliminary indications that DIMS will emerge as a national best practice." *See* (Letter report attached). The preliminary findings indicate a significant cost saving due to real-time case screening and processing of each individual defendant through the criminal-justice system in a faster and fairer method than ever thought possible. *See* (Letter report attached). In no small measure, this was due to the use of Sheriff's bonds under articles 17.05, 17.20, and 17.22 of the Code of Criminal Procedure. *See* (Letter report attached, "[T]he Sheriff's or peace officer's bond is an essential component of the DIMS system...."). The letter-report of the task force was dated October 21, 2005. *See* (Letter report attached).

[12] Felonies and A-B Misdemeanors

[13] The District Attorney thus makes attorneys and support staff from the District Attorney's Office actively

DIMS operates under an interlocal agreement (hereinafter DIMS contract) between the City and County of El Paso authorized by the Interlocal Cooperation Act. The operation of DIMS serves to increase the efficiency and effectiveness of local governments in their respective functions in the criminal justice system and increases the effectiveness of law enforcement in the City, and saves the City money, and improves community relations.

Because all DIMS cases involve warrantless arrests, no documentation of any kind (complaint, affidavit, information, etc.) is filed with any court until at least 24 hours after the case is accepted by the ADA. As such, no case is pending in any court for at least 24 hours after case acceptance.

El Paso County has a criminal law magistrate court.[14] El Paso's criminal law magistrate court is located in its County Jail. The judge of that court has the jurisdiction of a magistrate and is also a magistrate as defined by Article 2.09, Code of Criminal Procedure.[15]

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available to staff DIMS and provide real-time screening services on a 24-hour daily basis to include – and go beyond – regular business hours of operation.

Assistant district attorneys' (hereinafter ADAs) participation in DIMS is voluntary. A DIMS ADA normally works eight-hour shifts outside of regular office hours, which include graveyard shift work. These shifts (and hours) are worked in addition to the ADA's regular work-hour obligations. The District Attorney pays regular salary rates for ADAs who staff DIMS during regular office hours and promotes payment to ADAs for staffing DIMS outside of regular office hours under the DIMS contract.

[14]Tex. Gov.'t Code Ann. §54.731 *et seq.* (Vernon 2005)

[15]Tex. Gov.'t Code Ann. §54.733(c) *et seq.* (Vernon 2005)

III. Analysis

The Supreme Court has stated that there is a constitutional requirement for a timely judicial determination of probable cause as a prerequisite to extended restraint of liberty following a warrantless arrest based upon a police officer's on-the-scene assessment of probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975). What a "timely judicial determination" is has since been laid out as a bright-line rule by the Supreme Court: Anyone arrested for a crime without formal process is entitled to a magistrate's review of probable cause within 48 hours of the arrest. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 1556, 149 L.Ed.2d 549 (2001); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991). There is no constitutional right to an immediate determination of probable cause during administrative steps incident to an arrest, such as "booking" someone into jail. *See County of Riverside*, 111 S.Ct. at 1668.

Moreover, even if a defendant were held beyond the constitutionally allowable period of 48 hours, such would not affect the validity of the charging instrument or any conviction in the case. In *Gerstein*, the Supreme Court specifically held that separate from the question of restraint of liberty after arrest, there is no right to a judicial hearing as a prerequisite to prosecution by information. *See Gerstein*, 95 S.Ct. at 865. And the Supreme Court held that illegal arrest or detention would not void a subsequent conviction. *Id.* Thus, the failure to accord a defendant a timely probable-cause hearing with no determination of probable cause at all before trial will not void a subsequent conviction. *Id.*

These rules of law were adopted by the Court of Criminal Appeals in *Tarlton v. State*, 578 S.W.3d 417 (Tex.Crim.App. 1979). In that case, the defendant sought dismissal of the case against him by way of a pre-trial motion to quash because there was a failure to accord him any probable-cause determination by a magistrate before trial when he was arrested and prosecuted for misdemeanor DWI. The record shows that the defendant was released on bond within 24 hours of his arrest, and there was no probable-cause determination by a magistrate. The Court adopted the reasoning of the Supreme Court in *Gerstein*, namely, that failure to have a magistrate determine probable cause after a defendant's warrantless arrest did not void the prosecution or conviction. *See Tarlton*, 578 S.W.2d at 418. Additionally, since the defendant was released on a low bond ($1,000) with no significant conditions other than that he appear for court, the restraint on his liberty was not significant, making the failure to hold a probable-cause hearing of no consequence. *See id.*

Texas has implemented these constitutional requirements in three statutes in the Code of Criminal Procedure, articles 14.06, 15.17, and 17.033. Both articles 14.06 and 15.17 require a person who either arrests a defendant or the person who has him in custody to take that person before a magistrate "without unnecessary delay." *See* TEX.

