

Harris County District Courts Trying Criminal Cases

RESPONSE TO TIDC RECOMMENDATIONS

REQUIREMENT 1:

CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

RECOMMENDATION 1: Article 15.17 requires Harris County magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel, so that all arrestees who request counsel can have the request ruled upon within statutorily required timeframes.

The District Courts in conjunction with the misdemeanor Courts are studying ways to process defendants more efficiently from probable cause court to the home courts. However, right now we do not have an adequate staging area or holding facility for the 100,000 cases that we move through each year. There is physically not enough room in the holding areas for the 15.17 hearings in the Harris County Jail. A Joint Inmate Processing Center currently under construction is designed in part to address this issue.

REQUIREMENT 2:

DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN

RECOMMENDATION 2: The district courts must follow the indigence standard set in the local indigent defense plans.

RECOMMENDATION 3: Per Article 26.04(p), determinations of indigence may only be reconsidered if there is a material change in the defendant's financial circumstances.

RECOMMENDATION 4: As required by Article 26.04(j)(2), unless there is a finding of good cause entered on the record the attorney-client relationship cannot be disturbed.

RECOMMENDATION 5: In accordance with Article 26.04(m), when making indigence determinations, the appointing authority may not consider whether a defendant has posted bail, except to the extent that it reflects the defendant's financial circumstances.

The District Courts respectfully disagree with the Commission's assessment that the Felony Courts do not determine indigency according to standards directed by the indigent defense plan.

The Felony Courts follow the District Court Alternative Plan established in accordance with Article 26.04(g). The District Courts also employ all powers necessary for the exercise of their jurisdiction and the enforcement of lawful orders. *See* TEX. GOV'T CODE § 21.001. The Government Code as well as the Texas Constitution, require that Courts conduct proceedings in an orderly and expeditious manner so that justice is done. To that end, in an effort to deal with some 40,000 cases each year and to ensure that due process is afforded every defendant, the Harris County District Courts appoint attorneys to jailed defendants in the interest of justice, without ever making an indigency determination. Attorneys are appointed to jailed defendants because jailed defendants have no way to communicate with the Court, to advocate for bond, engage in discussions with the State, or bring other matters to the Court's attention such as mental health

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concerns. No inquiry is made into a defendant's financial status when an appointment is made in the interest of justice. The Court's authority to appoint counsel in the interest of justice is not only recognized by the Texas Constitution and the Government Code, but also by the Fair Defense Act as codified in the Texas Code of Criminal Procedure. Article 26.04(c) authorizes the appointment of counsel in the interest of justice. "Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding *that a defendant* charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement *is indigent or that the interests of justice require representation* of a defendant in the proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to represent the defendant in accordance with this subsection and the procedures adopted under Subsection (a)." See TEX. CODE CRIM P art. 26.04(c), *emphasis added*. Subsection (c) does not specify that only an indigent defendant may be appointed counsel in the interest of justice. Subsection (c) also requires no presumption of indigency to attach if counsel is appointed in the interest of justice. Otherwise, under the Texas Code Construction Act, the use of "or" in the phrase is meaningless. As written, article 26.04(c) does not restrict a court's authority to appoint counsel; it expands it. The "interest of justice" is not defined in the statute, but a Houston appellate Court has recognized that the rendition of a particular order in the interest of justice is by its nature discretionary. *White v. State*, 01-15-00294-CV, 2015 WL 7819734, at *3 (Tex. App.—Houston [1st Dist.] Dec. 3, 2015, no pet.) (mem. op., not designated for publication). "Texas courts have long accorded trial courts broad discretion within the standard 'in the interest of justice.'" *Id.*, quoting *Baker v. Bell Helicopter Textron, Inc.*, 985 S.W.2d 272, 276 (Tex.App.—Fort Worth 1999, pet. denied).

It is also untrue that Courts require attorneys to withdraw if a defendant posts bail. The only time an attorney withdraws is if it is later determined that the defendant is not indigent or wants to hire counsel of his choice.

