

CHAPTER 4 APPEARANCE AND PLEAS

1. Appearance

This checklist is a model for the court to follow during the first appearance by a defendant before the court. This process is often—though not quite properly—referred to as an “arraignment.” The court must take a plea before conversation about the case or sentencing should take place. When the defendant pleads guilty or nolo contendere, this chapter must be read in connection with Chapter 5—Pleas and DSC. When the defendant pleads not guilty, the procedures in Chapters 6 and 7 follow. In either event, the procedures in Chapter 8 are necessary in entering a judgment of guilt or acquittal. Chapters 4 through 8 should be used together as a series of procedures used in resolving cases.

Checklist 4-1	Script/Notes
<p><input type="checkbox"/> 1. If the defendant is appearing before you after being issued a citation, you shall perform the magistrate duties imposed by Art. 15.17, C.C.P., in the same manner as if the person had been arrested and brought before you as a magistrate.</p>	<p>Art. 15.17(g), C.C.P. See Checklist 1-1.</p>
<p><input type="checkbox"/> 2. A judge may not accept a plea of guilty or nolo contendere in open court unless it appears that the defendant is mentally competent, and the plea is free and voluntary.</p>	<p>Art.45.0241, C.C.P. See also <i>Drope v. Missouri</i>, 420 U.S. 162 (1975).</p>
<p><input type="checkbox"/> 3. Ensure that the plea is made by the defendant or the defendant’s attorney.</p>	<p>“Court Calls Case # _____, <i>State v. (Defendant).</i>”</p>
<p><input type="checkbox"/> a. If the plea is made by any other person (parent, friend, spouse, etc.), do not accept the plea.</p>	<p>“Are you <i>(Defendant)</i>?”</p>
<p><input type="checkbox"/> b. Because this is a criminal case, inform the person that the law only allows the defendant or his or her attorney to enter a plea.</p>	<p>See <i>TMCEC 2022 Forms Book</i>: Plea Form: In Person.</p>
<p><input type="checkbox"/> c. If the correct person is not before you, reset the case for defendant to appear.</p>	
<p><input type="checkbox"/> 4. The defendant is entitled to a copy of the complaint at least one day before any criminal proceeding, unless the defendant waives that right.</p>	<p>Art. 1.05, C.C.P. See <i>TMCEC 2022 Forms Book</i>: Waiver of Right to be Prosecuted by Complaint.</p>

a. Ask the defendant if he or she understands the charge.

“You are charged with _____, a misdemeanor punishable by a fine. Do you have a copy of the citation or complaint? Do you understand the nature of the charges against you?”

b. Give the defendant a copy of the complaint at least one day before trial, unless the defendant waives that right.

Art. 45.018(b), C.C.P.

5. Admonishments:

For a greater discussion of an accused’s rights, see TMCEC *Municipal Judges Book*: Chapter 4.

a. Explain the range of punishment for the offenses before the court.

“_____ is a misdemeanor punishable by a fine of not more than \$ _____ and not less than \$ _____ (if offense has a minimum fine) and by _____ (if offense bears sanctions in addition to a fine).”

b. Explain defendant’s right to jury trial.

“You have the right to have a jury determine your guilt or innocence on this charge. Do you wish to have a jury trial, or do you waive a jury and wish to proceed before the court without a jury?”

- c. Explain defendant’s right to counsel.

- d. Despite the general rule that indigent defendants accused of fine-only offenses are not statutorily entitled to the appointment of counsel, the exception is if “the interests of justice require representation.” This is a discretionary determination made by the judge.

- e. If represented by counsel, make sure the attorney’s name, address, and telephone number are noted on the docket.

- f. If the defendant is not represented by counsel, the defendant must waive the right to retain counsel.

“You have a right to be represented by an attorney in this case. Since the maximum penalty in this case does not include time in jail, you do not have a right under the law—neither the Texas nor U.S. Constitutions—to have an attorney appointed. You have the right to hire legal counsel. An attorney could advise you and help you make important decisions concerning the consequences and alternatives in this case. An attorney would be familiar with trial procedures and rules of evidence. In this trial, you will be held to the same legal standards as if you were an attorney. Do you still wish to proceed representing yourself?”

