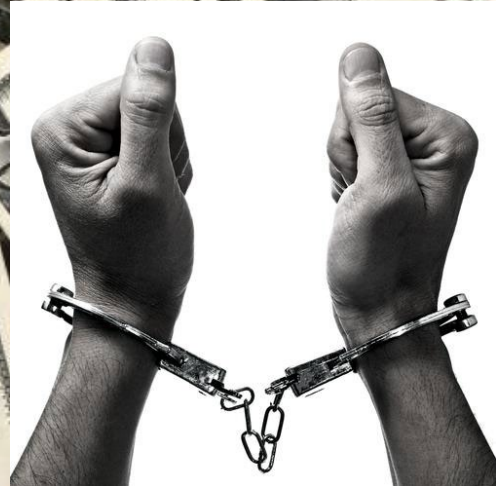
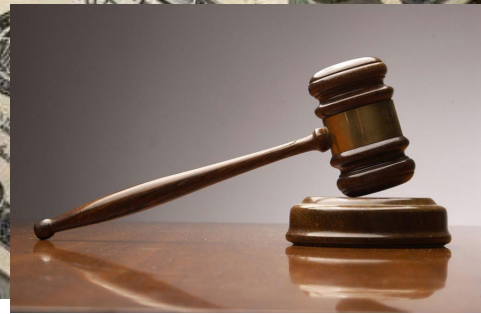
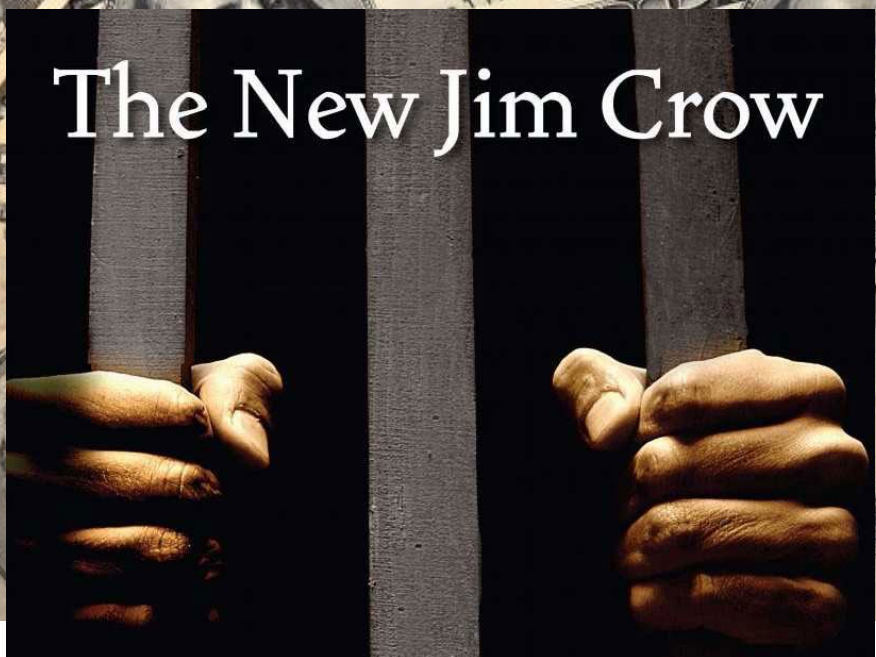