CODE CRIM. PROC. ANN. art. 14.06(a)(Vernon Supp. 2004-05); TEX. CODE CRIM. PROC. ANN. art. 15.17(a)(Vernon Supp. 2004-05). These two articles concern the presentment of the defendant before a magistrate in order to apprise the defendant of his rights. *See Cantu v. State*, 842 S.W.2d 667, 680 n. 10 (Tex.Crim.App. 1992). At first blush, these specific words ("without unnecessary delay") might indicate a requirement to bring the defendant before the magistrate before proceeding anywhere else after the arrest. Such argument fails to take into account the above cases, and the express provisions of both statutes that add, "but not later than 48 hours after the person is arrested....". *See* TEX. CODE CRIM. PROC. ANN. art. 14.06(a)(Vernon Supp. 2004-05); TEX. CODE CRIM. PROC. ANN. art. 15.17(a)(Vernon Supp. 2004-05).

Under the express language of the statutes, presentment before a magistrate of the in-custody arrestee can be accomplished by either the person making the arrest or the person having custody of the arrestee. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06(a)(Vernon Supp. 2004-05); TEX. CODE CRIM. PROC. ANN. art. 15.17(a)(Vernon Supp. 2004-05). By these express provisions, it appears that the Legislature envisioned that it would be proper to take an arrestee before a magistrate before booking (by the person making the arrest) or by the person having custody of the arrestee after booking (the Sheriff), either one. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06(a)(Vernon Supp. 2004-05); TEX. CODE CRIM. PROC. ANN. art. 15.17(a)(Vernon Supp. 2004-05). Since, under these statutes, the law only requires that the in-custody arrestee be presented before a magistrate within 24-48 hours, such can easily be accomplished by the Sheriff, the person having the arrestee in custody, after receiving the arrestee into his custody from the arresting officer.

The final statute that needs consideration is article 17.033. That statute was part of the Texas Fair Defense Act that went into effect June 14, 2001. It provides for the probable-cause hearing mandated by *Gerstein*, within 24 hours arrest for a misdemeanor, and within 48 hours after arrest for a felony, if the defendant remains in jail at those times. *See* TEX. CODE CRIM. PROC. ANN. art. 17.033(a-b)(Vernon Supp. 2004-05). Subject to one exception not applicable here, if the probable-cause hearing is not held within the required times, and the defendant remains in jail, the defendant must be released on bail not exceeding $5,000 in the case of a misdemeanor, and on bail not exceeding $10,000 in the case of a felony. *See* TEX. CODE CRIM. PROC. ANN. art. 17.033(a-b)(Vernon Supp. 2004-05).

Thus, under constitutional, statutory, and case authority, there is no violation of any defendant's right to appear before a magistrate to be advised of his rights (arts. 14.06 and 15.17) or have a probable-cause determination with concomitant release under certain maximum bail amounts (article 17.033) if the appearance before a magistrate occurs within 24 hours of the arrest, and only if the defendant remains in jail at that time. And it is lawful for the Sheriff to accept custody of an arrestee from a municipal police officer who has made a warrantless arrest of the arrestee and to not take the arrestee before a

magistrate for up to 24 hours.

Both the United States and Texas Constitutions provide that a defendant is entitled to reasonable bail. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required...."); TEX. CONST. art. I, §11 ("All prisoners shall be bailable...unless for capital offenses, when the proof is evident...."); TEX. CONST. art. I, §13 ("Excessive bail shall not be required...."); *see also* TEX. CODE CRIM. PROC. ANN. art. 1.07 (Vernon 2005)("All prisoners shall be bailable unless for capital offenses when the proof is evident."). And the appellate courts have noted that the right to reasonable bond is based upon the presumption of innocence and is protected by these constitutional provisions. *See, e.g., Nguyen v. State*, 881 S.W.2d 141, 143 (Tex.App. – Houston [1st Dist.] 1994, no pet.). There is no constitutional provision requiring that reasonable bail be set by any certain person or entity. The Legislature has provided for that.

