

Solving Complex Issues in Emergency Detentions

October 19, 2023



TEXAS TECH UNIVERSITY

School of Law™

Prof. Brian Shannon

Overview

- *Quick Review of Emergency Detention Law*
- *What's new in Fall 2023*
- *County responsibilities*
- *Model Law Recommendations*

Emergency Detention

- Warrantless
- With Magistrate's Warrant

Emergency Detention

- Purpose
- 12 hours – must be examined by a physician
- 48 hours/weekends

Traditionally – Law Enforcement – First Responders



Today – First Responders could be the MCOT



Law Enforcement Discretion

- Health & Safety Code Section 573.001:
 - Officer has substantial discretion
 - Even if there is probable cause that would justify and arrest, an apprehended person with mental illness can be taken to a mental health facility instead of jail

Law Enforcement Discretion

- Peace officer may take a person into custody without a warrant if reasonable belief that:
 - Person has a mental illness; and
 - There is a substantial risk of serious harm to the person or others unless immediately restrained
 - Peace officer can form belief from a representation of a credible person or on the basis of observed conduct

Law Enforcement Discretion

- Peace officer may take a person into custody without a warrant if reasonable belief that:
 - Person has a mental illness; and
 - There is a **substantial risk of serious harm to the person or others** unless immediately restrained
 - Peace officer can form belief from a representation of a credible person or on the basis of observed conduct

What is “substantial risk of serious harm”?

- May be determined by:
 - Officer’s assessment of the person’s behavior; or
 - Evidence of severe emotional distress and deterioration in the person’s mental condition to the extent that the person cannot remain at liberty.

What about liability risks for peace officers?

- H&S Code 571.019(a):
 - “A person who participates in the ... apprehension, custody, transportation, detention ... of any person or in the performance of any other act required or authorized by this subtitle and who acts in good faith, reasonably, and without negligence is not criminally or civilly liable for that action.”

Emergency Detention

- With Magistrate's Warrant
 - Written application by an adult
 - Judge or magistrate (can be, and often is, a JP) to decide if there is reasonable cause to believe person has a MI, and is at risk of serious harm to self, others, or evidences severe emotional distress and deterioration

New in 2023 – re Magistrate Warrant EDs

- Court **shall** permit email/pdf applications by physicians **or** licensed mental health professionals employed by the LMHA
- A facility may detain a person who is located in the facility to perform the preliminary exam if the court has transmitted the warrant to the facility (via email/pdf)

New in 2023 – re Magistrate Warrant EDs

- A peace officer who is transporting a proposed patient via a warrant to a facility does not have to stay at the facility for medical clearance, etc.
- The officer may leave after handoff to facility staff and having provided required documentation.
- Does not apply to APPOWs

Challenges in some counties:

- In some, there can be law enforcement reluctance or lack of awareness of their authority under Chapter 573.
- In some, there can be judicial reluctance.
- Possible solutions – see March 2023 JCMH Emergency Detention Round Table Report*



* <https://texasjcmh.gov/media/m1gnjgck/emergency-detention-rt-report-3-24-23.pdf>

National Center for State Courts – Mental Health Task Force

February 2023 Report – State Courts Leading Change*

* https://www.ncsc.org/_data/assets/pdf_file/0031/84469/MHTF_State_Courts_Leading_Change.pdf *

National Center for State Courts – Mental Health Task Force

- Model Code Workgroup



THE EQUITAS PROJECT
Disentangling mental health and criminal justice



National Center for State Courts – Mental Health Task Force

- Model Code Workgroup



THE EQUITAS PROJECT

Disentangling mental health and criminal justice



Model Code Workgroup

- Report and recommendations for Model Legal Processes*
 - Guidance for Emergency Psychiatric Intervention
 - Guidance for Court-Ordered Mental Health Treatment
 - Medication over Objection
 - Pathways to Care (in criminal justice matters)

* <https://www.mentalhealthcolorado.org/wp-content/uploads/2022/09/Model-Legal-Processes-to-Support-Clinical-Intervention-for-Persons-with-Serious-Mental-Illnesses-Final-9.2.2022.pdf>

Model Code Workgroup

- Report and recommendations for Model Legal Processes*
 - **Guidance for Emergency Psychiatric Intervention**
 - Guidance for Court-Ordered Mental Health Treatment
 - Medication over Objection
 - Pathways to Care (in criminal justice matters)

* <https://www.mentalhealthcolorado.org/wp-content/uploads/2022/09/Model-Legal-Processes-to-Support-Clinical-Intervention-for-Persons-with-Serious-Mental-Illnesses-Final-9.2.2022.pdf>

Model Code Proposals – Emerg. Psych. Interventions - Highlights

- Broad def. of “Legally empowered persons” to include:
 - (1) physicians, nurse practitioners, advanced practice nurses, and physician assistants;
 - (2) health care providers with expertise in diagnosing and treating mental illness, including but not limited to psychiatrists, advanced practice nurses with psychiatric expertise, psychiatric nurse practitioners, licensed clinical psychologists, licensed clinical social workers, and licensed professional counselors;
 - (3) judges and other quasi-judicial officers such as a magistrate or magistrates;
 - (4) law enforcement personnel and emergency medical personnel;and
 - (5) legal guardians of the individual subject to treatment under this provision.

Model Code Proposals – Emerg. Psych. Interventions - Highlights

- A “legally empowered person” may initiate and, if safe to do so, transport the person
- May act if there is good cause to believe that, as a result of mental illness and based on the individual’s recent actions, omissions, or behaviors, the individual:
 - (1) poses a substantial risk of
 - i. attempting suicide or inflicting serious self-injury;
 - ii. causing or inflicting injury on others or engaging in threatening behavior or verbal threats that arouses fear of serious harm to self or others;

Model Code Proposals – Emerg. Psych. Interventions - Highlights

- (1) poses a substantial risk of
 - iii. being unable to provide for immediate essential needs such as food, clothing, or shelter;
 - iv. being unable to protect self from victimization by others; or
 - v. being unable to exercise sufficient behavioral control to avoid criminal justice involvement, or

Model Code Proposals – Emerg. Psych. Interventions - Highlights

- (2) is unable to recognize symptoms or appreciate the risks and benefits of treatment and, as a result, is unable or unwilling to adhere to treatment and attempts have been made to engage the person in receiving person-centered health care and a continuum of supports and services, placing them at substantial risk of a serious deterioration in their mental condition in the near future that would result in their meeting one or more of the criteria specified in (1).

Model Code Proposals – Emerg. Psych. Interventions - Highlights

- Emergency psychiatric assessments shall be initiated within 4 hours of arrival at an assessment site and shall be completed within 24 hours of arrival.
- If, after completion of the emergency psychiatric assessment and any emergency interventions deemed medically necessary the individual continues to meet emergency treatment criteria ... and requires continued involuntary emergency mental health evaluation and intervention, the individual may be held for up to an additional **five** calendar days in an appropriate facility or site.
- Compare to current Texas law and those of other states.

Additional Resource

- Article: *Model Legal Processes for Court Ordered Mental Health Treatment - A Modern Approach*, 18 FIU L. Rev. __ (2023)
- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4543829

Parting Thoughts

- We've made progress, but more work is ahead of us!

