



Policy Monitoring Review of Goliad County's Indigent Defense Systems

January 11, 2016



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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.

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Purpose of the Limited Scope Policy Monitoring Review

The Texas Indigent Defense Commission (“Commission”) is required to monitor local jurisdictions’ compliance with the Fair Defense Act (“FDA”).¹ The policy monitor conducted a limited scope review in Goliad County to examine (1) local procedures for conducting Article 15.17 hearings and (2) local procedures for ruling on requests for counsel.

Factors Causing the Limited Scope Policy Monitoring Review

In March 2015, the Texas Indigent Defense Commission received a complaint regarding a defendant in Goliad County. The complaint alleged that the defendant did not receive timely Article 15.17 warnings or appointment of counsel and that the county was holding “No Counsel” misdemeanor dockets. The Commission forwarded the complaint to Goliad County officials and requested Article 15.17 forms for the period of October 13 through November 7, 2014. The justices of the peace provided the requested Article 15.17 forms. On some forms, requests for counsel were unmarked; others indicated that Article 15.17 hearings were not being promptly conducted for arrestees transferred to the county from other counties executing Goliad County arrest warrants.

Statistics submitted to the Office of Court Administration (OCA) for FY14 (October 2013 through September 2014) indicated that Goliad County justices of the peace were not reporting all magistrate warning data to OCA as required for the Texas

¹ Tex. Gov’t Code § 79.037(a)-(b).

Judicial Council Monthly Court Activity Reports. These monthly reports require justice courts to submit the number of Article 15.17 warnings given and the number of persons who request counsel at these hearings. According to data reported to OCA, Goliad County justices of the peace provided Article 15.17 warnings to 219 arrestees for FY14, 12 of whom requested counsel. The Justice of the Peace for Precinct 1 reported zero requests for counsel during this time period. Sample data from FY14 indicated a problem with reporting magistrate warning data to OCA. However, according to recent reporting, this problem has been addressed.

Based on (1) the documented complaint, (2) inconsistencies with justice court data reported to OCA, and (3) the low percentage of misdemeanor cases receiving appointed counsel, policy monitoring staff conducted a limited scope policy monitoring review in July 2015. See the Table 1 below showing felony and misdemeanor appointment data for Goliad County (as reported by the court clerk and county auditor) and statewide. Table 1 shows that across Texas, about 42% of misdemeanor defendants received appointed counsel in FY14. For FY14, Goliad County appointed counsel in misdemeanor cases at a fraction of the statewide average (6%).

Table 1: Goliad County Felony and Misdemeanor Appointment Data

Year	2011	2012	2013	2014	Texas 2014
Population (Non-Census years are estimates)	7,210	7,327	7,448	7,466	26,642,612
Felony Charges Added	49	69	63	127	270,401
Felony Cases Paid	45	67	48	58	192,735
% Felony Charges Defended with Appointed Counsel	91.8%	97.1%	76.2%	45.7%	71.3%
Misdemeanor Charges Added (from OCA report)	240	177	230	195	530,335
Misdemeanor Cases Paid	39	15	13	12	223,043
% Misdemeanor Charges Defended with Appointed Counsel	16.3%	8.5%	5.7%	6.2%	42.1%

Timeline and Methodology

Commission staff conducted a limited scope policy monitoring review of Goliad County between July 7 and 8, 2015. The monitor met with both justices of the peace and the constitutional county judge. The monitor observed Article 15.17 hearings and a misdemeanor docket. The monitor examined 31 misdemeanor and 10 felony case files.² The monitor also reviewed the local indigent defense plan and Texas Judicial Council Monthly Court Activity Reports (as reported to OCA) as part of this report.

² All cases were filed in FY14 (October 2013 – September 2014).

Current Review

This limited scope monitoring review examined the procedures for requesting and appointing counsel in misdemeanor and felony cases in Goliad County.