To implement these federal and state constitutional provisions, the Texas Legislature has provided authority for three persons or entities to set bail. Under article 17.05 of the Code of Criminal Procedure, it is provided that: "A bail bond is entered into before a magistrate upon an examination of a criminal accusation, or before a judge upon an application under habeas corpus, or it is taken from the defendant by a *peace officer* if authorized by Article 17.20, 17.21, or 17.22." *See* TEX. CODE CRIM.PROC. ANN. art. 17.05 (Vernon 1977)(emphasis added). Under the statutes concerning bail taken by peace officers, article 17.20 of the Code of Criminal Procedure provides in the case of misdemeanors:

> The sheriff, or other peace officer, in cases of misdemeanor, may, whether during the term of the court or in vacation, where he has a defendant in custody, take of the defendant a bail bond.

TEX. CODE CRIM. PROC. ANN. art. 17.20 (Vernon 2005). Article 17.22 similarly provides in the case of felonies:

> In a felony case, if the court before which the same is pending is not in session in the county where the defendant is in custody, the sheriff, or other peace officer having him in custody, may take his bail bond in such amount as may have been fixed by the court or magistrate, or if no amount has been fixed, then in such amount as such officer may consider reasonable.

TEX. CODE CRIM. PROC. ANN. art. 17.22 (Vernon 2005).

The only statute that would not allow a municipal police officer to set bail is article 17.21 that provides in felony cases, if the court in which the defendant's case is *pending*

is in session in the county in which the defendant is in custody, that court shall fix the amount of bail, and the sheriff or other peace officer – except a city police officer – may take the defendant's bail bond in the amount fixed by the court. *See* TEX. CODE CRIM. PROC. ANN. art. 17.21 (Vernon 2005). In DIMS cases, which are all warrantless arrests, there is no "court before which the [case] is pending." The defendant is simply being held by the arresting officer under the authority of the warrantless-arrest statutes. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01, 14.03, 14.04 (Vernon 2005); TEX. CODE CRIM. PROC. ANN. art. 18.16 (Vernon 2005). And such arrested person may be received into the jail by the sheriff. *See* TEX. CODE CRIM. PROC. ANN. art. 45.015 (Vernon Supp. 2004-05)("Whenever...the peace officer is authorized to retain a defendant in custody, the peace officer may place the defendant in jail....".); TEX. LOC. GOV'T CODE ANN. §351.041(a)(Vernon 1999)("The sheriff shall safely keep all prisoners committed to jail by a lawful authority...."); OP. TX. ATT'Y GEN. No. JM-151 (1984)("The sheriff my take custody of a prisoner lawfully arrested by a city police officer, thereby becoming responsible for that prisoner."); OP. TX. ATT'Y GEN. No. GA-0166 (2004)("Article 45.015 contemplates temporary detentions in jail....").

Because DIMS cases all involve warrantless arrests, there is no case pending in any court because, at that time of the warrantless arrest and processing the case through DIMS, nothing has been filed in any court. All appellate and attorney general opinions that have considered the matter state that no case is pending before any court until, at the very least, there is the filing of a complaint in a court. *See, e.g., Ex parte Mitchell*, 601 S.W.2d 376, 377 (Tex.Crim.App. 1980)(holding in felony theft case where complaint was filed in justice court, only the justice court had jurisdiction of that complaint until it was dismissed or superseded by action of the grand jury so that district court's order setting bail was void); *Ex parte Clear*, 573 S.W.2d 224, 229 (Tex.Crim.App. 1978)(filing of criminal complaint commences an action for purposes of determining which court has jurisdiction); *Smalley v. State*, 127 S.W. 225, 226 (Tex.Crim.App. 1910)("[W]e do hold that the making of the complaint and the filing of the complaint in county court is the commencement of a criminal action, as the information cannot be filed until the complaint or affidavit is made, and that the information must be based upon the complaint, and therefore, when the complaint is filed, it may be said that the case is pending in the county court."); OP. TX. ATT'Y GEN. No. LO98-066 (1998)(discussing cited cases and more, finally concluding that a prosecution is pending before the court or magistrate who receives a complaint or to which court such proceedings are subsequently transferred); OP. TX. ATT'Y GEN. No. LO97-103 (1997)(case is pending before the court in which the complaint was filed or to which the case is transferred for further proceedings); *see also* TEX. CODE CRIM. PROC. ANN. art. 4.16 (Vernon 2005)("[T]he court in which an indictment or complaint shall first be filed shall retain jurisdiction....").
Under the authorities cited, and because the Code of Criminal Procedure contemplates that a complaint is to be taken and filed in all cases, *see* OP. TX. ATT'Y GEN. No. LO98-