The Felony Courts agree that appointed counsel cannot be denied solely because a defendant has been released on bail. However, the fact that bail has been secured is relevant as it relates to the defendant's financial circumstances. See TEX. CODE CRIM. P. art 26.04(m). "In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection." *Id.* The statute contemplates that there is a difference between being in jail and being on bond. A defendant on bond can marshal resources and gain employment which could produce a material change in his financial circumstance. With this in mind, the Felony Courts can adopt policies and procedures to more accurately reflect the extent to which bond is considered for indigency determinations.

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REQUIREMENT 3:

ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS

No recommendations. County practices and procedures meet statutory requirements.

REQUIREMENT 4:

APPOINT COUNSEL PROMPTLY

RECOMMENDATION 6: Article 1.051(c)(2) requires felony requests for counsel be ruled upon within one working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. The county must implement practices that satisfy Article 1.051(c)(2)'s timeline.

To monitor this requirement, the Felony Judges will adopt procedures and policies to more rigorously document findings regarding determination of indigency to address the 6.5 percent deviations in timely appointments. The Board of Judges Trying Felony Cases has a committee working on this project, as well as other updates to the Harris County Alternative Plan.

Under the current plan the presiding district judge alone has the authority to determine indigence and appoint counsel.

The monitor's footnote addressing *Rothgery v. Gillespie County* is curious and potentially confusing. *Rothgery* noted that an Article 15.17 proceeding marks the beginning of adversarial judicial proceedings, triggering the duty to appoint counsel. *Rothgery*, 554 U.S. 191, 199, 128 S.Ct. 2578, 2584 (2008) ("Texas's article 15.17 hearing is an initial appearance: Rothgery was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail."). *Rothgery*, however, did not mandate the timing for appointment of counsel. In that regard, the Court noted first that the majority of jurisdictions "take the first step toward appointing counsel 'before, at, or just after initial appearance.'" *Id.* at 204, 2587. It then recognized that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212, 2591. Although an Article 15.17 proceeding may signal the initiation of adversary judicial proceedings, the Court cautioned—and Justices Roberts, Scalia, and Alito carefully elaborated in concurrence—that "[t]he question whether arraignment signals the initiation of adversary judicial proceedings ... is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." *Id.* at 212, 2591 (majority), 213, 2592 (Roberts, C.J., concurring), 218, 2591 (Alito, J., concurring) ("It follows that defendants in Texas will not necessarily be entitled to the assistance of counsel within some specified period after their magistrations. Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial "critical stage," as necessary to guarantee effective assistance at trial.") (internal references removed). Thus, *Rothgery* stands for the proposition that an Article 15.17 proceeding marks the beginning of adversarial judicial proceedings against a defendant, and the

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government must appoint counsel to an indigent defendant within a reasonable time period following the proceeding.

The monitor notes that, for any defendant released from custody, Article 1.051(j) requires the appointment of counsel at the point when adversarial judicial proceedings are initiated. In cases where defendant had been presented for an Article 15.17 proceeding, the monitor implies that *Rothgery* would mandate the immediate appointment of counsel:

Notwithstanding any other provision of this section, if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.

TEX. CODE CRIM. P. ANN. art. 1.051(j) (emphasis added). Article 1.051(j) appears intended towards those defendants that are released from custody prior to an Article 15.17 hearing. The monitor's analysis would suggest that the timeline for appointment of counsel is potentially sped up for someone that is released from custody. Given that a defendant could be released from custody immediately after an Article 15.17 hearing, and well before the magistrate's typical deadline for transmitting any request for counsel (much less the sole appointing authority's deadline to appoint counsel), the proffered interpretation seems unworkable and statutorily unintended. Article 1.051(j) triggers the duty to appoint counsel—as opposed to the actual appointment of counsel—at the point of the Article 15.17 proceeding.

REQUIREMENT 5:

INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS

RECOMMENDATION 7: The district courts must implement a system meeting the Commission's Contract Defender Rules for all term assignments exceeding one week. A notification for application is currently used, but the courts will also need to formalize contracts with defense attorneys.

The Felony Courts plan to re-write the Alternative Plan to include the Commission's Contract Defender Rules for term assignments exceeding one week. The Board of Judges Trying Felony Cases has a committee working on this project, as well as other updates to the Harris County Alternative Plan, as quickly as possible.

