



**Second Follow-up Policy Monitoring
Review of Childress County's
Indigent Defense Systems**

January 2020

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Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act through on-site reviews.¹ These reviews seek to promote local compliance with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes where needed.

In March 2015, Texas Indigent Defense Commission (Commission) staff made a limited scope review of Childress County's indigent defense practices. At the time of the review, the monitor found that arrestees were unable to request counsel at the Article 15.17 hearing. The magistrate warning form used at this hearing lacked a place to record whether the arrestee requested counsel at the hearing. Article 15.17(e) specifically requires the magistrate to ask each arrestee whether he/she would like to request appointed counsel and to record whether the arrestee requested the appointment of counsel. In response to the 2015 report, Childress County adopted a magistrate warning form which contains a space to indicate whether the arrestee requested appointed counsel.

In August 2017, TIDC conducted a follow-up review to determine if recommendations from the 2015 report had been addressed. This review found that formal Article 15.17 hearings were not occurring. Instead the magistrate set bail outside of the presence of the arrestee, and the arrestee had no opportunity to request counsel until later in the criminal proceedings. When arrestees later requested counsel, sample requests were not ruled upon, and instead they entered uncounseled pleas.

Second Follow-up Review

TIDC's policy monitoring rules require follow-up reviews of counties where the report included noncompliance findings.² TIDC staff members Kathleen Casey-Gamez and Scott Ehlers visited Childress County on August 20, 2019 to conduct the second follow-up review. The review focused on the ability to obtain appointed counsel in misdemeanor cases and examined the following core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATE WARNINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

As sources of information for the review, TIDC examined misdemeanor case files, the local indigent defense plan, and the annual Indigent Defense Expenditure Report.

¹ TEX. GOV'T CODE § 79.037(a)–(b); 1 TEX. ADMIN. CODE § 174.28.

² 1 TEX. ADMIN. CODE § 174.28(d)(3).

Table 1: History of Monitoring Findings

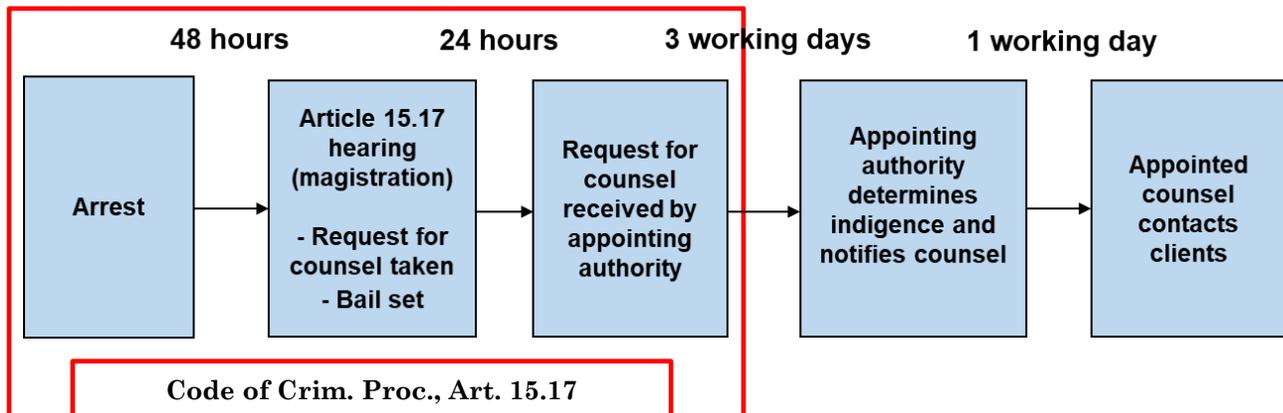
FDA Core Requirement	Description and Initial Year of Finding	Status after 2020 Review	
		Satisfied	Pending
1. Magistrate Warnings	The magistrate warning form must be updated to include a space to request counsel. (2015)	√ (2020)	
1. Magistrate Warnings	Magistrates must ask arrestees if they want to request appointment of counsel. (2015)	√ (2020)	
4. Prompt Appointment	The timeliness of indigence determinations in sample misdemeanor cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2020)		√
4. Prompt Appointment	Local procedures did not ensure requests for counsel were ruled upon prior to waivers of counsel. (2017)		√

Program Assessment

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

Once arrested, an arrestee must be brought before a magistrate within 48 hours.³ At this hearing, the magistrate must inform the arrestee of his or her right to counsel; inform the arrestee of the procedures for requesting counsel; and ensure the arrestee has reasonable assistance in completing the necessary forms for requesting assistance of counsel.⁴ Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.⁵

Figure1a: Timeline for Appointment of Counsel in Adult Criminal Cases



³ TEX. CODE CRIM. PROC. art. 15.17(a).