Methods to Conduct Article 15.17 Hearings

After arrest in Goliad County, all persons are booked at a central jail facility within the County and receive Article 15.17 warnings from a magistrate (typically one of two justices of the peace or the county judge). The magistrates determine whether probable cause is present to detain individuals, set bond, and take requests for counsel. According to data reported by the Goliad County magistrates, about 9% of misdemeanor arrestees and 4% of felony arrestees requested counsel at Article 15.17 hearings, compared with about 26% of misdemeanor and 34% of felony arrestees statewide. See Table 2 below.³

Table 2: Percent of Arrestees Requesting Counsel at Article 15.17 Hearings⁴

	JP – Pct. 1	JP – Pct. 2	Goliad County JPs Combined	All Texas JPs
Misdemeanor Warnings	8	50	58	152,408
Misdemeanor Requests	0	5	5	39,089
% Requesting Counsel	0%	10%	9%	25.6%
Felony Warnings	107	54	161	108,645
Felony Requests	0	7	7	36,826
% Requesting Counsel	0%	13%	4%	33.9%

Timeliness of Magistrate Warnings

Per Article 15.17(a) of the Code of Criminal Procedure, arrestees must be brought before a magistrate within 48 hours of arrest to receive the admonishments listed in Article 15.17(a). From case file review, the monitor could determine the time from arrest to magistrate warnings in 23 cases. All 23 cases received timely warnings.⁵ Since the

³ Many jurisdictions have difficulty reporting data showing requests for counsel at Article 15.17 hearings. The percent of persons requesting counsel was based on reports by justices of the peace, but only includes those justices of the peace who reported a positive number of requests for counsel during the time frame in question.

⁴ This data was obtained from a query of Texas Judicial Council Monthly Court Activity Reports for the Period from October 2013 to September 2014, available at:
<http://card.txcourts.gov/AdHocSearchNew.aspx>

⁵ In examining the timeliness of magistrate warnings, the monitor looked at the number of days from arrest to magistrate warnings rather than the number of hours. Using this logic, the monitor assumed the warnings were timely if they occurred within two days of arrest. For this sample, the monitor could determine the timeliness of warnings for 20 misdemeanor cases and 3 felony cases. 9 cases from the sample received warnings on the same day as arrest; 13 on the day after arrest; and 1 case received the warnings two days after arrest.

sample was 100% timely, the monitor presumes systems are in place to promptly bring arrestees before a magistrate.

Procedures for Taking Counsel Requests

Based on records review, interviews, and observations, it appears that arrestees given Article 15.17 warnings at the Goliad County Jail may be asked if they want to request counsel, but those requests for counsel are not always recorded. During the site visit, the monitor observed the Justice of the Peace for Precinct 1 give magistrate warnings to two arrestees at the Goliad County Jail. Both arrestees were asked whether they wanted appointed counsel. However, 8 of the 32 magistrate warning forms gathered did not include a record of whether the arrestee requested counsel or not. **Article 15.17 of the Code of Criminal Procedure requires the magistrate to ask individuals whether they want to request court appointed counsel and record each response.** Article 15.17(e) of the Code of Criminal Procedure states:

- (e) *In each case in which a person arrested is taken before a magistrate as required by Subsection (a), a record shall be made of:*
 - (1) *the magistrate informing the person of the person's right to request appointment of counsel;*
 - (2) ***the magistrate asking the person whether the person wants to request appointment of counsel; and***
 - (3) ***whether the person requested appointment of counsel.***

Article 15.17(a) also requires a magistrate to inform arrestees of the procedures for requesting counsel and to ensure reasonable assistance is provided to any arrestee requesting counsel in completing the necessary paperwork. Requests for counsel (and associated paperwork) must be transmitted to the appointing authority within 24 hours of the request being made. Based on the monitor's review of case files, of 11 requests made at the Article 15.17 hearing, only 4 received appointed counsel.⁶ There were no denials of indigence. The court may not have received the requests or received the requests but did not rule on them.

Newly Passed Legislation Affecting Magistrate Warnings

Effective September 1, 2015, SB 1517 amended Article 15.18 of the Code of Criminal Procedure to require the magistrate to ask a person arrested on an out-of-county warrant if he/she wishes to request counsel, inform the person of the procedures for requesting counsel, and ensure the person is provided reasonable assistance in completing the necessary forms for requesting counsel. The magistrate must then transmit the request for counsel to the appointing authority of the county issuing the warrant within 24 hours of the request being made.