Art. 1.051(c), C.C.P. Texas case law provides little guidance to such appointments. Criminal law scholars have opined, “Whether or not this is the case should be determined largely on the basis of whether the case presents defensive possibilities that are most likely to be adequately presented to the court only by an attorney. If this is the case, an attorney can and must be appointed regardless of the minor nature of the offense.” 42 Dix & Schmolesky, *Texas Practice: Criminal Practice & Procedure*, Sec. 29.32 (3d ed. 2011).

A warning and waiver of the constitutional right to retain counsel is required. See Chapter 3 concerning lay representation.

g. If the defendant wishes to retain counsel, reset the case for the defendant to have time to do so. If not, proceed.

h. Explain defendant’s privilege against self-incrimination.

i. Before accepting a plea of guilty or a plea of nolo contendere by a defendant charged with a misdemeanor involving family violence, the court shall admonish the defendant orally or in writing by using the statement to the right, verbatim.

6. If the defendant pleads not guilty:

a. Set the case for a pretrial hearing and/or trial; and

b. Provide the defendant with a copy of the setting order and docket the case.

See *TMCEC 2022 Forms Book*: Non-Jury Trial Setting Form: Defendant Appears by Mail; and Non-Jury Trial Setting Form: Defendant Appears in Person.

“You are not required to testify and no one may make you testify. If you decide not to testify, I will not use the fact that you did not testify as evidence against you. Choosing to remain silent cannot be used against you.”

“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.”

While bail is not required, a specific rule applies to bail set by municipal and justice courts after charges have been filed. Under that rule, judges may only require a personal bond, unless certain determinations have been made. Art. 45.016, C.C.P. See Checklist 1-5 (steps 11-13).

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2. Pleas Made by Mail

Under Art. 27.14(c), C.C.P., a payment received without a plea constitutes a finding of guilty in open court as though a plea of nolo contendere and a written waiver of jury trial had been received. Municipal court clerks usually collect and process these pleas and payments. If a plea and waiver of jury trial and a request for the amount of fine and/or appeal bond is received, the court must notify the defendant either in person or by regular mail of the amount of fine or costs; information regarding the alternatives to the full payment of any fine or costs assessed, if the defendant is unable to pay the full amount; and, if requested, the amount of an appeal bond that the court will accept. Defendants have up to 31 days from the date of receiving the notice to pay the fine and costs or file an appeal bond with the court. A defendant charged with a misdemeanor involving family violence may not mail or deliver in person a plea of guilty or nolo contendere; this plea must be made in open court. Art. 27.14(b), C.C.P.

Judges should instruct clerks to prepare judgments on all the pleas, waivers of jury trial, and payments offered to the courts. An offer to pay a fine and costs is not a conviction until the judge accepts the plea, waiver of jury trial, and/or payment of the fine, and enters judgment.

Checklist 4-2	Script/Notes
<p><input type="checkbox"/> 1. If the court receives payment by mail, without a plea:</p> <p><input type="checkbox"/> a. Determine that the defendant is at least 17 years of age or is not a minor defendant charged with an Alcoholic Beverage Code offense or a tobacco offense under the Health and Safety Code.</p> <p><input type="checkbox"/> b. Determine that the offense is punishable by fine-only and that no other sanction (such as counseling, community service, or DL suspension) is mandatory.</p> <p><input type="checkbox"/> c. Determine that the amount received is sufficient to cover the minimum lawful fine, court costs, and any other fees.</p> <p><input type="checkbox"/> d. Determine that the amount received is not more than the maximum lawful fine plus court costs and any other fees.</p> <p><input type="checkbox"/> e. Determine that the payment is in an amount acceptable to you.</p>	<p>Art. 27.14(b) and (c), C.C.P.</p> <p>Article 27.14, C.C.P., allows adult defendants charged in municipal and justice courts with fine-only offenses to mail or deliver in person to the court a plea of guilty or nolo contendere (no contest) and a written waiver of jury trial.</p> <p>Art. 27.14(c), C.C.P.</p> <p>Art. 27.14(c), C.C.P.</p>

- f. Determine that the payment is from the defendant, from defendant’s attorney, or made with the defendant’s agreement to be found guilty.
 - g. If the above requirements are met, accept the plea, waiver of jury trial, and/or payment and sign a judgment of guilty.

