

SEARCH WARRANTS, ARRESTS WARRANTS, AND OTHER WRITS

CHAPTER 2

SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

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CHAPTER 2 SEARCH WARRANTS, ARREST WARRANTS, AND OTHER WRITS

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1. The Arrest Warrant

Warrants, in contrast to other writs such as the *habeas corpus* and *certiorari*, are issued primarily by judges in their capacity as magistrates. There is one notable exception to this rule in Texas. Municipal judges and justices of the peace have authority to issue warrants of arrest for fine-only misdemeanors filed in their court pursuant to Article 45.014, Code of Criminal Procedure.

As a magistrate, a municipal judge has authority to issue warrants of arrest for offenses that are outside of municipal court jurisdiction, such as Class A and B misdemeanors and felonies. A magistrate’s authority for issuing warrants of arrest is found in Chapter 15 of the Code of Criminal Procedure. Article 2.09, Code of Criminal Procedure, lists Texas’ magistrates. Included in that list are municipal judges. A magistrate’s authority is county wide. *Gilbert v. State*, 493 S.W.2d 783 (Tex. Crim. App. 1973) and *Ex parte Clear*, 573 S.W.2d. 224 (Tex. Crim. App. 1978).

A magistrate’s authority to issue warrants is discussed in Checklist 2-1.

Checklist 2-1	Script/Notes
<p>A “warrant of arrest” is a written order from a magistrate directed to a peace officer commanding the officer to take the body of the person accused of an offense to be dealt with according to law.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 1. An arrest warrant may be issued: <ul style="list-style-type: none"> <input type="checkbox"/> a. With probable cause supported by oath or affirmation; and <input type="checkbox"/> b. When a verbal order of arrest is proper; <input type="checkbox"/> c. When a person swears under oath that another has committed an offense against the laws of the State; or <input type="checkbox"/> d. In any case in which the Code of Criminal Procedure permits the issuance of an arrest warrant. 	<p>Art. 15.01, C.C.P. See <i>TMCEC The Municipal Judges Book</i>: Chapter 1.</p> <p>Art. 1.06, C.C.P.</p> <p>Art. 15.03(a)(1), C.C.P.</p> <p>Art. 15.03(a)(2), C.C.P. A person may appear before the magistrate in person or they may be presented to the magistrate through an electronic broadcast system. Art. 15.03(c), C.C.P.</p> <p>A recording of the communication must be made and preserved, if the defendant is charged with the offense, until the defendant is acquitted or all appeals have been exhausted. Art. 15.03(d), C.C.P.</p> <p>Art. 15.03(a)(3), C.C.P.</p>

- 2. The arrest warrant:
 - a. Issues in the name of “The State of Texas”;
 - b. Names the person to be arrested, if known, or reasonably describes the person to be arrested including any or all of the following:
 - (1) Nickname or “street” name;
 - (2) Age;
 - (3) Gender;
 - (4) Height and weight;
 - (5) Identifying marks; and
 - (6) Ethnic origin.
 - c. Alleges the commission of some offense against the laws of the State; and
 - d. Is signed by a magistrate with his or her office named in the body of the warrant or in connection with the officer’s signature.
- 3. An arrest warrant must also be supported by an affidavit of probable cause stating:
 - a. The name of the accused, if known, and if not known, a reasonably definite description;
 - b. The time and place of the commission of the offense, as definitely as can be stated by the affiant; and
 - c. Sufficient facts to support a finding of probable cause that the person named therein:
 - (1) Committed the offense charged;
 - (2) Within the period covered by the statute of limitations.
- 4. The specific requisites of the complaint or affidavit are covered later in this chapter.
- 5. An arrest warrant is valid throughout Texas, unless issued by a city mayor.
- 6. Make sure a copy of any warrant or affidavit is provided to the clerk of the court for public disclosure once executed.

See *TMCEC Forms Book*: Warrant of Arrest: Judge, or Warrant of Arrest: Magistrate.

Arts. 15.04 and 15.05, C.C.P.
Art. 1.06, C.C.P.

See Checklist 2-4.