⁶ 9 of these 11 requests were misdemeanor cases; the other 2 were felony cases.

Recommendations Regarding Methods to Administer Article 15.17 Hearings

Recommendation 1: For offenses 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.** The magistrate must then ensure reasonable assistance is provided to any arrestee requesting counsel in completing the necessary paperwork to determine indigence.

Recommendation 2: Requests for counsel must be promptly transmitted to the appointing authority (within 24 hours of request) as required by Article 15.17(a) and the local indigent defense plan. Article 15.17 puts the responsibility for this transmission on the magistrate.

Methods to Determine Indigence and Assign Counsel

Once a process for taking requests for counsel and transmitting those requests to the appointing authority has been implemented, the county must develop procedures to determine indigence and assign counsel. The monitor's review of 31 misdemeanor and 10 felony case files revealed that the county does not have a process in place to timely determine indigence and rule on requests for counsel (made at magistration). Nine misdemeanor defendants from the sample group requested counsel at magistration. Six of those defendants did not receive any ruling on the requests; the other three were appointed counsel at a much later time.⁷ Two defendants from the felony sample requested counsel at magistration. One of those defendants received appointed counsel three months later; the other retained counsel. None of the case files included a denial of indigence.

According to Article 1.051(c) of the Code of Criminal Procedure, the appointing authority has 3 working days from receipt of the request to appoint counsel for those determined to be indigent. After an initial request for counsel is received (whether the request was made at the Article 15.17 hearing or at a later time), the appointing authority must rule upon the request according to the standards set in its indigent defense plan. The local indigent defense plan provides the following standard of indigence:

An accused is presumed indigent if any of the following conditions or factors are present:

⁷ Of the six misdemeanor cases in which defendants requested counsel at the Article 15.17 hearing but did not receive any ruling on the request: one received pre-trial diversion; one pled to a term of probation; two were dismissed to be re-filed as felony cases; one was dismissed in the interest of justice, and one pled to a term of confinement.

1. *At the time of requesting appointed counsel, the accused is eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;*
2. *The accused's net household income does not exceed 100% of the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register; unless the accused owns more than \$2000.00 in "Equity Assets". (Equity Assets are defined as the fair market value of marketable assets less indebtedness and/or cash, stocks, bonds, etc.)*
3. *The accused is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.*

Newly Passed Legislation Affecting Appointment of Counsel

In addition to amending magistrate warning requirements, SB 1517 also amended the requirements found in Article 1.051 for prompt appointment of counsel. Persons arrested in other counties on local warrants must be appointed counsel within 1 working day of receipt of the request in counties with a population of 250,000 or more and within 3 working days of receipt of the request in counties under 250,000. Persons arrested on out-of-county warrants must be appointed counsel if the person has not been transferred or released to the custody of the county issuing the warrant before the 11th day after the date of the arrest.

Recommendation Regarding Determination of Indigence and Appointment of Counsel

Recommendation 3: Goliad County must implement processes that ensure timely appointment of counsel in misdemeanor and felony cases.

Waivers of Counsel

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers of counsel that are voluntarily and intelligently made. Following a request for counsel, the county must either appoint counsel or determine that the defendant is not indigent and document the denial of court appointed counsel. This appointment/denial must occur within the timeframe established by Article 1.051 (within 3 working days).

Under 1.051(f-1),⁸ the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is ruled upon, and

⁸ Article 1.051(f-1) prohibits the prosecuting attorney from communicating with the defendant prior to a ruling on any pending request for counsel. Article 1.051(f-1) reads:

In any adversary judicial proceeding that may result in punishment by confinement, the attorney representing the state may not:

the defendant waives the opportunity to retain private counsel. Under 1.051(f-2),⁹ the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If the defendant is determined not to be indigent, the court must deny any request for counsel before a waiver of counsel is allowed. Waivers in violation of Subsections (f-1) or (f-2) are presumed invalid.