066 (1998), there is no case pending in any court until at least the filing of a complaint. Consequently, because in all DIMS cases no case is pending in any court at the time the case is accepted for prosecution and the in-custody defendant is processed into the jail, under article 17.22, peace officers – including municipal police officers – are authorized to set bail in felony cases if no bail has otherwise been set. *See* Tex. CODE CRIM. PROC. ANN. art. 17.22 (Vernon 2005). Only if a felony case is pending in a court would a municipal police officer be prevented from setting and taking bail of a defendant arrested without a warrant. *See* TEX. CODE CRIM. PROC. ANN. art. 17.21 (Vernon 2005). And that does not occur in any DIMS case. Thus, it appears that a municipal police officer could set bail in any DIMS case, misdemeanor or felony.

Besides this express statutory authorization allowing peace officers to take bail from a defendant in an amount deemed reasonable by the officer (consistent with the federal and state constitutional provisions that bail may not be excessive), opinions rendered by the Texas Attorney General state that, pursuant to these statutory provisions, bail may be set and taken by peace officers in a reasonable amount. *See, e.g.,* OP. TX. ATT'Y GEN. No. DM-57 (1991)("Article 17.20 permits a peace officer to set bail for all misdemeanors. Article 17.22 permits a peace officer to set bail for felonies where the court before which the case is pending 'is not in session in the county where the defendant is in custody' and where no bail amount has theretofore been fixed."); OP. TX. ATT'Y GEN. No. JM-760 (1987)("A peace officer may release a defendant upon a bail bond under conditions specified in articles 17.20, 17.21, or 17.22."); OP. TX. ATT'Y GEN. No. H-856 (1976)("[S]ince article 17.20 authorizes the sheriff or other peace officer to take bail in misdemeanor cases, article 17.15 compels the conclusion that such officer is also to regulate the amount of bail in such cases.")(emphasis in original). Additionally, the Court of Criminal Appeals in *Hokr v. State*, 545 S.W.2d 463 (Tex.Crim.App. 1977), held that a peace officer may set and take bail in a misdemeanor case before the defendant is formally charged. *See Hokr*, 545 S.W.2d at 464-65.

Of concern in both H-856 and the Court of Criminal Appeals' opinion in *Hokr* is the statement that normally a magistrate would set bail unless a magistrate is unavailable, namely, outside of the magistrate's normal working hours. *See Hokr*, 545 S.W.2d at 465; OP. TX. ATT'Y GEN. No. H-856. In *Hokr*, the Court of Criminal Appeals stated in *dicta*:

> We note...that an officer's authority to set the amount of bail *should be* limited to situations in which no magistrate is available...In this connection a person arrested when a magistrate is unavailable can be detained until the magistrate's normal working hours without violating the statutory requirement of an appearance 'immediately' or 'without unreasonable delay.

Hokr, 545 S.W.2d at 465 (emphasis added); *see also* OP. TX. ATT'Y GEN. No. H-856.

This quoted part of *dicta* in *Hokr* (and the same statement found in H-856) ignores the plain language of articles 17.05, 17.20, and 17.22 that: "A bail bond...is taken from the defendant by a peace officer if authorized by Article 17.20, 17.21, or 17.22." *See* TEX. CODE CRIM.PROC. ANN. art. 17.05 (Vernon 1977). Articles 17.20 and 17.22 have no requirement that a peace officer can take a bond only if it is outside of the normal working hours of a magistrate. In a misdemeanor case, article 17.20 provides that a peace officer can set and take a bond whether during the term of court or in vacation. *See* TEX. CODE CRIM. PROC. ANN. art. 17.20 (Vernon 2005). Article 17.22 allows, in a felony case, a peace officer to set and take a bond "if the court before which the same is pending is not in session." *See* TEX. CODE CRIM. PROC. ANN. art. 17.22 (Vernon 2005). There is no mention in any of these articles of a magistrate, much less a preference for a magistrate to set bail. Under the rules of statutory construction, a statute should be given its plain meaning. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991). H-856 and *Hokr* violate this rule of statutory construction by, in effect, adding language to articles 17.05, 17.20, and 17.22 that a peace officer may set bail and take bail only if the arrest occurs outside the normal working hours of the magistrate. **By the plain language of the statutes, the Legislature did not limit the authority of a peace officer to set and take bail from a defendant only outside the normal working hours of the magistrate**.

