



**Challenges of Implementing the Fair Defense Act**

Brush Country Pre-Trial Workshop  
Eagle Pass, TX  
February 20, 2018

Texas Indigent Defense Commission  
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Who We Are	What We Do
<p>Thirteen-member governing board administratively attached to the Office of Court Administration. Jim Bethke is the Executive Director. The Commission has eleven full-time staff.</p> <p><b>OFFICERS:</b> Honorable Sharon Keller      Chair – Presiding Judge, Court of Criminal Appeals</p> <p><b>EX OFFICIO MEMBERS:</b> Honorable Sharon Keller      Austin, Presiding Judge, Court of Criminal Appeals Honorable Nathan Hecht      Austin, Chief Justice, Supreme Court of Texas Honorable John Whitmire      Houston, State Senator Honorable Brandon Creighton      Conroe, State Senator Honorable Joseph “Joe” Moody      El Paso, State Representative Honorable Andrew Marr      Junction, State Representative Honorable Sherry Radack      Houston, Chief Justice, First Court of Appeals Honorable Vivian Torres      Rio Medina, Judge, Medina County Court at Law</p> <p><b>MEMBERS APPOINTED BY GOVERNOR:</b> Mr. Alex Bunin      Houston, Chief Public Defender, Harris County Public Defender’s Office Honorable Jon Burrows      Temple, Bail County Judge Honorable Richard Evans      Bandera, Bandera County Judge Mr. Don Hase      Arlington, Attorney, Ball &amp; Hase Honorable Missy Medary      Corpus Christi, Presiding Judge, 5<sup>th</sup> Administrative Judicial Region of Texas</p>	<p><b>Our Purpose</b></p> <p>Is to provide financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.</p> <p><b>Our Grant Program</b></p> <p>In FY 2016 \$31.5 million was disbursed to Texas counties. Formula grant awards totaled \$33.1 million to all 254 counties. Discretionary grants totaled just over \$6.4 million.</p> <p><b>Our Fiscal and Policy Monitoring Program</b></p> <p>The Commission monitors each county that receives a grant to ensure state money is being properly spent and accounted for and to enforce compliance by the county with the conditions of the grant, as well as with state and local rules and regulations.</p> <p><b>Our Innocence Program</b></p> <p>Since 2005, the Commission has provided up to \$100,000 annually to University of Texas School of Law, the Texas Tech University School of Law, the Thurgood Marshall School of Law at Texas Southern University, and the University of Houston Law Center to operate innocence clinics. This funding has contributed towards 11 exonerations. In 2015 the 84<sup>th</sup> Legislature expanded funding to include \$100,000 per year for two new public law schools at the University of North Texas Dallas College of Law and the Texas A&amp;M University School of Law in Fort Worth.</p>

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**The Fair Defense Act of 2001**

**Local Reporting Requirements:**

- Indigent Defense Plan (judiciary)
- Indigent Defense Expenditures and Attorney Case Count (auditor/treasurer)
- Practice Time Figures (criminal defense attorneys)

**Created Mechanism for (partial) state funding through grants**

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## The Fair Defense Act of 2001

### Core Requirements:

- Prompt and accurate magistration hearings
- Develop a Standard of Indigence and Process to Determine Eligibility
- Minimum Attorney Qualifications
- Timely Appointment of Counsel
- Fair, neutral, and non-discriminatory attorney selection process
- Standard attorney fee schedule and payment process

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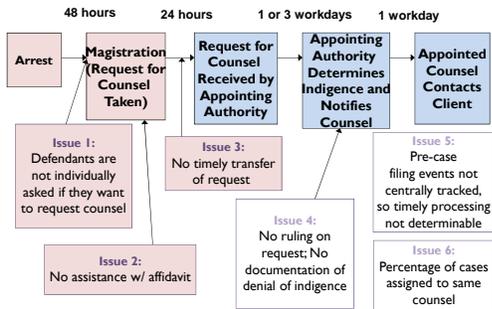
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## PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