An unrepresented defendant cannot enter a guilty plea until a second waiver is obtained, and this waiver must substantially conform to the language of Article 1.051(g).¹⁰ With these statutes in mind, the monitor's review of misdemeanor case files checked to ensure: (1) requests for counsel were ruled upon prior to a communication with the prosecutor; and (2) cases involving pro se pleas included a waiver of counsel substantially conforming to Article 1.051(g).

Under current practices in Goliad County, it appears that arrestees have the ability to request counsel at the Article 15.17 hearing, but those requests are not always ruled upon within statutorily required timeframes. As noted previously, the monitor's case file review included 6 misdemeanor cases in which defendants requested counsel at the Article 15.17 hearing, but there were no rulings on the requests. Two of those defendants entered uncounseled pleas and a third received pre-trial diversion. The

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- (1) *Initiate or encourage an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel; or*
 - (2) *Communicate with a defendant who has requested the appointment of counsel, 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:*
 - (A) *has been given a reasonable opportunity to retain and has failed to retain private counsel; or*
 - (B) *waives or has waived the opportunity to retain private counsel.*

⁹ Article 1.051(f-2) similarly prohibits the court from encouraging the defendant to communicate with the prosecutor prior to ruling on any pending request for counsel. Article 1.051(f-2) states:

... *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.*

¹⁰ Such waivers must be signed by the defendant and substantially conform to the following:

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)

county must implement procedures to rule upon requests for counsel prior to any waiver of counsel.

Goliad County utilizes waivers of counsel that allow a defendant to waive the right to retain counsel so that the defendant can speak with the prosecutor (see Appendix A). However, the county does not utilize waivers of counsel for purposes of entering an uncounseled plea. The local indigent defense plan includes this waiver (see Appendix B). Before an unrepresented defendant enters a plea, the defendant must sign a waiver of counsel that substantially conforms to Article 1.051(g) of the Code of Criminal Procedure.

Recommendation Regarding Waivers of Counsel

Recommendation 4: As required by Article 1.051(f-2), Goliad County must rule upon requests for counsel prior to a waiver of counsel.

Recommendation 5: As required by Article 1.051(g), an unrepresented defendant must sign a waiver of counsel substantially conforming to the language in Article 1.051(g) before a pro se plea can be entered. If the county were to use the waiver of counsel form listed in its indigent defense plan, this recommendation would be met.

Texas Judicial Council Monthly Court Activity Reports

Beginning in FY12, OCA started collecting additional data in its Texas Judicial Council Monthly Court Activity Reports. As part of these additional reporting requirements, counties must now report the number of individuals requesting counsel at Article 15.17 hearings administered by justices of the peace. For FY14 (October 2013-September 2014), Goliad County justices of the peace reported 219 magistrate warnings and 12 requests for counsel. The monitor's record review indicated that requests for counsel are not being accurately reported.

The monitor queried Goliad justice court reports to OCA for August through October 2015 (following the onsite review and discussion with the justices of the peace). Recent data suggests that both justices of the peace are now actively reporting both the number of warnings and requests for counsel to OCA.

Recommendation Regarding Texas Judicial Council Monthly Court Activity Reports

Recommendation 6: Justices of the peace must report the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports.

Conclusion

The monitor appreciated the professionalism and assistance provided by Goliad County officials and staff. Goliad County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the County's transition and process improvements regarding the report's recommendation.

Summary of Recommendations

Recommendations Regarding Methods to Administer Article 15.17 Hearings

Recommendation 1: For offenses 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**. The magistrate must then ensure reasonable assistance is provided to any arrestee requesting counsel in completing the necessary paperwork to determine indigence.

Recommendation 2: Requests for counsel must be promptly transmitted to the appointing authority (within 24 hours of request) as required by Article 15.17(a) and the local indigent defense plan. Article 15.17 puts the responsibility for this transmission on the magistrate.

Recommendation Regarding Determination of Indigence and Appointment of Counsel

Recommendation 3: Goliad County must implement processes that ensure timely appointment of counsel in misdemeanor and felony cases.