Art. 15.06, C.C.P.
A warrant issued by a mayor is generally only valid in the county it is issued in. Art. 15.07, C.C.P.

Art. 15.26, C.C.P.
See Checklist 2-10.

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| <p><input type="checkbox"/> 5. Make sure copies of all capiases and affidavits are provided to the clerk of the court for public disclosure once executed.</p> | <p>Art. 15.26, C.C.P.
See Checklist 2-10.</p> |
| <p><input type="checkbox"/> 6. A “capias” as defined in Chapter 43 is a writ that is: (1) issued by a court having jurisdiction of a case after judgment and sentence; and (2) directed to any peace officer of the State of Texas commanding the officer to arrest a person convicted of an offense and bring the arrested person before that court immediately or on a day or at a term stated in the writ.</p> | <p>Art. 43.015(1), C.C.P.</p> |
| <p><input type="checkbox"/> 7. The court may issue a capias, as defined in Chapter 43, when a judgment and sentence have been rendered against a defendant and the defendant is absent.</p> | <p>Art. 43.04, C.C.P</p> |
| <p><input type="checkbox"/> 8. A capias, issued pursuant to Chapter 43, may be issued in electronic form.</p> | <p>Art. 43.021, C.C.P.</p> |
| <p><input type="checkbox"/> 9. A capias may be issued to any county in the State and shall be executed as in other cases, but no bail shall be taken.</p> | <p>Art. 43.06, C.C.P.</p> |

- (7) A drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;
 - (8) Any property whose possession is prohibited by law;
 - (9) Implements or instruments used in commission of a crime;
 - (10) Property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person(s) committed an offense;
 - (11) Persons; or
 - (12) Contraband subject to forfeiture under Chapter 59 of the Code of Criminal Procedure.
- c. Identifies the property to be seized with particularity;
- d. Identifies the location or property sought including:
- (1) A specific street address; and
 - (2) A full description of the building and surrounding areas. If no address is provided, this description should be detailed enough to distinguish the property to be searched. In cases of a multiple unit structure, such as apartment complexes, condominiums, and storage facilities, identify the specific unit to be searched.
- e. Describes the person to be searched, including any or all of the following, although all need not be present:
- (1) Proper name, nickname, or street

See Checklist 2-5 for special rules concerning “evidentiary” warrants for mere evidence.

Art. 18.04, C.C.P.

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| <ul style="list-style-type: none"><input type="checkbox"/> name;<input type="checkbox"/> (2) Age;<input type="checkbox"/> (3) Gender;<input type="checkbox"/> (4) Height and weight;<input type="checkbox"/> (5) Identifying marks; or<input type="checkbox"/> (6) Ethnic origin.
<ul style="list-style-type: none"><input type="checkbox"/> 2. Be certain to record on the face of the warrant the date and hour the warrant is signed.
<input type="checkbox"/> 3. If the facts presented for the issuance of an arrest warrant also establish probable cause that a person has committed an offense, the search warrant may also order the arrest of that person.
<input type="checkbox"/> 4. With the exception of affidavits for search warrants that have been temporarily sealed, make sure a copy of all warrants and affidavits are provided to the clerk of the court for public disclosure. | <p>Art. 18.07, C.C.P.</p>
<p>This is a “combination” search and arrest warrant. Art. 18.03, C.C.P.; see <i>TMCEC Forms Book</i>: Search and Arrest Warrant.</p>
<p>Art. 15.26, C.C.P.
Art. 18.01(b), C.C.P.
Art. 18.111, C.C.P.
See Checklist 2-10.</p> |
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4. The Affidavit Supporting the Arrest Warrant, Capias, or Search Warrant