### Texas Code Crim. Proc. Article 15.17

- Hearing within 48 hours of arrest
- Must inform arrestee of right to appointed counsel
- Record must be made
- Magistrate must ensure reasonable assistance
- Must transmit forms to appointing authority within 24 hours of request (unless authorized to appoint counsel)

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RATES FOR REQUESTING COUNSEL AT 15.17 HEARING		
FY2017	Misd. Requests / Warnings	Felony Requests / Warnings
Dimmit County JPs	0 / 446 (0%)	0 / 277 (0%)
Kinney County JPs	12 / 138 (9%)	8 / 64 (13%)
City of Eagle Pass	343 / 477 (72%)	88 / 120 (73%)
Maverick County JPs	412 / 1013 (41%)	169 / 357 (47%)
Uvalde County JPs	614 / 1207 (51%)	293 / 478 (61%)
Val Verde County JPs	241 / 682 (35%)	226 / 380 (59%)
Zavala County JPs	54 / 424 (13%)	12 / 121 (10%)

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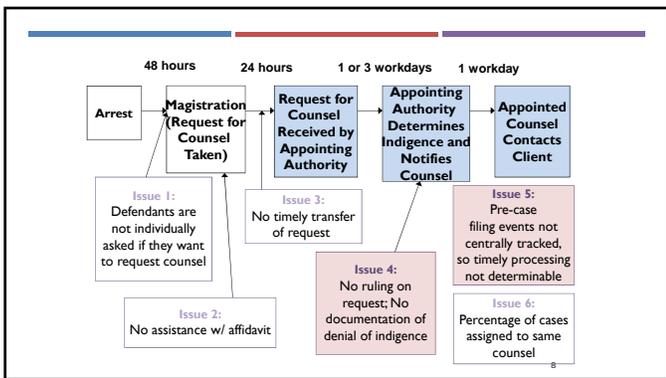
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**STANDARD OF INDIGENCE**

**Texas Code Crim. Proc. Article 26.04 (Adults)**

- Procedures must include financial standards
- Court may consider income, assets, and expenses of defendant (and defendant's spouse).
- Court may not consider bail or ability to post bail, "except to the extent that it measures the defendant's financial circumstances".

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**LOCAL STANDARDS OF INDIGENCE**

- Income Less than 125% of FPG: Dimmit, Edwards, Maverick, Uvalde, Webb, Zavala
- Income Less than 110% of FPG: Kinney, Val Verde
- Income Less than 100% of FPG: Frio, La Salle

Household Size	100%	110%	125%
1	\$12,060	\$13,266	\$15,075
2	16,240	17,864	20,300
3	20,420	22,462	25,525
4	24,600	27,060	30,750
5	28,780	31,658	35,975
6	32,960	36,256	41,200

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**Timely Appointment of Counsel or Denial of Indigence**

**Texas Code Crim. Proc. Article 1.051**

- Must appoint counsel /deny indigence within 3 working days (counties under 250,000 population)
- If defendant is released from custody, appointment not required until defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.

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**Timely Appointment of Bonded Defendants**

**Rothgery v. Gillespie County, 554 US 191 (2008).**

A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

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### WAIVERS OF COUNSEL – 2 PARTS

- **Unrepresented defendants speaking with the prosecutor:** Art. 1.051(f-1),(f-2)
  - Prosecutor may not initiate waiver
  - All requests for counsel must first be ruled upon
  - Procedures for requesting counsel must be explained
- **Unrepresented defendants entering a plea:** Art. 1.051(g)
  - Court must determine waiver is voluntarily and intelligently made
  - Defendant must sign waiver that substantially conforms to Art. 1.051(g)

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### WHAT IF AN UNCOUNSELED MISDEMEANOR DEFENDANT WANTS TO SPEAK WITH THE PROSECUTOR?

