



# **Follow-up Policy Monitoring Review of Kleberg 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.<sup>1</sup> 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 January 2016, TIDC issued a limited scope report of Kleberg County's indigent defense practices. The limited scope report covered the ability of arrestees to request and obtain appointed counsel. At the time of the review, arrestees were brought before a magistrate shortly after arrest. Magistrates asked arrestees if they wanted to request counsel, but if an arrestee requested counsel, the request was recorded on a form separate from the magistrate warning form. TIDC requested but was unable to obtain the forms.<sup>2</sup> There did not seem to be any method to transmit requests for counsel from the jail to the courts.

At the time of the review, appointments of counsel typically occurred at court dockets when defendants could renew a request for counsel, originally made at the Article 15.17 hearing. Because TIDC was unable to obtain information as to when a defendant initially requested counsel, TIDC could not make an analysis of the timeliness of attorney appointments.

In response, Kleberg County applied to TIDC for a compliance grant which TIDC funded. The grant provided for an indigent defense coordinator tasked with ensuring counsel requests were transmitted from the jail to the courts. TIDC made a follow-up review to ensure that recommendations from the 2016 report have been addressed and that arrestees have the ability to request and promptly receive appointed counsel.

## **Follow-up Review**

TIDC's policy monitoring rules require follow-up reviews of counties where the report included noncompliance findings.<sup>3</sup> TIDC staff members Joel Lieurance and Claire Buetow visited Kleberg County to conduct a limited scope review from July 22 to July 23, 2019. TIDC reviewed felony and misdemeanor case files, records maintained by the indigent defense coordinator, the indigent defense plan, quarterly grant progress reports to TIDC, and Texas Judicial County Monthly Court Activity Reports. The review focused on three core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE.

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b).

<sup>2</sup> Request for counsel forms were not maintained by the clerks' offices, and so were not available as a record for the courts to review.

<sup>3</sup> 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. (2016)	√ (2020)	
1. Magistrate Warnings	Kleberg County must maintain records documenting whether arrestees requested counsel. (2016)	√ (2020)	
1. Magistrate Warnings	Arrestees who make bail shortly after arrest must be given reasonable assistance with affidavits of indigence. (2020)		√
4. Prompt Appointment	Kleberg County must maintain records documenting the timeliness of indigence determinations. (2016)	√ (2020)	
4. Prompt Appointment	The timeliness of indigence determinations in sample felony cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (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. (2020)		√
4. Prompt Appointment	Waivers of counsel must use language that closely tracks Article 1.051(g). (2016)	√ (2020)	
6. Data Reporting	Justices of the peace and municipal courts must submit Judicial Council Monthly Activity Reports documenting the number of magistrate warnings and the number of persons requesting counsel. (2016)		√

**Program Assessment**

**REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

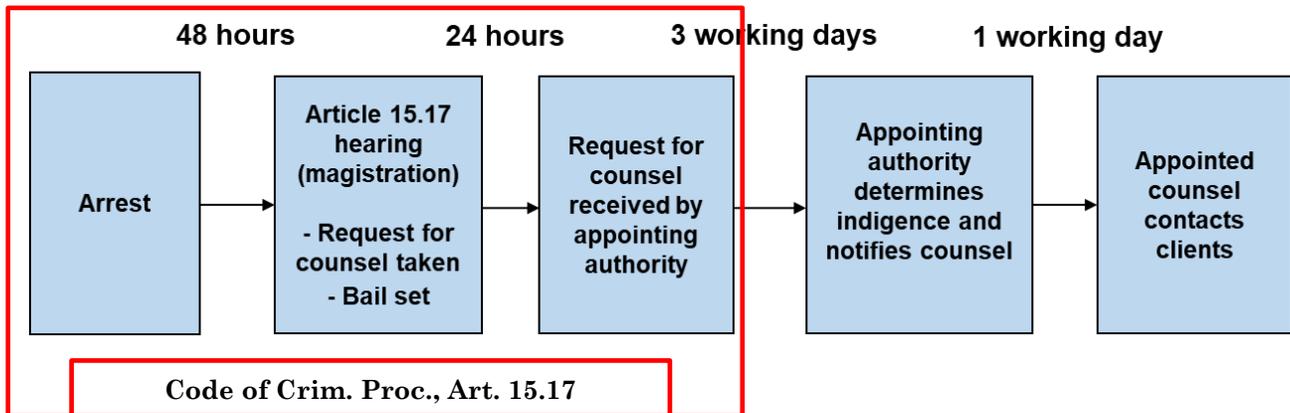
Once arrested, an arrestee must be brought before a magistrate within 48 hours.<sup>4</sup> At this hearing, the magistrate must inform the arrestee of his or her right to counsel; inform the arrestee of the procedures for requesting counsel; and ensure the arrestee has reasonable assistance in completing the necessary forms for requesting assistance