⁴ *Id.*

⁵ *Id.*

Timeliness of Warnings

A county is presumed to be in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings sampled are conducted within 48 hours of arrest.⁶ TIDC examined FY2018 case file records and was able to determine the time between arrest and the Article 15.17 hearing in 29 sample cases. Magistrate warnings occurred within two days of arrest for all sample cases, indicating that Childress County has procedures in place to promptly bring arrestees before a magistrate.

Table 2: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	29	—
0 days	4	
1 day	24	
2 days	1	
Timely Hearings	29	100.0%
More than 2 days	0	0%

Ability of Arrestees to Request Counsel

At the Article 15.17 hearing, the magistrate must inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused's request for counsel.⁷ The magistrate must make a record of each step of this exchange.⁸ If the arrestee requests counsel, the magistrate must ensure that reasonable assistance in completing the financial affidavit is provided to the arrestee. The request and associated paperwork must then be transmitted to the appointing authority within 24 hours of the request having been made.

TIDC reviewed 33 magistration forms and found the magistrate warning form had been updated to include a space to request counsel. Each form contained a mark as to whether arrestees requested counsel. Eight arrestees requested appointed counsel, and 25 did not request appointed counsel. Based on these records, magistrates in Childress County are asking and recording whether arrestees wish to request appointment of counsel. Childress County has successfully addressed past findings and recommendations relating to the Article 15.17 hearing.

⁶ 1 Tex. Admin. Code § 174.28. If the hearing occurred within two days of arrest, the monitor presumed warnings were timely.

⁷ TEX. CODE CRIM. PROC. art. 15.17(a).

⁸ TEX. CODE CRIM. PROC. art. 15.17(e).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistrate warnings.

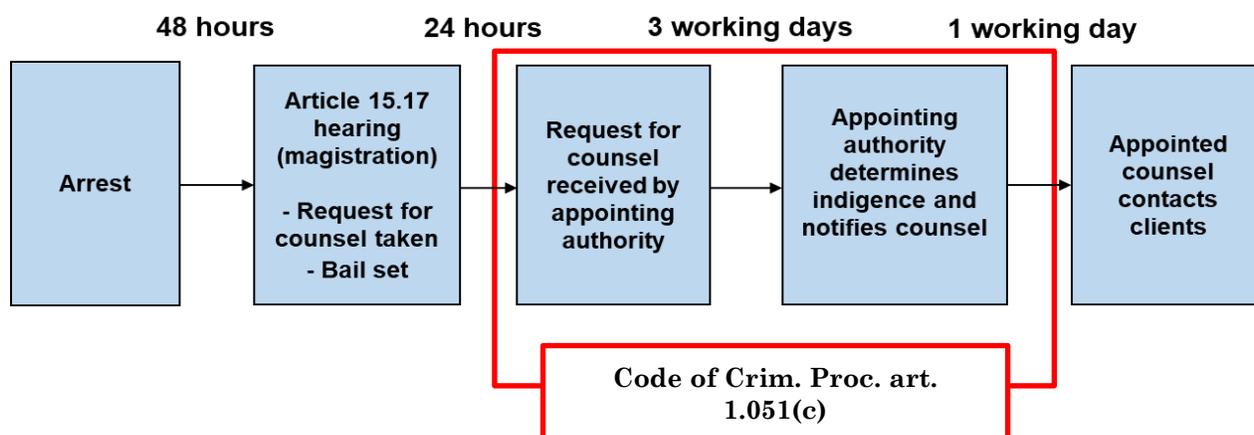
FINDING and RECOMMENDATION 1: For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel. The County must update its magistration form to comply with Article 15.17(e) and with its indigent defense plan. The new form must state whether the individual is requesting counsel.