Checklist 2-4	Script/Notes
<p><input type="checkbox"/> 1. The affidavit must establish a substantial basis for concluding that there is a “fair probability” that a search will uncover evidence of wrongdoing or that a person has committed an offense.</p> <p><input type="checkbox"/> 2. The affidavit must contain facts, not mere conclusions, from which the magistrate can make an independent determination of probable cause.</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. The determination is based on the totality of the circumstances, practicality, and common sense.</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. Probable cause is a level of certainty more than mere suspicion but less than a preponderance; it is not a more-likely-than-not standard.</p> <p><input type="checkbox"/> 3. Any reliable evidence may be considered without regard to its admissibility at trial; hearsay and police records may be considered.</p> <p><input type="checkbox"/> 4. Do not consider any information not in the warrant affidavit.</p> <p style="padding-left: 40px;">If the applicant for a warrant has additional information, have that information included in an affidavit that is attached to the warrant.</p> <p><input type="checkbox"/> 5. Determine whether the source of the information in the affidavit is reliable.</p> <p style="padding-left: 40px;"><input type="checkbox"/> a. The affiant is presumed to be honest (because of the oath).</p> <p style="padding-left: 40px;"><input type="checkbox"/> b. A named victim, eyewitness, or citizen informant who reports a crime is presumed reliable.</p> <p style="padding-left: 40px;"><input type="checkbox"/> c. An unnamed informant’s reliability may be</p>	<p><i>Illinois v. Gates</i>, 462 U.S. 213 (1983).</p> <p>See <i>TMCEC Forms Book</i>: Affidavit for Probable Cause for Arrest Warrant; or Clerk’s Affidavit for Capias Pro Fine. Art. 18.01(b), C.C.P.</p> <p>See <i>TMCEC The Municipal Judges Book</i>: Chapter 1.</p> <p>The “four corners” doctrine limits the determination of sufficient probable cause to the four corners of the affidavit. <i>Lagrone v. State</i>, 742 S.W.2d 659 (Tex. Crim. App. 1987); <i>Adkins v. State</i>, 717 S.W.2d 363 (Tex. Crim. App. 1986).</p>

shown by:

- (1) Recitation of lack of criminal record, good reputation in the community for general veracity, and gainful employment;
 - (2) Corroboration of details provided by the informant;
 - (3) Recitation that informant has provided true, correct, and reliable information in the past; or
 - (4) Declaration by informant against penal interest.
6. Determine the basis of the source’s knowledge and whether the information from the source is credible.
- a. Is the information first-hand and the result of direct observation of the facts rather than an opinion or a conclusion?
 - b. Is the information hearsay and, if so, is there an indication of its reliability?
 - c. Is the information corroborated by other sources or independent investigation?
 - d. Are there details not commonly known that suggest inside information by the informant?
 - e. In the case of a search warrant, does it state the time when the information was acquired?
7. The search warrant affidavit is generally public information after the warrant is executed and should be made available for public inspection.
8. Make sure a copy of all warrants and affidavits are provided to the clerk of the court for public disclosure.

Wetherby v. State, 482 S.W.2d 852 (Tex. Crim. App. 1972).

Schmidt v. State, 659 S.W.2d 420 (Tex. Crim. App. 1983). Stale information will not support a conclusion that property is still on the premises to be searched.

Art. 18.01(b), C.C.P.
See Checklist 2-10.

Art. 15.26, C.C.P.
See Checklist 2-10.

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5. Search Warrants for Mere Evidence

Checklist 2-5	Script/Notes
<p>A “mere evidence” or evidentiary search warrant is an order from the magistrate to a peace officer to search for and seize property or items, except the personal writings of an accused, that constitute evidence of an offense or tend to show a particular person committed an offense.</p>	<p>Art. 18.02(10), C.C.P.</p> <p>A blood warrant is an example of a “mere evidence” search warrant. See Checklist 2-6.</p>
<p><input type="checkbox"/> 1. An original mere evidence warrant may be issued by a judge of a municipal court of record or a county court judge who is a licensed attorney; a judge of a statutory county court, the Court of Criminal Appeals, or the Supreme Court.</p>	<p>Art. 18.01(h), C.C.P.</p>
<p><input type="checkbox"/> 2. Except under the limited circumstances noted below, neither a judge of a non-record municipal court nor a justice of the peace may issue a mere evidence warrant. The exception is for counties that do not have: (1) a judge of a municipal court of record who is a licensed attorney; (2) a county judge who is a licensed attorney; or (3) a statutory county court judge.</p>	<p>Art. 18.01(i), C.C.P.</p>
<p><input type="checkbox"/> 3. Any subsequent mere evidence warrant to search the same person, place, or thing subjected to a prior search under a mere evidence warrant may be issued only by a judge of a district court, a court of appeals, the Court of Criminal Appeals, or the Supreme Court.</p>	<p>Even municipal courts of record cannot issue a second mere evidence warrant. Art. 18.01(d), C.C.P.</p>
<p><input type="checkbox"/> 4. Greater specificity is required in the affidavit for an evidentiary warrant than for a regular search warrant.</p>	<p>Art. 18.01(c), C.C.P.</p>
<p><input type="checkbox"/> a. The affidavit must contain facts to establish probable cause that:</p>	<p>See Checklist 2-4 on probable cause.</p>
<p><input type="checkbox"/> (1) A specific offense was committed;</p>	
<p><input type="checkbox"/> (2) Specifically described property or items to be searched for and seized constitute evidence of the specific offense or that a particular person committed it; and</p>	