RECOMMENDATION 8: For assigned counsel cases, the distribution of attorney appointments fell outside of the Commission's threshold for presuming an appointment system is fair, neutral, and nondiscriminatory. The district courts need to put in place a system that meets this threshold.

The Felony District Courts would respectfully disagree with the Commission's assessment. Factoring in the Courts' Alternative Plan requirement that attorneys make themselves available for appointments, the distribution of attorney appointments falls within the threshold presumption that Harris County District Courts do have a fair, neutral and nondiscriminatory system of appointments.

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In the Assigned Counsel Felony Cases list provided in the monitoring review, there were 36 attorneys with zero cases which were factored into the respective share calculations. Twenty-six of these attorneys did not make themselves available for the entire year for appointment to Felony Cases. There were five attorneys who were not on the Felony Master List for the entire year, one being not available for appointment for the entire year. In summary there were 30 attorneys included in the monitoring review that were either not available or not on the master list for the entire year.

Given these points, we provided an alternative analysis that excluded these 30 attorneys from contributing to the ‘respective share’. Here is a direct comparison of the analysis methods:

Review Method Total Cases	Respective Share	Respective Share Max (3x)	Top 10% #attorneys	Top 10% Atty #cases	Average per Attorney	Percent Appointments received by Top 10%
Monitoring Review includes all 251 Attorneys	98	293	25	8015	321	3.28x exceeds respective share (321 / 98)
DCA Review includes 221 Attorneys by excluding the 30 attorneys for reasons stated above	111	333	22	7227	329	2.96x does not exceed respective share (329 / 111)

The District Court’s Alternative plan requires attorneys from the master list to make requests for appointment by way of an attorney calendar, for no more than four weeks at a time. Records of attorney availability are recorded within the FDAMS system for this analysis. The net result of the below analysis illustrates that the Top 10% of Attorneys were likely to receive higher appointment numbers by making themselves more available:

- The Top 10% of Attorneys made themselves on average available for 213 days.
- The Next 40% of Attorneys made themselves available on average for 172 days, which is 19% less availability than the top 10% of attorneys
- The Bottom 50% of Attorneys made themselves available on average for 102 days, which is 52% less availability than the top 10% of attorneys

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- 26 Attorneys appearing in the report with zero cases did not make themselves available for appointment from Oct 1st 2013 through September 30th 2014.

REQUIREMENT 6:

PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS

RECOMMENDATION 9: Per Article 26.05(c), Harris County must implement a method to ensure that no payment is made without the proper judge authorizing payment. The ViPS payment system may provide safeguards to prevent unallowable payments.

The ViPS system, that has been in use since October 1, 2015, implements the rules of the Fee Schedule preventing an attorney from submitting requests for “unallowable payments.” Attorney submitted Fee Vouchers are electronically filed with the District Clerk and routed to the Judge for authorization. Only Judges are granted authorization permissions within the system.

RECOMMENDATION 10: In accordance with Article 26.05(c), Harris County must implement a method for judges to document reasons for disapproving a requested amount of payment. This practice appears to have been successfully implemented with the new ViPS payment system.

In accordance with Article 26.05(c) and in accordance with the District Court’s Alternative plan section 11.5, if the judge disapproves the requested amount, the judge must make written finding in the ViPS system. The findings are recorded in the ViPS system which are available for the attorney to review and make appropriate Voucher changes as needed.

REQUIREMENT 7:

STATUTORY DATA REPORTING

RECOMMENDATION 11: Harris County must implement procedures to ensure that unallowable expenses are not reported on the IDER.

Harris county has implemented an improved change control procedure to ensure correct expense reporting in the IDER report. This was used in the recent 2016 IDER report submission and for IDER 2017 which will make use of the newly implemented features of the ViPS system.

RECOMMENDATION 12: Harris County must implement procedures to ensure that transcript fees for appeals cases are reported as appellate expenses.

At the current time, we are unable to separate the transcript fees for criminal appeal cases from other types of case. For IDER 2016 all SOF expenses have been removed. Existing auditor procedures are being reviewed to find a method to include transcription fees only for criminal appeal cases in future IDER reporting.