



Policy Monitoring Review of Fisher County's Indigent Defense Systems

November 2019



209 W. 14th Street, Room 202 (Price Daniel Building)
Austin, Texas 78701
Phone: 512.936.6994; Fax: 512.463.5724
www.tidc.texas.gov

Chair:

Honorable Sharon Keller Presiding Judge, Court of Criminal Appeals

Ex Officio Members:

Honorable Sharon Keller	Austin, Presiding Judge, Court of Criminal Appeals
Honorable Nathan L. Hecht	Austin, Chief Justice, Supreme Court of Texas
Honorable John Whitmire	Houston, State Senator
Honorable Brandon Creighton	Conroe, State Senator
Honorable Nicole Collier	Fort Worth, State Representative
Honorable Andrew Murr	Junction, State Representative
Honorable Sherry Radack	Houston, Chief Justice, First Court of Appeals
Honorable Vivian Torres	Rio Medina, Medina Statutory County Judge

Members Appointed by the Governor:

Mr. Alex Bunin	Houston, Chief Public Defender, Harris County Public Defender Office
Honorable Richard Evans	Bandera, Bandera County Judge
Mr. Gonzalo Rios, Jr.	San Angelo, Attorney, Gonzalo P Rios Jr Law Office
Honorable Valerie Covey	Georgetown, Williamson County Commissioner
Honorable Missy Medary	Corpus Christi, Presiding Judge, 5th Administrative Judicial Region of Texas

Staff:

Geoff Burkhart	Executive Director
Wesley Shackelford	Deputy Director
Megan Bradburry	Executive Assistant
Claire Buetow	Policy Analyst
Kathleen Casey-Gamez	Policy Analyst
Edwin Colfax	Grant Program Manager
Scott Ehlers	Special Counsel
Joel Lieurance	Senior Policy Monitor
Debra Stewart	Fiscal Monitor
Doriana Torres	Grant Specialist
Sharon Whitfield	Budget & Accounting Analyst

MISSION

The Texas Indigent Defense Commission provides 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.

Contents

Background	4
Methodology	4
Program Assessment	5
REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS	5
REQUIREMENT 4: APPOINT COUNSEL PROMPTLY	7
Conclusion	9
Summary of Findings and Recommendations	10

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 May 2017, TIDC conducted an informal drop-in review of Fisher County that examined local procedures for appointing counsel in misdemeanor cases. From this review, TIDC could not conclusively determine how magistrate warnings were handled. At the time, the Fisher County Jail was not in use, and misdemeanor arrestees were either transferred to other counties or released on bail. For those persons who were promptly released on bail, the County could not produce any forms showing arrestees had been given an opportunity to request counsel. When arrestees were transferred to other counties and requested counsel, their requests were not ruled upon.

Historically, the percent of misdemeanor defendants receiving appointed counsel in Fisher County has been significantly lower than the statewide average (see Table 1). TIDC conducted a limited scope review to ensure that misdemeanor arrestees have the ability to request and receive appointed counsel.

Table 1: Misdemeanor Cases Paid as a Percentage of New Cases Added

Year	2014	2015	2016	2017	2018	Texas 2018
Misdemeanor Cases Added (from OCA report)	28	30	15	37	66	467,851
Misdemeanor Cases Paid	0	0	0	1	5	214,494
% Misdemeanor Cases Paid	0%	0%	0%	3%	8%	46%

Methodology

TIDC staff members Joel Lieurance and Claire Buetow visited Fisher County to conduct a limited scope review on July 16, 2019. The review focused on the ability of misdemeanor arrestees to request and obtain appointed counsel. TIDC compared local practices to two core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

TIDC reviewed 35 misdemeanor cases filed in FY2018 (October 2017 – September 2018) and interviewed local officials.