- (3) The property or items constituting evidence are located at or on the particular person, place, or thing to be searched.

- 5. A warrant to search for “mere evidence” — as opposed to items in Article 18.02(1-9) — may not be issued for the office of a:
 - a. Newspaper;
 - b. News magazine; or
 - c. Television or radio station.

Art. 18.01(e), C.C.P.

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6. Blood Search Warrants

Checklist 2-6	Script/Notes
<p>A blood search warrant is an order from the magistrate to a peace officer directing the officer to search for and seize a blood specimen from a person who is arrested for an intoxication offense and refuses to submit to a breath or blood alcohol test.</p>	<p>Arts. 18.01(j) and 18.02(10), C.C.P.</p>
<p><input type="checkbox"/> 1. A blood search warrant may be issued by any magistrate who is a licensed attorney if:</p>	<p>Art. 18.01(j), C.C.P.</p>
<p><input type="checkbox"/> a. The suspect refuses to submit to a breath or blood alcohol test; and</p>	
<p><input type="checkbox"/> b. Is charged with:</p>	
<p><input type="checkbox"/> (1) Driving While Intoxicated;</p>	<p>Sec. 49.04, P.C.</p>
<p><input type="checkbox"/> (2) Driving While Intoxicated with a Child Passenger;</p>	<p>Sec. 49.045, P.C.</p>
<p><input type="checkbox"/> (3) Flying While Intoxicated;</p>	<p>Sec. 49.05, P.C.</p>
<p><input type="checkbox"/> (4) Boating While Intoxicated;</p>	<p>Sec. 49.06, P.C.</p>
<p><input type="checkbox"/> (5) Assembling or Operating an Amusement Ride While Intoxicated;</p>	<p>Sec. 49.065, P.C.</p>
<p><input type="checkbox"/> (6) Intoxication Assault; or</p>	<p>Sec. 49.07, P.C.</p>
<p><input type="checkbox"/> (7) Intoxication Manslaughter.</p>	<p>Sec. 49.08, P.C.</p>
<p><input type="checkbox"/> 2. Greater specificity is required in the affidavit for an evidentiary warrant than for a regular search warrant.</p>	<p>Art. 18.01(c), C.C.P.</p>
<p><input type="checkbox"/> a. The affidavit must contain facts to establish probable cause that:</p>	<p>See Checklist 2-4 on probable cause.</p>
<p><input type="checkbox"/> (1) A specific offense was committed;</p>	
<p><input type="checkbox"/> (2) Specifically described property or items to be searched for and seized constitute evidence of the specific offense or that a particular person committed it; and</p>	

- (3) The property or items constituting evidence are located at or on the particular person, place, or thing to be searched.
- 3. In the following circumstances, a blood search warrant is not necessary for police to obtain a blood sample:
 - a. A suspect could voluntarily agree to submit to the drawing of a blood sample;
 - b. A police officer is mandated to obtain a blood sample where a person has been arrested for a motor or watercraft intoxication offense, the person refuses the officer's request to submit to the taking of a specimen voluntarily, and:
 - (1) The person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident:
 - (a) Any individual has died or will die;
 - (b) An individual other than the person has suffered serious bodily injury; or
 - (c) An individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for treatment;
 - (2) The offense for which the person was arrested is Driving While Intoxicated with Child Passenger; or
 - (3) At the time of the arrest, the officer possesses or receives reliable information from a credible source that the person:
 - (a) Has been previously convicted of or placed on