Bail

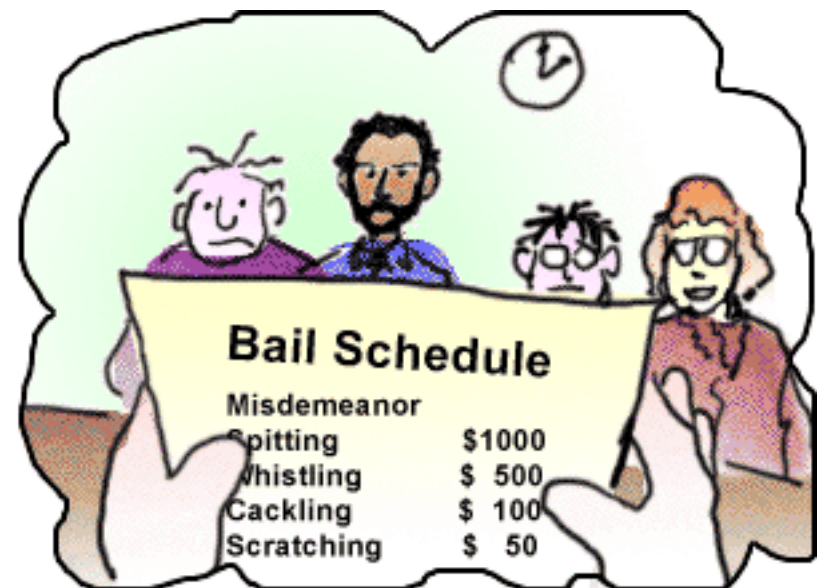


# The New Jim Crow



# Dix & Schmolesky

- “Arguably the use of a bail schedule is contrary to the entire spirit of the bail process.”
- 41 Tex. Prac. Criminal Practice and Procedure § 21:45 (3d ed.).



# Rothgery v. Gillespie County


- What marks the initiation of adversarial judicial proceedings that trigger Sixth Amendment protections?
- 128 S. Ct. 2578 (2008)
- (Thanks to Jim Bethke at TIDC for the next few slides)

# CCP 15.17

- Art. 15.17 hearing (magistration) marks the initiation of adversary judicial proceedings, “with the consequent state obligation to appoint counsel within a reasonable time after a request for assistance is made”

# “Bail Hearing”

- “[A] criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”

- 
- Does the right to counsel attach at the Article 15.17 hearing even if a prosecutor is not aware of or involved in its conduct?
  
  - Answer: Yes


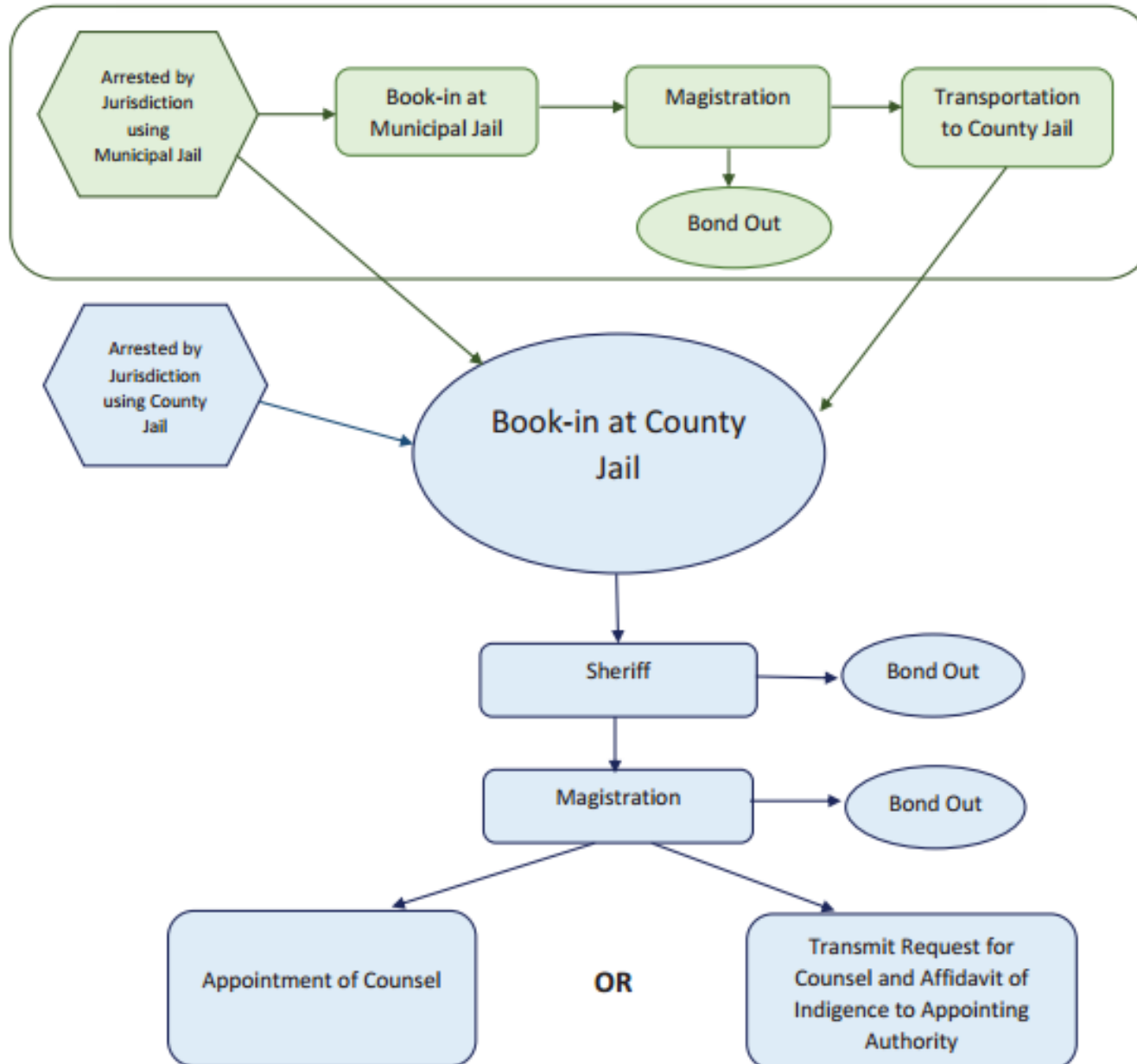
- 
- Is an indictment or information required in order to commence adversary judicial proceedings and cause the right to counsel to attach?
  