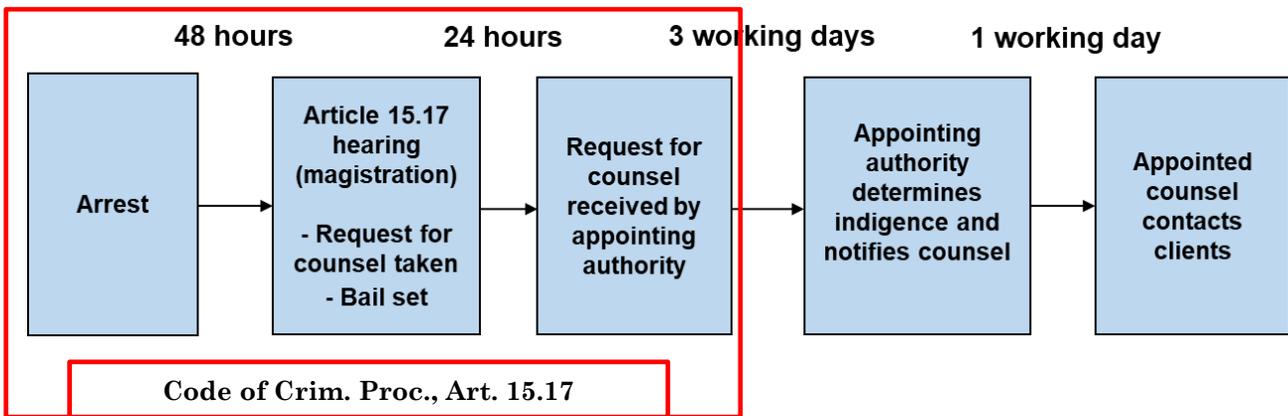
¹ TEX. GOV'T CODE § 79.037(a)–(b).

Program Assessment

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

A person must be brought before a magistrate within 48 hours of arrest.² 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.³ Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.⁴

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



Fisher County now has an operating jail. Arrestees go before a local magistrate (typically the justice of peace) for the Article 15.17 hearing.

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.⁵ To determine the timeliness of Article 15.17 warnings in Fisher County, TIDC calculated the number of days between arrest and the Article 15.17 hearing for 19 cases. Magistrate warnings occurred within two days of arrest for all sample cases, indicating that Fisher County has procedures in place to promptly bring arrestees before a magistrate.

² TEX. CODE CRIM. PROC. art. 15.17(a).

³ *Id.*

⁴ *Id.*

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

Table 2: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	19	—
0 days	12	63.1%
1 day	6	31.6%
2 days	1	5.3%
Timely Hearings	19	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.⁶ The magistrate must make a record of each step of this exchange.⁷ 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 23 magistrations forms and found that none recorded whether arrestees requested counsel.

Reports on Hearings and Requests

Justices of the Peace and Municipal Judges must submit Judicial Council Monthly Court Activity Reports to the Office of Court Administration (OCA). The reports document the number of Article 15.17 hearings conducted and the number of requests for counsel from these hearings.⁸ TIDC uses these reports as well as court observations and case file records to determine if magistrates inform arrestees of their right to counsel and if arrestees are able to invoke that right.

For FY2018 (October 2017 – September 2018), the Justice of the Peace for Fisher County did not report conducting any hearings or receiving any requests for counsel.⁹ Hearings and requests for counsel must be reported monthly to OCA.

⁶ TEX. CODE CRIM. PROC. art. 15.17(a).

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

⁸ 1 TEX. ADMIN. CODE § 171.7.

