



5 PRETRIAL ISSUES IN DOMESTIC VIOLENCE CRIMINAL CASES

JUDGE SHEQUITA D. KELLY- 1/30/24

INTRODUCTION

- ▶ Born on Halloween
- ▶ Yogi
- ▶ Married with 3 kids 1 dog
 - ▶ 1st
 - ▶ To Go to College
 - ▶ Create DV diversion program-Intercepted
 - ▶ Virtual platform for Dallas County-Court Call

WHATS LOVE GOT TO DO WITH IT



DV STATS IN TEXAS

According to the **Training Institute on Strangulation Prevention**,
“A woman who has suffered a nonfatal strangulation incident with her intimate partner is **750%** more likely to be killed by the same perpetrator...”

- ▶ Researchers and law enforcement professionals have determined that nonfatal strangulation is a leading indicator of escalating violence in a relationship and an important risk factor for homicide in women.
- Women are five times more likely to be murdered by an abusive partner when the abuser has access to a **gun**

According to the **Texas Council on Family Violence**

- Over the past 10 yrs, the number of women killed by intimate partner violence with a firearm has doubled
- Over 179 killed in 2022- 129 with guns



#1 BONDS

#1 BONDS 17.03 (b-2)

(b-2) Except as provided by Articles 15.21, 17.032, 17.033, and 17.151,

a defendant may not be released on personal bond if the defendant:

- (1) is charged with an offense involving violence; or
- (2) while released on bail or community supervision for an offense involving violence, is charged with committing:
 - (A) any offense punishable as a felony; or
 - (B) an offense under the following provisions of the Penal Code:
 - (i) Section 22.01(a)(1) (assault);
 - (ii) Section 22.05 (deadly conduct);
 - (iii) Section 22.07 (terroristic threat); or
 - (iv) Section 42.01(a)(7) or (8) (disorderly conduct involving firearm).

#1 BONDS 17.03 (b-3)2

(b-3)2

"Offense involving violence" means an offense under the following provisions of the Penal Code:

- (A) Section 19.02 (murder);
- (B) Section 19.03 (capital murder);
- (C) Section 20.03 (kidnapping);
- (D) Section 20.04 (aggravated kidnapping);
- (E) Section 20A.02 (trafficking of persons);
- (F) Section 20A.03 (continuous trafficking of persons);
- (G) Section 21.02 (continuous sexual abuse of young child or disabled individual);
- (H) Section 21.11 (indecenty with a child);
- (I) Section 22.01(a)(1) (assault), if the offense is:
 - (i) punishable as a felony of the second degree under Subsection (b-2) of that section; or
 - (ii) punishable as a felony and involved family violence as defined by Section 71.004, Family Code;

#1 BONDS

► Art. 17.15. RULES FOR SETTING AMOUNT OF BAIL. (a) The amount of bail and any conditions of bail to be required in any case in which the defendant has been arrested are to be regulated by the court, judge, magistrate, or officer taking the bail in accordance with Articles 17.20, 17.21, and 17.22 and are governed by the Constitution and the following rules:

- 1. Bail and any conditions of bail shall be sufficient to give reasonable assurance that the undertaking will be complied with.
- 2. The power to require bail is not to be used to make bail an instrument of oppression.
- 3. The nature of the offense and the circumstances under which the offense was committed are to be considered, including whether the offense: (A) is an offense involving violence as defined by Article 17.03; or (B) involves violence directed against a peace officer.
- 4. The ability to make bail shall be considered, and proof may be taken on this point.
- 5. The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered.
- 6. The criminal history record information for the defendant, including information obtained through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system developed under Article 17.021, shall be considered, including any acts of family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail.
- 7. The citizenship status of the defendant shall be considered.

#1 BONDS

▶ STAY AWAY ORDER VS. EPO

WHAT IS THE DIFFERENCE?

#1 BONDS

► Protective Order

1. Granted prior to a case filing; no criminal case necessary
2. Prohibits possession of firearm-Rahimi case
3. Jurisdiction

Criminal Court has no jurisdiction unless...