Sec. 724.012, T.C.

community supervision for Driving While Intoxicated with Child Passenger, Intoxication Assault, or Intoxication Manslaughter; or

- ❑ (b) On two or more occasions, has been previously convicted of or placed on community supervision for Driving While Intoxicated, Flying While Intoxicated, Boating While Intoxicated, or Assembling or Operating an Amusement Ride While Intoxicated.

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7. Search Warrants to Photograph a Child. Art. 18.021, C.C.P.

Checklist 2-7	Script/Notes
<input type="checkbox"/> 1. The affidavit must contain the following information in addition to that normally required: <ul style="list-style-type: none"> <input type="checkbox"/> a. The allegation of one of the following specific offenses: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Injury to a child; <input type="checkbox"/> (2) Sexual assault of a child; <input type="checkbox"/> (3) Aggravated sexual assault of a child; or <input type="checkbox"/> (4) Continuous sexual abuse of young child or children. <input type="checkbox"/> b. The name or a description of the victim; <input type="checkbox"/> c. A statement that evidence of the offense or evidence that a particular person committed the offense can be detected by photographing the child; and <input type="checkbox"/> d. A statement that the child to be located and photographed can be found at a particular place to be searched. 	<p>Sec. 22.04, P.C.</p> <p>Sec. 22.011(a), P.C.</p> <p>Sec. 22.021, P.C.</p> <p>Sec. 21.02, P.C.</p> <p>Art. 18.01(f), C.C.P.</p> <p>Art. 18.021(c), C.C.P.</p>
<input type="checkbox"/> 2. Special conditions for the execution of the warrant are also found in Article 18.021, C.C.P.	
<input type="checkbox"/> 3. The return on the warrant shall include the exposed film.	<p>Art. 18.021(d), C.C.P.</p>

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In *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), the U.S. Supreme Court held that administrative searches trigger Fourth Amendment interests because submitting or refusing to submit may result in criminal prosecution. The Court also held that probable cause is required for issuance of a warrant for an administrative search, but the standard is lower than for issuance of a search warrant for fruits or instrumentalities of crime. In issuing administrative search warrants, magistrates should distinguish their function from that of issuing a search warrant. Administrative search warrants are for the inspection of premises, not the seizure of items. Administrative search warrants relate to preliminary inspection powers and should not be confused with the power of municipal courts of record to issue destruction orders to enforce provisions of Chapter 214, L.G.C., and Chapter 683, T.C. See Sec. 30.00005, G.C.

8. Administrative Search Warrants, Art. 18.05, C.C.P.

Checklist 2-8	Script/Notes
<p><input type="checkbox"/> 1. The warrant is issued to:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. One of the following only:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Fire marshal;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) Health officer; or</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) Code enforcement officer.</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Of any county, city, other political subdivision, or the State.</p> <p><input type="checkbox"/> 3. For the inspection of any specified premises to determine the presence of a(n):</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Fire hazard;</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. Health hazard;</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. Unsafe building condition; or</p> <p style="padding-left: 20px;"><input type="checkbox"/> d. Violation of any:</p> <p style="padding-left: 40px;"><input type="checkbox"/> (1) Fire, health, or building regulation;</p> <p style="padding-left: 40px;"><input type="checkbox"/> (2) Statute; or</p> <p style="padding-left: 40px;"><input type="checkbox"/> (3) Ordinance.</p> <p><input type="checkbox"/> 4. If the officer is from a city or county, or political subdivision, verify that he or she is designated as a person authorized to be issued the warrant.</p> <p><input type="checkbox"/> 5. If the officer is from a political subdivision other than a city or county, verify that the political subdivision routinely inspects premises to determine whether there is a fire or health hazard, unsafe building condition, or a violation of fire, health or building regulations,</p>	<p style="text-align: center;">Art. 18.05(a), C.C.P.</p> <p style="text-align: center;">Art. 18.05(d), C.C.P.</p> <p style="text-align: center;">Art. 18.05(d), C.C.P.</p>

statutes, or ordinances.