⁹ Statewide, when justice courts conducted magistrate warnings, counsel was reportedly requested in 32% of misdemeanor warnings and 38% of felony warnings. Court activity may be queried from OCA’s court activity database, available at <https://www.txcourts.gov/statistics/court-activity-database/>.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

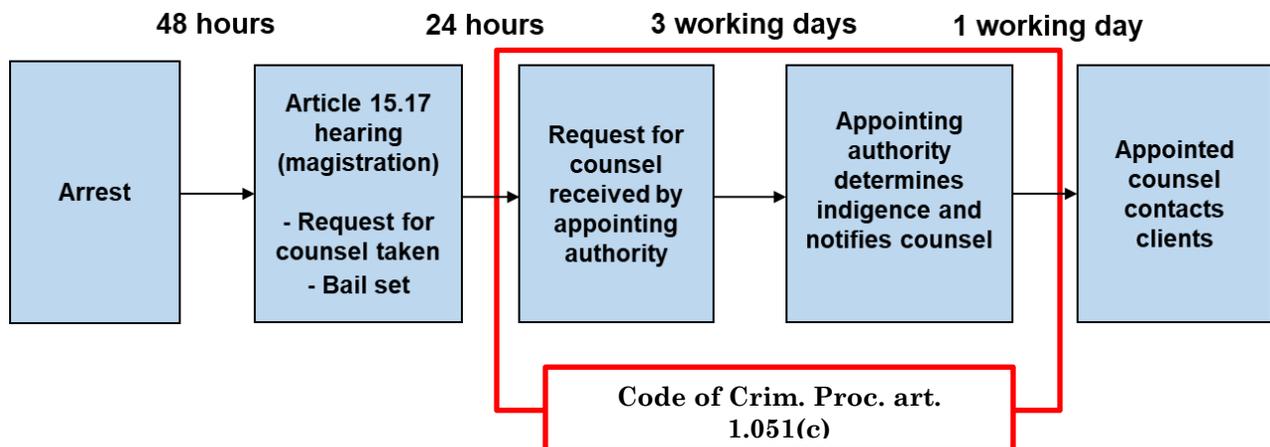
FINDING and RECOMMENDATION 1: For offenses with a Class B misdemeanor grade and higher, the magistrate must inform arrestees of the procedure for requesting counsel, ask all arrestees whether they want to request counsel, and record each individual's response.

FINDING and RECOMMENDATION 2: In order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports, the justice of the peace must report the number of magistrate warnings conducted and the number of persons requesting counsel to OCA.

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.¹⁰ 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.¹¹ 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.¹²

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



¹⁰ The time frame is one working day for counties with a population over 250,000.

¹¹ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

¹² 1 TEX. ADMIN. Code § 174.51.

To assess the ability of Fisher County defendants to receive prompt appointment of counsel in misdemeanor cases, TIDC examined 35 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). From this sample, five persons requested counsel. Defendants withdrew their requests in two cases. In two other cases, defendants entered uncounseled pleas without a documented denial of the request. The court appointed counsel in one case (and this appointment was timely).

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. 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)). Fisher 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).

Additional Observation Regarding Withdrawals of Requests

Two sample defendants withdrew their requests for counsel. Under Fifth and Sixth Amendment standards, a withdrawal of a counsel request is permissible, but it must be voluntarily, knowingly, and intelligently made.¹³ Statutorily, Article 1.051(f-2) disallows the trial court from directing or encouraging the defendant to talk to the prosecutor while the defendant's request is pending.

¹³ A defendant's withdrawal of an invocation of the Sixth Amendment right to counsel is analyzed under rules governing the constitutional validity of waivers of the Sixth Amendment right to counsel. See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 630 (1986); *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Prompt Appointment

FINDING and RECOMMENDATION 3: The absence of a ruling on two 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)). Fisher 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).

Conclusion

TIDC appreciated the professionalism and assistance provided by Fisher County officials and staff. Fisher County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, TIDC will continue to review the County's transition and adjustments to the report's findings.

Summary of Findings and Recommendations

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

FINDING and RECOMMENDATION 1: For offenses with a Class B misdemeanor grade and higher, the magistrate must inform arrestees of the procedure for requesting counsel, ask all arrestees whether they want to request counsel, and record each individual's response.

FINDING and RECOMMENDATION 2: In order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports, the justice of the peace must report the number of magistrate warnings conducted and the number of persons requesting counsel to OCA.

FINDING and RECOMMENDATION 3: The absence of a ruling on two 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)). Fisher 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).