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<sup>4</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

of counsel.<sup>5</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>6</sup>

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



***The 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.<sup>7</sup> The magistrate must make a record of each step of this exchange.<sup>8</sup>

At the time of the 2016 review, TIDC could not determine the frequency of counsel requests at the Article 15.17 hearing. The magistrate warning form used by judges did not contain a space to record whether the arrestee had requested counsel.<sup>9</sup> Instead requests were marked on a separate form. When TIDC asked Kleberg County to produce these records, the County was unable to do so.

In the current review, Kleberg County produced records showing whether arrestees requested counsel at the Article 15.17 hearing. Judges use the magistrate warning form in the indigent defense plan, which includes a space to denote whether the arrestee requests counsel. The indigent defense coordinator now keeps records of each hearing. These records indicate that defendants have the ability to request counsel and regularly request counsel at the Article 15.17 hearing.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>8</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>9</sup> The form used by magistrates was not the form included with the indigent defense plan.

### ***Reasonable Assistance in Completion of Financial Forms***

At the Article 15.17 hearing, the magistrate must ensure the arrestee has reasonable assistance in completing the necessary forms for requesting counsel.<sup>10</sup> TIDC's case file review included multiple cases in which defendants requested counsel, made bail that same day, and did not complete affidavits of indigence. Procedures for ensuring reasonable assistance in completing financial forms are not in place for persons who make bail immediately after requesting counsel. Kleberg County must ensure that reasonable assistance is available to those persons needing help in completing affidavits of indigence.

### ***Transmission of Requests to the Appointing Authority***

Within 24 hours of an arrestee requesting counsel, the request and financial paperwork must be transmitted to the entity authorized to appoint counsel.<sup>11</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.<sup>12</sup>

In Kleberg County at the time of the 2016 review, there was no method to send counsel requests from the jail to the courts. Currently, the indigent defense coordinator is based in the jail and is charged with this task. She gathers all magistrate warning forms and affidavits of indigence and forwards the requests to the court of dispositive jurisdiction.

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<sup>10</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>11</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>12</sup> TEX. CODE CRIM. PROC. art. 15.18 (a-1).

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

### **Conduct prompt and accurate magistration proceedings.**

**FINDING 1 AND RECOMMENDATION:** Kleberg County was using a magistrate warning form different from the one adopted in its indigent defense plan. This form did not have a place to record whether an arrestee requested counsel. Kleberg County must use forms adopted by the judges in its indigent defense plan, including the magistrate warning form and affidavit of indigence submitted in the Kleberg County Adult Indigent Defense Plan. The judges may adopt and submit a revised form if they so choose.

*Successfully Addressed in the 2020 review.*

**FINDING 2 AND RECOMMENDATION:** For the 2016 review, TIDC requested records showing whether counsel was requested at the Article 15.17 hearing, and Kleberg County could not provide these records. As required by Title 1, Rule 173.401(c) of the Texas Administrative Code, Kleberg County must make available to Commission staff all requested records relevant to a monitoring review.