- 6. A warrant may not be issued under Article 18.05, C.C.P., to a code enforcement official of a county with a population of 2.4 million or more for the purpose of allowing the inspection of specified premises to determine the presence of an unsafe building condition or a violation of a building regulation, statute, or ordinance.

- 7. The affidavit must demonstrate probable cause to believe that the specific named violation or hazardous condition is present in the premises to be inspected.

- 8. The judge may consider the:
 - a. Specific knowledge of the affiant;
 - b. Age and general condition of the premises;
 - c. Previous violations or hazards found present in the premises;
 - d. Type of premises;
 - e. Purposes for which the premises are used; and
 - f. Presence of hazards or violations in, and the general condition of premises near, the premises sought to be inspected.

Art. 18.05(e), C.C.P.

Art. 18.05(c), C.C.P.

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9. Search Warrant Return and the Immediate Disposition of Seized Property

Checklist 2-9	Script/Notes
<input type="checkbox"/> 1. Review the search warrant returned and determine: <ul style="list-style-type: none"> <input type="checkbox"/> a. If the warrant was executed; <input type="checkbox"/> b. The manner of execution; and <input type="checkbox"/> c. If any articles were seized. 	
<input type="checkbox"/> 2. Enter an order directing where and with whom the seized property will be kept for safekeeping.	Art 18.10, C.C.P.
<input type="checkbox"/> 3. Hold a hearing on any questions arising from the execution of the search warrant. <ul style="list-style-type: none"> <input type="checkbox"/> a. Discharge the defendant and release the property if good grounds for the issuance of the warrant are not shown. <input type="checkbox"/> b. Retain any criminal instruments seized and order them to be held by the sheriff subject to a subsequent order as provided by Articles 18.17, 18.18, and 18.19, C.C.P., or Chapter 59, C.C.P. 	Art. 18.12, C.C.P. Art. 18.13, C.C.P. This provision presumably applies only if the defendant is also arrested, perhaps under a combination arrest/search warrant.
<input type="checkbox"/> 4. If the magistrate finds good grounds for issuance of the search warrant, the defendant may be entitled to an examining trial.	Art. 18.14, C.C.P.
<input type="checkbox"/> 5. The property seized may not be removed from the county without an order approving the removal signed by a magistrate in the county in which the warrant was issued.	Art. 18.10, C.C.P.
<input type="checkbox"/> 6. File the search warrant with the clerk of the court having jurisdiction of the case. <ul style="list-style-type: none"> <input type="checkbox"/> a. Send a record of any proceedings to the court of jurisdiction. <input type="checkbox"/> b. Retain a copy of all search warrants, affidavits, returns, and related documents. 	Art. 18.15, C.C.P.
<input type="checkbox"/> 7. Make sure a copy of all warrants and affidavits are provided to the clerk of the court for public disclosure.	Art. 15.26, C.C.P. See Checklist 2-10.

- ☐ a. A district or appellate judge may seal the affidavit if the prosecuting attorney establishes a compelling state interest that either: (1) public disclosure of the affidavit would jeopardize the safety of a victim, witness, or confidential informant or cause the destruction of evidence; or (2) the affidavit contains information obtained from a court-ordered wiretap that has not expired at the time the attorney representing the State requests the sealing of the affidavit.

- ☐ b. The order may not prohibit the disclosure of information relating to the contents of a search warrant, return of a search warrant, or inventory of the property taken pursuant to a search warrant, or affect the right of the defendant to discover the contents of an affidavit. When the order expires, the affidavit must be unsealed.

Art. 18.01(b), C.C.P.

Art. 18.011, C.C.P.