 - h. If the above requirements are not met, return the payment to the defendant or defense attorney, inform them of the acceptable fine amount and of any other applicable sanctions, and set the case for trial.
2. If the defendant does not deliver a fine, but delivers a plea or request for bond amount, determine if defendant has:
- a. Pled guilty or nolo contendere.
 - b. Requested in writing that the court notify defendant of the amount of an appeal bond the court will approve.
 - c. Waived a jury trial in writing.
 - d. Provided the court with defendant’s or defense attorney’s address.
 - e. Delivered the request, plea, jury waiver, and address by defendant’s appearance date.

See *TMCEC 2022 Forms Book*: Plea Form: By Mail or Delivery to Court; and Judgment: Jury Waived – Guilty.

Effective January 1, 2014, a written acknowledgement of the disclosure, receipt, and list of any discovery provided to the defendant must be signed by each party before a plea of guilty or nolo contendere is accepted. It is unclear if an acknowledgment is necessary when no discovery was requested, ordered, or provided. Art. 39.14(j), C.C.P.

Art. 27.14(b), C.C.P.

Art. 45.025, C.C.P.

- ❑ f. Extended his or her time by the “Mailbox Rule.” If the defendant mailed the plea and jury waiver on or before the due date of appearance, and these documents are received by the clerk not later than 10 days after the due date, the plea and waiver are properly filed. Make sure the clerk keeps the envelope with the postmark.

- ❑ g. Determine that the offense is punishable by fine-only and that no other sanctions (such as counseling, community service, or DL suspension) are mandatory and that defendant is at least 17 years of age.

- ❑ h. Determine that the defendant is not charged with a misdemeanor involving family violence, as defined by Sec. 71.004, F.C.

Art. 45.013, C.C.P. “Day” does not include Saturday, Sunday, or legal holidays. This rule increases the amount of time allowed to file a document when the document is filed by mail.

Any plea to a family violence case must be made in open court. Art. 27.14(b), C.C.P.

Art. 66.252, C.C.P., requires family violence defendants to be fingerprinted. This fingerprinting could occur in open court at the time of the plea. The court clerk, on disposition, must report the person’s citation or arrest and the disposition of the case to DPS using a uniform incident fingerprint card or an electronic methodology approved by DPS. The arresting law enforcement agency is charged with preparing the fingerprint card, but with Class C family violence cases, it is possible that a defendant was never arrested. In this situation, the judge may order a law enforcement officer to use a uniform incident fingerprint card to take the defendant’s fingerprints.

- i. If the above are done, notify defendant/defense attorney—either in person or by certified mail return receipt requested—of the amount of the fine assessed and the amount of the appeal bond.

- 3. If the defendant mails a plea of not guilty to the court, the plea should be processed in the same way as a plea of not guilty made in open court.

See *TMCEC 2022 Forms Book: Notice to Defendant Following Plea by Mail*. Defendant must pay fine or post the appeal bond by the 31st day after receiving the notice. Remember that the bond is timely filed if postmarked before the 31st day and received within 10 days. Art. 45.013, C.C.P.

Article 27.16(b), C.C.P., allows a defendant charged with a misdemeanor for which the maximum possible punishment is by fine-only, in lieu of entering a plea in open court, to mail to the court a plea of not guilty.

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3. Pleas in Open Court

Most of the requirements relating to acceptance of a plea are contained in Article 26.13, C.C.P. The Court of Criminal Appeals has held such statutory requirements inapplicable to misdemeanor cases. *Empy v. State*, 571 S.W.2d 526, 529 (Tex. Crim. App. 1978). Despite the increased number of direct and indirect consequences of being convicted of a Class C misdemeanor in Texas, federal due process only requires a plea of guilty in a misdemeanor be made knowingly and intelligently after being admonished as to the range of punishment. *Tatum v. State*, 861 S.W.2d 27 (Tex. App.—Houston [14th Dist.] 1993, pet. ref’d). A guilty plea is not rendered involuntary by lack of knowledge of collateral consequence (e.g., deportation), and defendants have no constitutional right to be admonished of such consequences. *State v. Jimenez*, 987 S.W.2d 886 (Tex. Crim. App. 1999).