  - Answer: No



Figure 1. Defendant Case Flow from Arrest to Magistration



# Bail

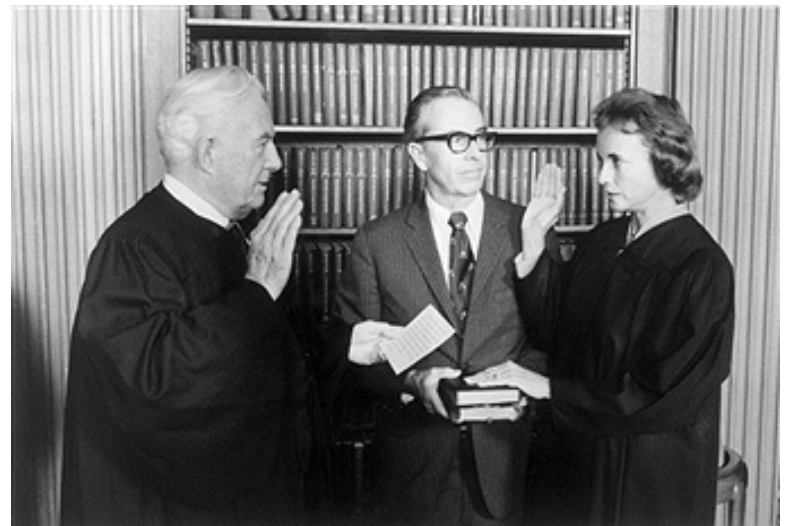
- **Bail** is the is the **security** given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a **bail bond or a personal bond**.
- Tex. Crim. Proc. Code Ann. art. 17.01 (West).

- Personal bond – CCP 17.04
- (not personal recognizance – it is more like an unsecured debt)
  
- Bail bond –
  - ▣ Cash – CCP 17.02
  - ▣ Surety Bond – CCP 17.11

# Personal Bond

“I swear that I will appear before (the court or magistrate) at (address, city, county) Texas, on the (date), at the hour of (time, a.m. or p.m.) or upon notice by the court, or pay to the court the principal sum of (amount) plus all necessary and reasonable expenses incurred in any arrest for failure to appear.”