Additionally, H-856 and *Hokr* based their conclusions that a magistrate should set bail unless the magistrate's offices are closed on articles 14.06 and 15.17 of the Code of Criminal Procedure, which at the time (1976 and 1977) **provided that a defendant should be taken to a magistrate "without unnecessary delay**." *See Hokr*, 545 S.W.2d at 465; OP. TX. ATT'Y GEN. No. H-856. **In 2001**, the Legislature passed the Texas Fair Defense Act. *See* TEX. S.B. 7, 77th Leg., R.S. (2001). As part of that legislative package, **both articles 14.06 and 15.17 were amended to provide that "without unnecessary delay" meant within not more than 48 hours**. *See* TEX. S.B. 7, 77th Leg., R.S. (2001). This was consistent with Supreme Court cases holding that anyone arrested for a crime without formal process was entitled to a magistrate's review of probable cause within 48 hours of the arrest. This requirement was met by DIMS since its inception in 1994, well before the 2001 act. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 1556, 149 L.Ed.2d 549 (2001); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991).

Thus, *Hokr* and H-856 analyze statutes that have undergone substantial amendments to comport with the bright-line rule established by the Supreme Court that warrantless-arrest arrestees who remain in confinement must be taken before a magistrate – not under the previous amorphous concept of "without unnecessary delay" – but within a set time limit of 24-48 hours depending on the severity of the crime. Moreover, even under the old statutes, *Hokr's* holding was *dicta* and indicated a permissive *should* instead of a mandatory *must* when discussing the fact that the officer should take the arrestee before a magistrate for the setting of bail if it is within the normal working hours of the

magistrate. If the Legislature had intended to incorporate the notation in *Hokr* and H-856 that peace officers may only set bail outside of the normal working hours of the magistrate, it could have said so when it amended articles 14.06 and 15.17. Additionally, many legislative sessions have come and gone with no amendment to the plain language of the peace-officer bond statutes (articles 17.05, 17.20, and 17.22) that collectively allow a peace officer to set and take bail but make no mention whatsoever that such can occur only outside the normal working hours of the magistrate. Under a well-settled rule of statutory construction, appellate courts will presume that the Legislature amended a statute with knowledge of applicable court decisions. *See Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). Because language in *Hokr* and H-856 about peace officers setting bail outside the magistrate's normal working hours has not been incorporated into any of the statutes discussed above, it is safe to say that the *dicta* in *Hokr* and H-856 making this statement is not now the law in Texas, if it ever was.

Moreover, article 17.033, a new statute passed as part of the Texas Fair Defense Act (and that went into effect January 1, 2002), *see* TEX. S.B. 7, 77th Leg., R.S. (2001), provides for the probable-cause hearing mandated by the Supreme Court within 24 hours after arrest for a misdemeanor, and within 48 hours after arrest for a felony, if the defendant remains in jail at those times. *See* TEX. CODE CRIM. PROC. ANN. art. 17.033(a-b)(Vernon Supp. 2004-05). Subject to one exception not applicable here, if the probable-cause hearing is not held within the required time, and the defendant remains in jail, the defendant must be released on bail not exceeding $5,000 in the case of a misdemeanor, and on bail not exceeding $10,000 in the case of a felony. *See* TEX. CODE CRIM. PROC. ANN. art. 17.033(a-b)(Vernon Supp. 2004-05).

Thus, under articles 14.06, 15.17, and 17.033, and applicable Supreme Court opinions, there is no requirement to take a defendant immediately before a magistrate; such requirement is satisfied if it occurs within 24 hours of a misdemeanor arrest and 48 hours of a felony arrest if the defendant remains in custody. If H-856 and *Hokr* were written today, they would doubtless say that a peace officer can set and take a bond under the applicable statutes for a peace-officer bond of an in-custody defendant up to 24 hours after arrest in a misdemeanor case and up to 48 hours after arrest in a felony case before the arrestee must appear before a magistrate. But even though it is lawful to hold arrestees for 24-48 hours, as shown in the letter report from the Texas Task Force on Indigent Defense, DIMS fosters a practice of immediate release of an eligible arrestee under reasonable standardized bond amounts. *See* (Letter report attached).