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11. The Capias Pro Fine

A capias pro fine is a post-judgment enforcement mechanism for unpaid fines and/or court costs. Though the “capias pro fine” has been expressly authorized for use in courts governed by Chapter 45 since 1999, it was undefined in the Code of Criminal Procedure until 2007. The issuance of a capias pro fine results in an arrest, but it is neither an arrest warrant (see Checklist 2-1), nor is it a capias (see Checklist 2-2). Remember that converting a fine and/or court costs to a term of confinement when a defendant is unable to pay violates the defendant’s constitutional rights. The 14th Amendment requires that defendants accused of fine-only offenses be provided “alternative means” of discharging the judgment to avoid incarceration (via time-payment plans or discharge through community service.) *Tate v. Short*, 401 U.S. 395 (1971). See “Pay or Lay: Tate v. Short Revisited”, *The Recorder*, 12:3 (March 2003).

Checklist 2-11	Script/Notes
<p>A capias pro fine is a writ: (1) issued by a court having jurisdiction of a case after judgment and sentence for unpaid fines; and (2) directed to any peace officer of the State of Texas commanding the officer to arrest a person convicted of an offense and bring the arrested person before that court immediately or on a day or at a term stated in the writ.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 1. If a defendant fails to satisfy a judgment according to its terms, the capias pro fine, as defined in Article 43.015, C.C.P., may be issued for the defendant’s arrest. <input type="checkbox"/> 2. A capias pro fine may be issued in electronic form. <input type="checkbox"/> 3. A capias pro fine may be issued for the arrest and commitment of a defendant convicted of either a misdemeanor or felony, or found in contempt where the penalty includes a fine. <input type="checkbox"/> 4. A capias pro fine shall recite the judgment and sentence and command the peace officer to immediately bring the arrested person to court. <input type="checkbox"/> 5. A capias pro fine authorizes a peace officer to place the defendant in jail until the business day following the date of the defendant’s arrest if the defendant cannot be brought before the court immediately. <input type="checkbox"/> 6. A capias pro fine may be issued to any county in the State and shall be executed as in other cases, but no bail shall be taken. 	<p>Art. 43.015(2), C.C.P. Special rules apply to capias pro fines issued for offenses committed by those under age 17. See Checklist 13-21. See <i>TMCEC Forms Book: Capias Pro Fine</i>; <i>TMCEC The Municipal Judges Book: Chapter 3</i>.</p> <p>Art. 43.021, C.C.P.</p> <p>Art. 43.05(a), C.C.P.</p> <p>Art. 43.05(b), C.C.P.</p> <p>Art. 43.06, C.C.P.</p>

- 7. A *capias pro fine* may issue simultaneously with civil enforcement of the judgment (i.e., execution).
- 8. When a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment, the judge may order the defendant confined in jail until discharged by law if the judge at a hearing makes a written determination that either:
 - a. The defendant is not indigent and has failed to make a good faith effort to discharge the fine and costs; or
 - b. The defendant is indigent and:
 - (1) has failed to make a good faith effort to discharge the fine and costs under Article 45.049, C.C.P. (community service); and
 - (2) could have discharged the fine under Article 45.049, C.C.P., (community service) without experiencing any undue hardship.
- 9. A certified copy of the judgment, sentence, and order is sufficient to authorize confinement.
- 10. The court should set out a period of time between eight and 24 hours as the period the defendant must remain in jail to satisfy not less than \$50 of the fine and costs owed.

Art. 43.07, C.C.P.

Art. 45.046(a), C.C.P.
 See *TMCEC Forms Book*: Order of Commitment (*Capias Pro Fine*); Judgment/Jail Credit Addendum.

Note: Article 45.0491, C.C.P., authorizes the waiver of fines and costs if the defendant defaults in payment and the court determines that (1) the defendant is indigent and (2) the performance of community service would constitute an undue hardship on the defendant.

Art. 45.046(b), C.C.P.

Art. 45.048, C.C.P.

Jail credit for time served before the judgment must be credited to each case concurrently. Post judgment credit can be ordered to be served consecutively (or stacked) by the court if all cases with which the fine is to be treated consecutively are identified in the order. *Ex Parte Hannington*, 832 S.W.2d 355 (Tex. Crim. App. 1992); Tex. Atty. Gen. Op. JC-0393 (2001); *Ex Parte Minjares*, 582 S.W.2d 105 (Tex. Crim. App. 1978).