ARTICLE 17.292(N)CCP;

ON MOTION, NOTICE, AND HEARING, OR ON AGREEMENT OF THE PARTIES, AN ORDER FOR EMERGENCY PROTECTION ISSUED UNDER THIS ARTICLE MAY BE TRANSFERRED TO THE COURT ASSUMING JURISDICTION OVER THE CRIMINAL ACT GIVING RISE TO THE ISSUANCE OF THE EMERGENCY ORDER FOR PROTECTION. ON TRANSFER, THE CRIMINAL COURT MAY MODIFY ALL OR PART OF AN ORDER ISSUED UNDER THIS SUBSECTION IN THE SAME MANNER AND UNDER THE SAME STANDARDS AS THE ISSUING COURT UNDER SUBSECTION (J)

WHAT IS THE DIFFERENCE

#1 BONDS

► Stay Away Order

1. Set as a condition of bond
2. Modifications (children, housing, business)
3. Senate Bill 6-2021

CAUSE NUMBER(S): _____

STATE OF TEXAS

§
§
§
§
§

IN THE COUNTY CRIMINAL

V.

COURT NO. _____

DALLAS COUNTY, TEXAS

**MODIFICATION OF BOND CONDITIONS, SHERIFF'S NOTIFICATION PURSUANT TO ART.
17.50(c), PSRS INPUT FORM, AND/OR ORDER ON WRIT RELATED TO BOND**

This Court, in reviewing the Defendant/Applicant's previously set bond and bond conditions, and considering the Defendant/Applicant's ability to make bail, all of the evidence presented at a bail hearing, and all other relevant factors relating to the setting of bail and bail conditions; modifies the bond and/or condition(s) of bond as indicated below:

- | | |
|---|---|
| <input type="checkbox"/> Bond revoked, warrant to be issued | <input type="checkbox"/> Bail set \$_____ cash/surety |
| <input type="checkbox"/> Modified condition(s) of bond. (<i>See below.</i>) | <input type="checkbox"/> Bail Denied |
| <input type="checkbox"/> Removed condition(s) of bond. (<i>See below.</i>) | <input type="checkbox"/> PR Bond Granted \$_____ |
| <input type="checkbox"/> This criminal charge disposed or bond discharged. | <input type="checkbox"/> Bail remains unchanged. |

The Court finds the following condition(s) of bond apply and Defendant/Applicant shall:

- | | | |
|--|---|---|
| <input type="checkbox"/> Appear at all court settings | <input type="checkbox"/> Supervised access to children | <input type="checkbox"/> Surrender your Passport |
| <input type="checkbox"/> NO alcohol/illicit drugs | <input type="checkbox"/> ONLY w/protected person | <input type="checkbox"/> Home confinement ordered |
| <input type="checkbox"/> Submit to alcohol/drug testing | <input type="checkbox"/> NO contact w/protected | <input type="checkbox"/> Report to Pretrial Services |
| <input type="checkbox"/> DO NOT POSSESS deadly weapons | <input type="checkbox"/> person(s) | <input type="checkbox"/> ELM – work or travel permitted |
| <input type="checkbox"/> NO new arrests/charges | <input type="checkbox"/> NO contact/communication | <input type="checkbox"/> ELM – House Arrest |
| <input type="checkbox"/> Surrender all weapons/firearms | <input type="checkbox"/> w/ANY minors | <input type="checkbox"/> Alcohol Monitor – SCRAM |
| <input type="checkbox"/> NO contact with co-defendants | <input type="checkbox"/> Curfew of _____ p.m. | <input type="checkbox"/> Alcohol Monitor – Portable |
| <input type="checkbox"/> NO contact or communication w/victim <u>in any manner</u> | <input type="checkbox"/> DO NOT threaten or harass victim, his/her family, or their pets, even if shared. | <input type="checkbox"/> Ignition Interlock within _____ days |
| <input type="checkbox"/> NO contact w/victim family | | <input type="checkbox"/> Original bail conditions still apply |
| | | <input type="checkbox"/> NO Family Violence Assault |
| | | <input type="checkbox"/> Remain in _____ County |

Additional conditions added, removed, or specific information applies:

☐ NOTICE TO SHERIFF – This is designated a violent offense pursuant to CCP Article 17.50 and the Clerk of the Court is hereby ORDERED to transmit a copy of this order to the Sheriff.

☐ Protected Person Information attached hereto as page 3.
Clerk of the Court is hereby ORDERED to file protected person information as confidential.