Recommendations Regarding Waivers of Counsel

Recommendation 4: As required by Article 1.051(f-2), Goliad County must rule upon requests for counsel prior to a waiver of counsel.

Recommendation 5: As required by Article 1.051(g), an unrepresented defendant must sign a waiver of counsel substantially conforming to the language in Article 1.051(g) before a pro se plea can be entered. If the county were to use the waiver of counsel form listed in its indigent defense plan, this recommendation would be met.

Recommendation Regarding Texas Judicial Council Monthly Court Activity Reports

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APPENDIX A – Goliad County Waiver of Counsel Form (for purposes of speaking with the prosecutor)

JUDGE'S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT AN ATTORNEY

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

1. You may hire an attorney;
2. You may request an attorney to be appointed to represent you, if you are financially unable to hire one; or
3. You may represent yourself.

If you want an attorney to represent you and are financially able to hire an attorney, I will reset this case for approximately 30 days for you 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 I can determine whether to appoint an attorney to represent you.

You may not speak to the prosecutor about your case unless you decide to waive your right to an attorney.

You are further advised if you waive your right to an attorney, discuss your case with a prosecutor and decide you want an attorney after said discussion, you may approach the bench and inform the court of your decision. You will be given time to hire an attorney or have one appointed if you are financially unable to hire one.

DEFENDANT'S CHOICE

I want to reset this case to hire my own attorney.

I want to apply for a court-appointed attorney.

I want to waive my right to an attorney and represent myself.

Name:

Date: 10/23/2013

Cause No. 13-10-9984-CR

Signature:

APPROVAL OF THE COURT

The foregoing waiver is accepted. The Court finds that the Defendant understands fully the above explanations and that all rights were knowingly, intelligently and voluntarily waived by the Defendant.

SIGNED AND APPROVED ON THIS 23RD DAY OF OCTOBER, 2013.

Karen W. Bowman

Judge Presiding

FILED
Date October 23, 2013

Revised: 3/17/08

Mary Ellen Flores
County Clerk, Goliad County, Texas

APPENDIX B – Waiver of Counsel Form Listed in Goliad County Indigent Defense Plan (for purposes of entering an uncounseled plea)

CAUSE NO.

THE STATE OF TEXAS § IN THE COUNTY
VS § COUNTY COURT AT LAW #
§ VICTORIA COUNTY, TEXAS

WAIVER OF COUNSEL

1. I have been advised by the Judge of my constitutional and statutory right to representation by a lawyer in any proceeding against me.
2. The Court has advised me of the procedures for requesting appointed counsel and I have been given a reasonable opportunity to request appointed counsel.
3. I know and understand that if the Court makes the determination that I am unable to currently afford a lawyer, a lawyer will be appointed for me free of charge. I also understand that upon disposition of my case I may be required to repay part or all of the cost of the lawyer to the county, if the Court determines I am financially able to do so.
4. I further understand that I may withdraw my waiver of the right to counsel at any time prior to a disposition in this case and hire a lawyer or, if indigent, request the appointment of counsel.
5. I understand that the role of the prosecutor/Assistant District Attorney is to represent the State of Texas, the adverse party in this case, and **that the prosecutor/Assistant District Attorney does not represent me.** I further understand that the prosecutor/Assistant District Attorney is unable to advise me in any manner regarding my case.
6. I fully understand the charges against me.
7. Understanding my right to have appointed for me free of charge if I am not financially able to employ counsel, I hereby in open court knowingly, intelligently, and voluntarily waive (i.e., give up) my right to a lawyer and request that I be allowed to proceed with my case without a lawyer. I want to discuss a plea offer with the prosecutor without an attorney.

Signed this _____ day of _____, _____

Defendant

COURT'S APPROVAL

The Court finds that the defendant understands his/her right to a lawyer, and the charges filed. The Court further approves the above defendant initiating communications with the prosecutor/Assistant District Attorney. The defendant's waiver of counsel is APPROVED.

Judge Presiding