Checklist 4-3	Script/Notes
<p>If a defendant is charged with an offense involving family violence, the judge or justice must take the defendant’s plea in open court.</p> <p>“No contest” means that the defendant is neither admitting nor denying the charge but is choosing not to contest the charges in court. Within municipal court, a plea of no contest has the same legal effect as a plea of guilty.</p> <p>The defendant may waive a trial by jury in writing. Only when a written waiver is made can the court proceed. The decision to waive rests with the defendant. The manner, in writing, is controlled by statute.</p>	<p>Art. 45.0211, C.C.P.</p> <p>Art. 66.252, C.C.P., requires family violence defendants to be fingerprinted. This fingerprinting could occur in open court at the time of the plea. The court clerk, on disposition, must report the person’s citation or arrest and the disposition of the case to DPS using a uniform incident fingerprint card or an electronic methodology approved by DPS. The arresting law enforcement agency is charged with preparing the fingerprint card, but with Class C family violence cases, it is possible that a defendant was never arrested. In this situation, the judge may order a law enforcement officer to use a uniform incident fingerprint card to take the defendant’s fingerprints.</p> <p>Art. 27.02, C.C.P.</p> <p>Art. 45.025, C.C.P.</p>

1. Give the admonishments as required in Checklist 4-1 and request a plea.

2. If the defendant refuses to plead:

a. Enter a plea of not guilty;

b. Note on docket that defendant would not plea and that a plea of not guilty was entered by the court;

c. Note defendant’s election of jury trial or jury waiver on docket;

d. Set a case for trial, and

d. Set a pretrial and trial date.

e. Provide defendant with Setting Notice for Pretrial or Trial. Go to Chapters 6 and 7.

3. If defendant pleads not guilty:

a. Enter a plea of not guilty;

b. Note on docket;

c. Note defendant’s election of jury trial or jury waiver on docket; set a pretrial and trial date; and

d. Provide defendant with Setting Notice for Pretrial or Trial. Go to Chapters 6 and 7.

4. If the defendant will not elect jury or bench trial, set case for jury trial.

Arts. 27.16(a) and 45.024, C.C.P.

“If you will not plead, I am required by law to enter a plea of not guilty for you. I have done so. Do you want a jury trial? Or do you want to waive a jury trial and have a trial without a jury?”

“I accept a plea of not guilty. Do you wish to have a jury trial or to waive a jury trial and have a trial before the court?”

While bail is not required, a specific rule applies to bail set by municipal and justice courts after charges have been filed. Under that rule, judges may only require a personal bond, unless certain determinations have been made. Art. 45.016, C.C.P. See Checklist 1-5 (steps 11-13).

“Since you will not tell me whether you want a trial with or without a jury, I am setting your case for a jury trial.”

- ❑ 5. If the defendant is charged with an offense that is eligible for dismissal for a Driving Safety Course (DSC) pursuant to Article 45.0511, C.C.P., the court must inform the defendant that DSC may be an option.

- ❑ 6. If defendant pleads guilty or no contest without conditions, go to Step 9.
 - ❑ a. The most common conditional plea is a plea of guilty or no contest made with an election to take DSC. If the defendant elects DSC, go to Checklists 5-2 and 5-3.

 - ❑ b. Another conditional plea is a plea pursuant to a plea bargaining with the prosecutor.
 - ❑ (1) Advise the defendant that you, the judge, are not bound by the plea offer.

 - ❑ (2) Inform the defendant that if you reject the offer, the plea may be withdrawn.

 - ❑ (3) Accept or deny the offer.

 - ❑ (4) If rejected, permit the defendant to withdraw the plea of guilty or no contest.

 - ❑ c. If the conditions are denied, inform the defendant or his or her attorney that defense must enter an unconditional plea of not guilty, guilty, or no contest.

- ❑ 7. If the conditions are accepted, determine if other procedures are necessary.