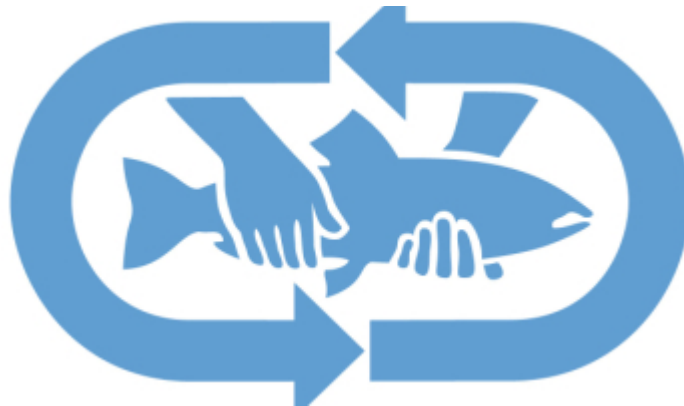
Tex. Crim. Proc. Code  
Ann. art. 17.04



# Release for Class C fine only offenses

- A magistrate may release a defendant without bond under the following circumstances -- (most people are just ticketed and released)

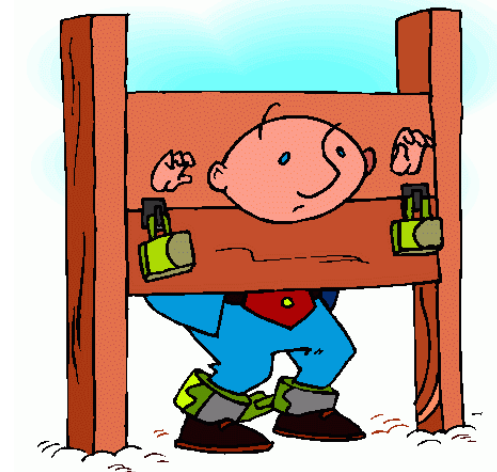
Tex. Crim. Proc. Code Ann. art. 15.17 (West)



# U.S. Const. Amend. VIII

- “[e]xcessive bail shall not be required.”

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.



# Texas Constitution

- “All prisoners shall be bailable by sufficient sureties, unless for capital offenses...”
- Tex. Const. art. 1 § 11;
- Tex. Code Crim. Proc. 1.07.
- Excessive bail shall not be required. Tex. Const. art. 1 § 11c.

- 
- **Six constitutional limitations on pretrial release**



# Tex. Const. art. 1 § 11a

- 1. Who is a habitual offender
- 2. Accused of a non-capital felony while on bail for a prior indicted felony
- 3. Accused of an offense involving a deadly weapon with a prior felony conviction, or
- 4. Accused of a violent or sexual offense while on supervision

# Tex. Const. art. 1 § 11a

---

- The magistrate **cannot** deny bail on these.
- But a district court judge can deny bail
- Ex parte Moore, 594 S.W.2d 449, (Tex.Crim.App.1980)

# Tex. Const. art. 1 § 11b

- 5. Accused of a felony or an offense involving family violence, who is released on bail pending trial, and whose bail is subsequently revoked or forfeited for a violation of a condition of release.
- Judge or Magistrate can deny bail

# Tex. Const. art. 1 § 11c

- 6. Accused who violates an order for emergency protection issued by a judge or magistrate after an arrest for an offense involving family violence or who violates an active protective order rendered by a court in a family violence case.
- Judge or Magistrate can deny bail

# Tex. Code Crim. Proc. Art. 17.03

- (b) Only the **court before whom the case is pending (\*\*)** may release on **personal bond** a defendant who:
  - (1) is charged with an offense under the following sections of the Penal Code:
    - (A) Section 19.03 (Capital Murder);
    - (B) Section 20.04 (Aggravated Kidnapping);
    - (C) Section 22.021 (Aggravated Sexual Assault);
    - (D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles,<sup>1</sup> or Court Participant);
    - (E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);
    - (F) Section 29.03 (Aggravated Robbery);
    - (G) Section 30.02 (Burglary);
    - (H) Section 71.02 (Engaging in Organized Criminal Activity);
    - (I) Section 21.02 (Continuous Sexual Abuse of Young Child or Children); or
    - (J) Section 20A.03 (Continuous Trafficking of Persons);