- The court must advise the defendant of:
  - the right to counsel and
  - the procedure for requesting appointed counsel.
- A prosecutor may speak to a defendant who has requested appointed counsel only if
  - **the court has determined the defendant is not indigent, and**
  - the defendant: 1) has been given a reasonable opportunity to retain counsel; or 2) **has waived the opportunity to retain counsel.**
- Waivers obtained in violation of the above provisions are presumed invalid.

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IN THE [INSERT COUNTY]  
[INSERT COUNTY] COUNTY, TEXAS

#### JUDGE'S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT ATTORNEY

As a defendant in a criminal case, you have three options:

1. You may hire an attorney.
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you.
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be sent to give you time to do so.

If you want an attorney and do not have the money to hire one, you will need to fill out a financial questionnaire so that the proper person can determine whether or not to appoint an attorney to represent you.

You may not speak to the prosecutor about your case unless you sign a written waiver of your right to representation by an attorney.

Be aware that there are dangers to self-representation. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens, and employment.

If you choose to proceed without an attorney, you may change your mind at any time and may request counsel from the Court.

\_\_\_\_\_  
Judge Presiding

#### DEFENDANT'S CHOICE (mark initials next to only ONE choice)

- \_\_\_\_\_ I want to read this case to hire my own attorney.
- \_\_\_\_\_ I have hired an attorney, whose name is \_\_\_\_\_
- \_\_\_\_\_ I want to apply for court-appointed counsel.
- \_\_\_\_\_ I have a court-appointed attorney, whose name is \_\_\_\_\_
- \_\_\_\_\_ I want to waive my right to an attorney and represent myself.

Defendant: \_\_\_\_\_ Date: \_\_\_\_\_

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### WHAT IF A MISDEMEANOR DEFENDANT WANTS TO ENTER AN UNCOUNSELED PLEA?

- If a defendant wishes to waive the right to counsel to enter guilty plea, the court must:
  - advise the defendant of the nature of the charges against him
  - if the defendant is proceeding to trial, the dangers and disadvantages of self-representation.
  - **determine that the waiver is voluntarily and intelligently made**
  - must provide the defendant with a statement in substantially the following form:

*"I have been advised this \_\_\_ day of \_\_2\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)."*

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### HOW CAN A COURT DETERMINE A WAIVER IS VOLUNTARILY AND INTELLIGENTLY MADE?

- One indigent defense plan includes a *Faretta* script. Under *Faretta*, a defendant has a constitutional right to represent himself / herself if he/she knowingly and voluntarily waives the right to counsel. Sample questions:
  - Have you ever before represented yourself in a criminal action? Do you understand how to conduct legal research?
  - Are you familiar with the Rules of Evidence? Are you familiar with the Code of Criminal Procedure?
  - Did you finish high school? Do you have a college degree?
  - Do you understand that you will be on your own and will receive no advice, guidance or help from the court? Understanding these questions, is it still your desire to represent yourself and give up your right to be represented by an attorney?

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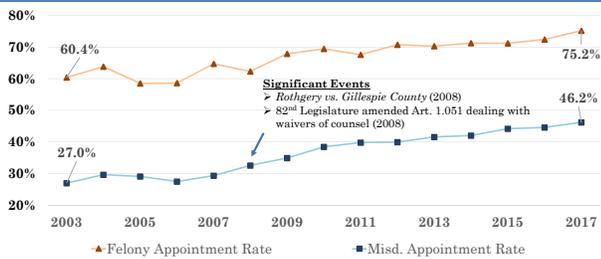
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### Since Passage of the FDA, Appointment Rates Have Increased




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LOCAL APPOINTMENT RATES				
2017	Misd. Cases Paid / Cases Added	Misd. Appt Rate	Felony Cases Paid / Cases Added	Felony Appt Rate
Dimmit	11 / 291	4%	76 / 98	78%
Frio	97 / 590	16%	99 / 258	38%
Kinney	9 / 144	6%	17 / 44	39%
Maverick	22 / 1344	2%	68 / 154	44%
Uvalde	16 / 502	3%	232 / 285	81%
Val Verde	445 / 637	70%	360 / 453	79%
Zavala	9 / 102	9%	60 / 104	58%