Offense: _____ Degree: _____ SID/FBI No: _____

County: DALLAS COUNTY, unless other specified: _____

The Clerk of the Court is ORDERED to transmit a copy of this order to:

1. The Court's designee in accordance with Tex. Code Crim. Proc. Art. 17.022(d).
2. The Sheriff in accordance with Tex. Code Crim. Proc. Art. 17.50(c), **if indicated herein.**

Signed, Judge Presiding: _____ Date: _____

MODIFICATION OF BOND CONDITIONS, SHERIFF'S NOTIFICATION

PURSUANT TO ART. 17.50(c), PSRS INPUT FORM, and/or ORDER ON WRIT RELATED TO BOND – PG 3

*******MARK AS CONFIDENTIAL IN ONBASE*******

Protected Person Data

Protected Person Name:		Sex:(circle one) Male Female	
Race (circle): Indian Asian Black White Unknown		Ethnicity: (circle one) Hispanic Non-Hispanic Unknown	
Date of Birth:		Social Security:	
Protected Person Address:			
City:	County:	State:	Zip:

Protected Person Employer Data

Protected Person Employer Name:		Address:	
City:	State:	Zip:	
Protected Person Employer Name:		Address:	
City:	State:	Zip:	

To be completed by Criminal Justice/Law Enforcement Official:

SID:	FBI #:	FPC:	MNU:
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Child Data

Protected Child's Name:		Sex:(circle one) Male Female	
Race: (circle one): Indian Black White Unknown Asia n		Ethnicity: (circle one) Hispanic Non-Hispanic Unknown	
Date of Birth:		Social Security:	
Protected Child's School/Daycare Address:			
City:	County:	State:	Zip:

_____ **MINIMUM DISTANCE REQUIRED**

_____ **RELATIONSHIP/FORMER RELATIONSHIP WITH DEFENDANT**

To be completed by Criminal Justice/Law Enforcement Official:

SID:	FBI #:	FPC:	MNU:
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Activity	Must I Consider a Public Safety Report?	Am I required to submit a bail form?
Performing a 15.17 hearing and setting bail after arrest on a warrant (no indictment, information, or complaint filed)	Yes	Yes
Performing a 15.17 hearing and setting bail after warrantless arrest	Yes	Yes
Determining bail after a 15.17 hearing performed by another magistrate because the judge is the only judge authorized to set bail (b/c of pending felony)	Yes	Yes
Setting a new bail after surety surrender on previous bail	No	Yes
Bond modification - type of bond or amount of bond	No	Yes
Bond revocation without new bond	No	No
Issuing a capias	No	No
Arrest warrant following indictment (new charges)	No	Yes (at time of arrest)
Arrest warrant following indictment (no new charges and no change to originally set bail)	No	No
Arrest warrant following indictment (with change to originally set bail)	No	Yes (at time of arrest)
Warrant for violation of parole/probation (community supervision)	No	Yes (if bail taken after arrest)
Issuing an arrest warrant based on probable cause affidavit	No	No

ENOUGH



#2 CRAWFORD HEARINGS

- ▶ WHAT IS THE PURPOSE?
- ▶ WHEN DOES IT APPLY?
- ▶ WHAT IS THE ANALYSIS?
- ▶ Testimonial vs. Non-Testimonial?

*Use to preserve the Defendant's 6th amendment right to confrontation

*Triggered when Prosecutors want to use out of court testimonial statement without the declarant being present

1. Is the declarant available?
2. Is the statement admissible hearsay?
3. Is the statement testimonial?

Is the primary purpose of the statement is to assist with any ongoing emergency?
= NON-TESTIMONIAL

#2 CRAWFORD QUIZ

Testimonial or Non-Testimonial

911 call

Forensic test results

Fingerprint comparison report

Medical Records

Hypothetical #1

Hypothetical #2

The Color Purple



F HD

#3 RECANTATION

- ▶ STATE MUST DISCLOSE
- ▶ FORFEITURE BY WRONGDOING

#3 RECANTATION

► FORFEITURE BY WRONGDOING

Art. 38.49. FORFEITURE BY WRONGDOING. (a) A party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness:

- (1) may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and
- (2) forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing.

(b) Evidence and statements related to a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness are admissible and may be used by the offering party to make a showing of forfeiture by wrongdoing under this article, subject to Subsection (c).