- 
- (2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first-degree felony; or
- 
- (3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.
- 
-

# In counties over 3.3 million ...

- Harris County magistrates may release defendants on personal bond, even for these serious offenses. Tex. Govt. Code § 54.856
  
- (a) ....In criminal cases filed in the district courts and county criminal courts at law, the jurisdiction of the criminal law hearing officer is limited to:
  - (1) determining probable cause for further detention of any person detained on a criminal complaint, information, or indictment filed in the district courts or county criminal courts at law;
  - (2) committing the defendant to jail, discharging the defendant from custody, or **admitting the defendant to bail**, as the law and facts of the case require;

□

Tex. Gov't Code Ann. § 54.856 (West)

# Burden of Proof

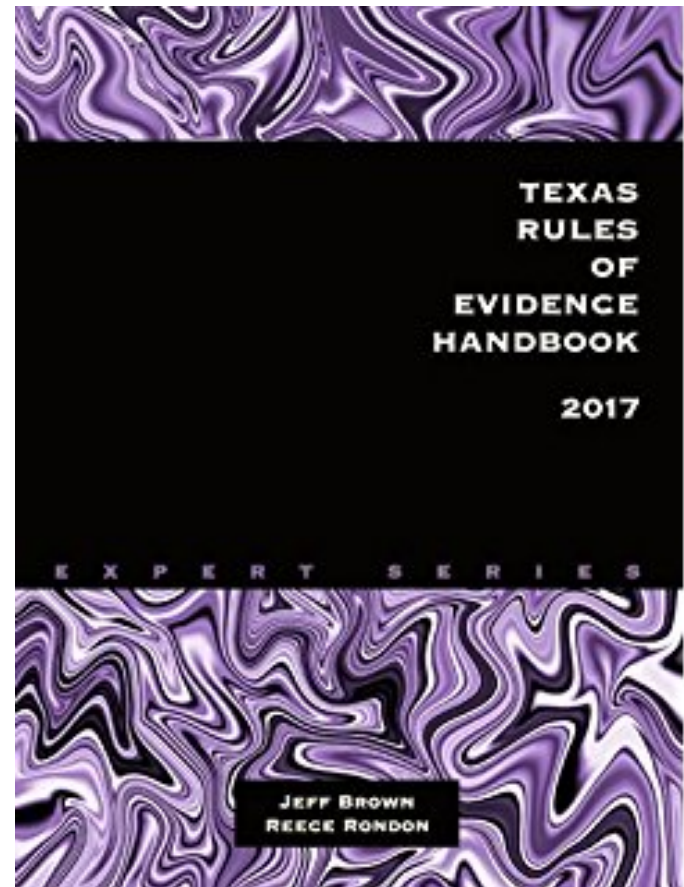
- .. in a proceeding to deny bail under Article I, Section 11a, is a “substantial showing” of the guilt of the accused rather than a showing that the accused is “guilty beyond a reasonable doubt.”
  
- *Ex Parte Moore*,  
594 S.W.2d 449, 452  
(Tex.Crim.App.1980)





# Tex. R. Evid. 101(d)(E)

- Rules of evidence apply in hearings to deny, revoke or increase bond.
- DO NOT APPLY IN  
MAGISTRATION HEARING



# Setting Bail

- Five Statutory Considerations
- Tex. Code Crim.Proc. art. 17.15:



# Reasonable Assurance

- 1. Sufficiently high to give “reasonable assurance” will be complied with ...