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COMPARE REQUESTS TO APPOINTMENTS		
FY2017	Misd. Requests / Warnings	Misd. Cases Paid / Cases Added
Dimmit	0 / 446 (0%)	11 / 291 (4%)
Kinney	12 / 138 (9%)	9 / 144 (6%)
Maverick	755 / 1,490 (51%)	22 / 1344 (2%)
Uvalde	614 / 1207 (51%)	16 / 502 (3%)
Val Verde	241 / 682 (35%)	445 / 637 (70%)
Zavala	54 / 424 (13%)	9 / 102 (9%)

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Decreasing Rates of Pro Se Misdemeanor Defendants							
<ul style="list-style-type: none"> <li>Since 2011, when OCA began tracking the number of retained cases, the percentage of pro se misdemeanor cases has decreased</li> </ul>							
% of Pro Se Misd. Dispositions	FY11	FY12	FY13	FY14	FY15	FY16	FY17
Statewide	33.2%	28.8%	27.5%	25.4%	23.8%	24.1%	21.6%
Counties (Pop. < 50K)	68.7%	66.3%	66.4%	63.5%	61.7%	58.3%	56.1%
Counties (Pop. 50K < 250K)	56.9%	50.8%	48.4%	46.6%	42.5%	39.4%	42.1%
Counties (Pop. > 250K)	19.6%	15.2%	13.3%	11.6%	11.3%	13.0%	9.4%
<ul style="list-style-type: none"> <li>The number of pro se dispositions can be estimated by the following formula:                      &gt; Pro Se Dispositions = Total Dispositions – Total Retained Cases – Total Cases in Which Attorneys were Paid</li> </ul>							

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### Process Questions

- What must you do if a defendant requested counsel at magistration but did not complete the affidavit of indigence?
- If 50 defendants in your county request appointment of counsel in misdemeanor cases and you appoint counsel in 40 of those cases, how many denials of indigence should there be?

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### FOR MORE INFORMATION:

- TIDC Model Forms and Procedures:  
<http://www.tidc.texas.gov/policies-standards/model-forms-procedures/>
- A Primer for Local Officials:  
[http://tidc.texas.gov/media/30272/150106\\_Primer\\_FINAL.pdf](http://tidc.texas.gov/media/30272/150106_Primer_FINAL.pdf)

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### TIDC Discretionary Grant Program

#### Goals

- Develop new programs or processes to improve indigent defense services
- Support policy initiatives and strategic objectives of TIDC
- Aimed at permanent programs sustainable beyond end of grant

#### How It Works

- Competitive (evaluated by committee of outside reviewers)
- Grant payments made on a reimbursement basis
- Require county matching funds
- 4-Year Grants for Public Defenders; avg. 50% match over 4 years

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### TIDC Discretionary Grant Program (cont'd)

#### FY 2019 Discretionary Grant Request for Applications (RFA)

Available on TIDC Website Under "Grants and Reporting" Tab

<http://www.tidc.texas.gov/media/57909/fy19-discretionary-grant-rfa.pdf>

Essential Reading!



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### TIDC Discretionary Grant Program (cont'd)

#### FY19 Discretionary Grant Timeline

- Request for Application (RFA) issued **January 2018**
- Intent to Submit Application due **March 9, 2018**
- Full Applications due **May 4, 2018**
- Start Date for Funded Programs **October 1, 2018**

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### TIDC Discretionary Grant Program (cont'd)

#### More FY19 Funding Details

- Grant period: October 1, 2018 to September 30, 2019
- Quarterly fiscal and progress reports required
- Multi-year programs awarded year by year

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**TIDC Contacts**

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