See Checklist 5-1 for DSC eligibility. Art. 45.0511(p), C.C.P. “You may have the right to elect to have your case dismissed for taking a Driving Safety Course or Motorcycle Operator Training Course under Article 45.0511, C.C.P. Do you wish me to further explain that option, or do you wish to elect to take a Driving Safety Course?”

“I am not bound by the plea agreement you made with the State.”

“If I reject the agreement, I will permit you to withdraw your plea of guilty or no contest.”

“I accept the plea agreement.”

“I reject the plea agreement. Do you wish to withdraw the plea of guilty or no contest and enter a plea of not guilty?”

See Checklist 5-1 for DSC; Checklist 8-2 for deferred disposition; and Checklist 8-3 for community service and indigence.

- ❑ 8. Determine whether it is a plea of guilty or a plea of no contest and enter it on the court's docket.

“Do you understand that by your plea of guilty or no contest, you give up the right to contest these charges and that your plea is all of the evidence I will need to find you guilty?”

“Are you pleading guilty or no contest of your own free will? No one has threatened you or promised you anything we have not already discussed?”

Effective January 1, 2014, a written acknowledgement of the disclosure, receipt, and list of any discovery provided to the defendant must be signed by each party before a plea of guilty or nolo contendere is accepted. It is unclear if an acknowledgment is necessary when no discovery was requested, ordered, or provided. Art. 39.14(j), C.C.P.

- ❑ 9. Go to Checklist 8-1 for sentencing.

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4. Pleas in Jail

Accepting a plea from an arrested person who is detained in jail for an unadjudicated fine-only offense has been widely practiced in jurisdictions across Texas for some time, as this method was convenient for both the court and the defendant. However, until the passage of H.B. 2679 in 2013, the practice was neither expressly sanctioned nor prohibited.

The topic of “jail house pleas” generated a lot of discussion in recent years, and the focus intensified after the holding in *Lilly v. State*, 365 S.W.3d 321 (Tex. Crim. App. 2012). *Lilly* provided insight into how the Court of Criminal Appeals might handle an appeal challenging a jail house plea as violative of the constitutional and statutory requirements that criminal defendants, even those who are imprisoned, be afforded access to a courtroom open to the public.

Article 45.023(b), C.C.P., authorizes a justice or judge of a justice or municipal court to permit a defendant who is detained in jail for a fine-only misdemeanor to enter a plea, bringing a measure of resolution to the matter by providing a procedural glide path that balances the interests of convenience and the Sixth Amendment rights guaranteed to all criminal defendants by the U.S. Constitution.

Checklist 4-4	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. If a defendant, charged with a fine-only offense, is detained in jail before trial, the judge may permit the defendant to: <ul style="list-style-type: none"> <input type="checkbox"/> a. Plead guilty or not guilty; <input type="checkbox"/> b. Enter a plea of nolo contendere; or <input type="checkbox"/> c. Enter the special plea of double jeopardy as described by Art. 27.05, C.C.P. 	Art. 45.023(b), C.C.P.
<ul style="list-style-type: none"> <input type="checkbox"/> 2. If a defendant who is detained in jail enters a plea of guilty or nolo contendere, the justice or judge may, after complying with Article 15.17, C.C.P., and advising the defendant of the defendant’s right to trial by jury, as appropriate: <ul style="list-style-type: none"> <input type="checkbox"/> a. Accept the defendant’s plea; <input type="checkbox"/> b. Assess a fine, determine costs, and accept payment of the fine and costs; <input type="checkbox"/> c. Give the defendant credit for time served; <input type="checkbox"/> d. Determine whether the defendant is indigent; or 	Art. 45.023(c), C.C.P.

e. Discharge the defendant.

3. Following a plea of guilty or nolo contendere entered while detained in jail, the judge shall grant a motion for new trial made not later than 10 days after the rendition of judgment and sentence, and not afterward.

Effective January 1, 2014, a written acknowledgement of the disclosure, receipt, and list of any discovery provided to the defendant must be signed by each party before a plea of guilty or nolo contendere is accepted. It is unclear if an acknowledgment is necessary when no discovery was requested, ordered, or provided. Art. 39.14(j), C.C.P.

Remember that the motion is timely filed if postmarked on or before the 10th day and received within 10 days. Art. 45.013, C.C.P.