- *Ex parte Watson*, 940 S.W.2d 733 (Tex. App. – Texarkana 1997)(prior history of flight and bad behavior in jail sufficient for \$350,000 bond)

# Not oppressive

- 2. Not used an instrument of oppression



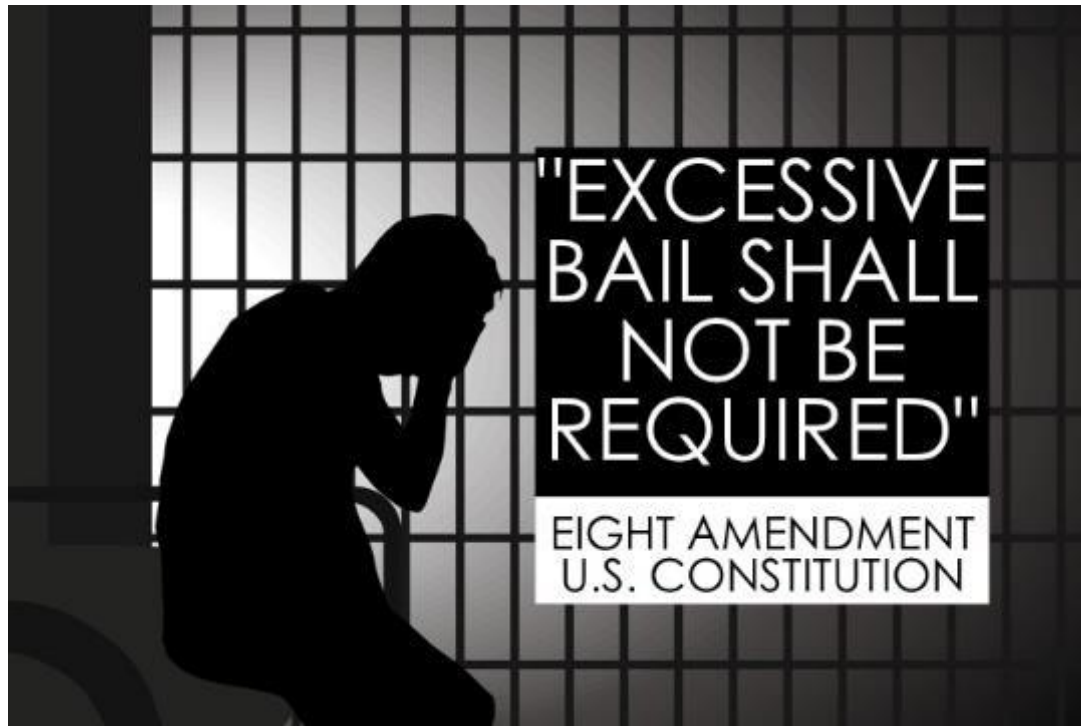
# The charge

## □ 3. Nature and circumstances of the offense



\$\$\$

□ 4. Ability to make bail



# Victim/Community concerns

- 5. Safety of the victim/community



# Harris County Rules

- Codifying Texas Const. provisions and case law from *Ex parte Rubac*, 611 S.W.2d 848 (Tex. Crim. App. 1981)
- 4.2.3.1.5. the criminal law hearing officer shall also consider the employment history, residency, family affiliations, prior criminal record, previous court appearance performance, and any outstanding bonds of the accused.





# Other considerations

- 1. The length of the sentence,
- 2. The nature of the offense,
- 3. Other supportive data that the Court deems relevant includes:
  - ▣ a. petitioner's work record,
  - ▣ b. family ties, and
  - ▣ c. length of residency,
  - ▣ d. ability to make the bond,
  - ▣ e. prior criminal record,
  - ▣ f. conformity with previous bond conditions,
  - ▣ g. other outstanding bonds,
  - ▣ h. and aggravating factors involved in the offense,

- Factors are to be analyzed individually
- Fact-driven determination



# Bond conditions



# CCP 17.151

- Incarcerated Defendant must get affordable bond if State is not “ready for trial”:
- Within 90 days for a felony
- Within 30 days for Class A misd.
- Within 15 days for a Class B misd.

# CCP 17.151

- Same statute applicable to 90 day indictment
- Applicable if the State is ever “not ready” after 90 days confinement
- State’s claim of “ready” good enough absent bad faith

# Ex Parte Gill,

- “Conditioning release...on matters such as victim or community safety concerns deprives the statute of any meaning. . .and frustrates art. 17.151’s clear intent.”
- 413 S.W.3d 425 (Tex. Crim. App. 2013).