Successfully Addressed in the 2020 review.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the third working day following receipt of the request for counsel.⁹ If an arrestee makes bail, Article 1.051(j) sets the deadline for appointing counsel to be the defendant's first court appearance or the initiation of adversarial judicial proceedings, whichever comes first. *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing.¹⁰ Since the *Rothgery* decision, the meaning of the language from Article 1.051(j) cannot be construed to allow for a ruling on a request for counsel to be delayed because the defendant makes bail. Once adversarial judicial proceedings have been initiated, courts must provide a method for defendants to request and obtain appointed counsel.¹¹

Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases



⁹ The time frame is one working day for counties with a population over 250,000.

¹⁰ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

¹¹ 1 TEX. ADMIN. Code § 174.51.

Timeliness of Appointments in Misdemeanor Cases

To assess the timeliness of Childress County’s current appointment procedures in misdemeanor cases, TIDC staff examined 45 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). TIDC found requests for counsel in 11 sample cases, and the County made timely determinations of indigence in 8 of the 11 cases (**73% timely**). This level of timeliness reflects great improvements over previous reviews, but does not meet TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel. Childress County must implement procedures to make prompt determinations of indigence.

Table 3: Times to Appointment in Misdemeanor Cases

	Sample Size	Number from sample	Percent
Number of case files examined	45		
Total cases with a counsel request		11	
Appointment / denial of indigence occurred in:			
0 work days		6	
1 – 3 work days + 24 hour transfer		2	
Total timely appointments / denials		8	73%
More than 3 work days + 24 hour transfer			
No ruling on request		2	
Total untimely appointments / denials		3	27%

Article 1.051 governs the right to counsel. In pertinent part, Article 1.051(f-2) states the following:

In any adversary judicial proceeding that may result in punishment by confinement, the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court’s designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) Has been given a reasonable opportunity to retain and has failed to retain private counsel; or
- (2) Waives or has waived the opportunity to retain private counsel.

The court hearing misdemeanor cases failed to rule on a defendant's request for counsel in two sample misdemeanor cases.¹² One of the defendants pled to a term of probation, the other to a term of deferred adjudication. The absence of a ruling on a pending counsel request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Childress County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Prompt Appointment

FINDING and RECOMMENDATION 2: TIDC's sample review of misdemeanor cases did not meet the agency's 90% timeliness threshold. Childress County must implement procedures to ensure prompt determinations of indigence are made.

New finding and recommendation.

FINDING and RECOMMENDATION 3: The absence of a ruling in 2 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Childress County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

Issue Pending.

Conclusion

TIDC appreciated the professionalism and assistance provided by Childress County officials and staff. Childress County officials appear willing to make necessary changes to improve the indigent defense system.

TIDC stands ready to provide technical assistance to the County in addressing issues raised in the report. TIDC has also recently expanded its Improvement Grant Program to fund two-thirds of costs for establishing and operating rural regional public defender offices, as well as expanding other funding for rural counties. Attached to this report is a flyer discussing new funding opportunities for rural counties. Please contact Scott Ehlers, Director of Public Defense Improvement (sehlers@tidc.texas.gov; 512-936-7551), or Kathleen Casey-Gamez, Senior Policy Analyst (kcasey-gamez@tidc.texas.gov; 512-463-2573) if you would like to discuss how TIDC can assist you in improving Childress County's indigent defense system.

As mandated by statute, TIDC will continue to monitor the County's progress on meeting the requirements of the Fair Defense Act.

¹² The two misdemeanor cases referenced are case numbers 23712 and 23397.

Status of Findings and Recommendations

FINDING and RECOMMENDATION 1: For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel. The County must update its magistration form to comply with Article 15.17(e) and with its indigent defense plan. The new form must state whether the individual is requesting counsel. *Successfully Addressed in the 2020 review.*

FINDING and RECOMMENDATION 2: TIDC's sample review of misdemeanor cases did not meet the agency's 90% timeliness threshold. Childress County must implement procedures to ensure prompt determinations of indigence are made. *New finding and recommendation.*

FINDING and RECOMMENDATION 3: The absence of a ruling in 2 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Childress County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2). *Issue Pending.*

Summary of Findings and Recommendations Remaining to be Addressed

Childress County must respond in writing how it will address each of these findings and recommendations.

FINDING and RECOMMENDATION 2: TIDC's sample review of misdemeanor cases did not meet the agency's 90% timeliness threshold. Childress County must implement procedures to make prompt determinations of indigence.

New finding and recommendation.

FINDING and RECOMMENDATION 3: The absence of a ruling in 2 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Childress County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

Issue Pending.