Finally, the fact that a bail schedule is available to a peace officer in setting bail is not improper. Numerous appellate courts have validated such schedules and their use. For instance, in *Esquivel v. State*, 922 S.W.2d 601 (Tex.App. – San Antonio 1996, no pet.), the San Antonio Court of Appeals was not upset by the use of such a schedule to initially set bail and just noted it should not be used at a bail-reduction hearing. *See*

Esquivel, 922 S.W.2d at 604 ("While the utilization of such a schedule may assist the court at the time bail is initially set, it should not be used by the trial court at a bail-reduction hearing.").

In *Ex parte Bogia*, 56 S.W.3d 835 (Tex.App. – Houston [1st Dist.] 2001, no pet.), the defendant complained of bail being set at $360,000 for the charge of theft over $100,000 but less than $200,000. The appellate court went on at length referring to the Harris County bail schedule and reduced the defendant's bail to $10,000, *expressly using the Harris County bail schedule to do so*. *See Ex parte Bogia*, 56 S.W.3d at 840 ("We grant relief and order appellant's bail set at $10,000, *the amount provided in the District Court Bail Schedule* for defendants like appellant.")(emphasis added).

In a similar case, in a bail-reduction hearing, the Austin Court of Appeals concluded that the bail set, $12,500 in a case involving delivery of less than 1 gram of cocaine, was appropriate and within the guidelines of the Travis County bail schedule. *See Ex parte Carter*, 2002 WL 31386079, *2 (Tex.App. – Austin, Oct. 24, 2002, no pet.)(not designated for publication)("The record indicates that the $12,500 bail in this cause is in accord with the standard schedule or guidelines used in Travis County.").

Finally, the Houston First Court of Appeals has used the Harris County bail schedule to reduce bail in cases out of other counties. In *Ex parte Sabur-Smith*, 73 S.W.3d 436 (Tex.App. – Houston [1st Dist.] 2002, no pet.), the defendant was charged with sexual assault in Brazos County, and his bail was set out of that county at $150,000. Expressly using the Harris County bond schedule, the appellate court reduced the bond to $30,000:

> This Court, in a Harris County case, has considered the Harris County District Court Bail Schedule as a factor in reviewing the amount of the bail for various offenses. *See Ex parte Bogia*, 56 S.W.3d 835, 838 (Tex.App. – Houston [1st Dist.] 2001, no pet.). The Harris County District Court Bail Schedule is not binding on district courts outside Harris County, nor on district courts in Harris County. Still, it is some indication of the propriety of bail for various types of offenses, just as case law arising from other counties is. The standard bail in the Harris County District Court Bail Schedule for a "3g" offense, such as sexual assault, is $30,000.

Ex parte Sabur-Smith, 73 S.W.3d at 441 n.5.

The peace officers here, City of El Paso police officers, will not be bound by the bail schedule and will be able to exercise their discretion in setting bail accorded them under article 17.15 of the Code of Criminal Procedure, utilizing factors set forth therein. By having, but not being bound by, a bail schedule available to assist an officer in initially setting bail under a peace-officer bond, lasting for a few short hours before a magistrate sets bail (assuming the defendant does not bond out on the peace-officer bond), the concerns expressed in DM-57 that bail amounts should not be determined by a pre-set

schedule but made on a case-by-case basis are satisfied. *See* OP. TX. ATT'Y GEN. No. DM-57 (1991).

IV. Conclusion

For all reasons stated, it is lawful for municipal police officers of the City of El Paso to set reasonable bail for both misdemeanor and felony arrestees pursuant to articles 17.05, 17.20, and 17.22 of the Code of Criminal Procedure, and for the Sheriff to accept such arrestees into the El Paso County Jail without the arrestee appearing before a magistrate for up to 24 hours in a misdemeanor case and for up to 48 hours in a felony case before the requirements of article 14.06, 15.17, and 17.033 of the Code of Criminal Procedure must be satisfied.

Respectfully submitted,

Jaime Esparza
District Attorney
34th Judicial District