#3 RECANTATION

► FORFEITURE BY WRONGDOING

(c) In determining the admissibility of the evidence or statements described by Subsection (b), the court shall determine, out of the presence of the jury, whether forfeiture by wrongdoing occurred by a preponderance of the evidence. If practicable, the court shall make the determination under this subsection before trial using the procedures under Article 28.01 of this code and Rule 104, Texas Rules of Evidence.

(d) The party offering the evidence or statements described by Subsection (b) is not required to show that:

(1) the actor's sole intent was to wrongfully cause the witness's or prospective witness's unavailability;

(2) the actions of the actor constituted a criminal offense; or

(3) any statements offered are reliable. (e) A conviction for an offense under Section 36.05 or 36.06(a), Penal Code, creates a presumption of forfeiture by wrongdoing under this article. (f) Rule 403, Texas Rules of Evidence, applies to this article. This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.

MR. AND MRS. SMITH



#4 IMMIGRATION CONSEQUENCES

▶ WHAT MAY TRIGGER DEPORTATION?

- ▶ Depends on the status (Resident/Green Card, Undocumented, DACA)

▶ 2006-2018

- ▶ AFV was not a deportable offense by statute because it wasn't deemed a crime of violence. Because Texas law didn't require use of force just injury

▶ 2018

- ▶ AFV was deemed a crime of violence. Fifth circuit considered *indirect force* as a crime of violence. Court also made it retroactive which caused a lot of deportation issues despite being properly advised

#4 IMMIGRATION CONSEQUENCES

- ▶ WHAT MAY TRIGGER DEPORTATION?

- ▶ 2021

- ▶ AFV is not deportable by statute. Determine to not be a crime of violence due to the mens rea including recklessness
- ▶ Mens rea is important. Terroristic threat is more like to result in proceedings in all three classes than AFV because of mens rea

- ▶ Attorneys- what should you be doing?

#4 IMMIGRATION CONSEQUENCES



Immigration consequences are really specific to the person's immigration status. The case law is very unpredictable, so the attorneys need to be consulting with an immigration specialist.



Judges:

Judges can only give a general admonition without having a ton of details about the defendant's status

You are further admonished if you are not a United States Citizen, entering a plea of guilty or no contest may subject you to the immigration laws of the United States of America, which include deportation, exclusion from the United States and denial of naturalization.

IMMIGRATION CONSEQUENCE

➤ **Prosecutors:** Bargaining tool but *Padilla vs. Kentucky*-559 U.S. 356 (2010) expresses the need for proportionality

“Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.” *Padilla* at 373.

“A criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.” *Padilla* at 373

5 PLEAS/PRETRIAL MOTIONS



5 PLEAS/PRETRIAL MOTIONS

▶ ADMONISHMENTS AFFV

- ▶ Art 42.013 CCP- In trial if the court determines the offense involved FV- court SHALL make a finding and enter an AFFV
- ▶ Art 42.0131 CCP-Upon conviction the court SHALL admonish on the handgun consequences

➤ ENHANCEMENTS

Deferred Adjudication warning

Texas Penal Code Sec 22.01 (f)

(f) For the purposes of Subsections (b) (2) (A) and (b-3) (2):

(1) a defendant has been previously convicted of an offense listed in those subsections committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if the defendant was adjudged guilty of the offense or entered a plea of guilty or nolo contendere in return for a grant of deferred adjudication, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision; and

(2) a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed.

PLEAS/PRETRIAL MOTIONS

➤ 38.371

(b) In the prosecution of an offense described by Subsection (a), subject to the Texas Rules of Evidence or other applicable law, **each** party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.

(c) **This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.**

▶ JURY CHARGE MUST REFLECT THE PURPOSE OF ADMISSION

PLEAS/PRETRIAL MOTIONS

► JURY CHARGE MUST REFLECT THE PURPOSE OF ADMISSION

You are instructed that if there is any testimony before you in this case regarding the defendant having committed offenses or acts other than the offense alleged against him in the Information in this case, you cannot consider such testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses or acts, if any were committed. Even then, you may only consider the same in determining the defendant's motive, opportunity, intent, plan, identity, knowledge or absence of mistake or accident, if any, alleged against him in the Information in this case, and not for any other purpose.



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THANK
YOU