*Successfully Addressed in the 2020 review.*

**FINDING 3 AND RECOMMENDATION:** Arrestees who make bail shortly after the Article 15.17 hearing often fail to complete affidavits of indigence. Kleberg County must ensure reasonable assistance in completing financial affidavits of indigence.

*New finding and recommendation.*

## **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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

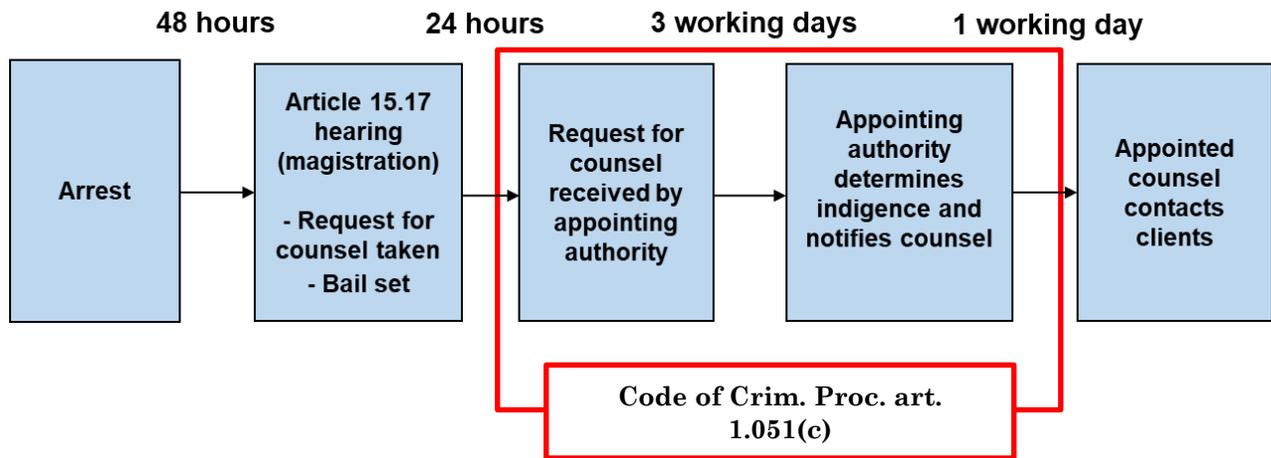
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<sup>13</sup> The time frame is one working day for counties with a population over 250,000.

<sup>14</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

<sup>15</sup> 1 TEX. ADMIN. Code § 174.51.

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



***Timeliness of Appointments in Felony Cases***

To assess the timeliness of Kleberg County’s current appointment procedures in misdemeanor cases, TIDC staff examined 50 sample felony cases filed in FY2018 (October 2017 – September 2018). Magistrate warning forms are now kept in felony case files, so that one can determine the timeliness of indigence determinations. Counsel was appointed timely in 25 of 36 sample felony cases having a request for counsel (**69% timely**). This level of timeliness does not meet TIDC’s 90% threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel.

Late determinations of indigence occurred when defendants requested counsel at the Article 15.17 hearing but made bail shortly afterward. These requests were not ruled upon unless the defendant re-initiated a request at the initial appearance. All requests must be ruled on by the end of the third working day following receipt of the request for counsel.

**Table 2: Times to Appointment in Felony Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	50		
Total cases with a counsel request		36	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		9	
1 – 3 work days + 24 hour transfer		16	
<b>Total timely appointments / denials</b>		<b>25</b>	<b>69%</b>
More than 3 work days + 24 hour transfer		8	
No ruling on request		3	
Total untimely appointments / denials		11	31%

### ***Timeliness of Appointments in Misdemeanor Cases***

To assess the timeliness of Kleberg County’s current appointment procedures in misdemeanor cases, TIDC staff examined 63 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). Magistrate warning forms are now kept in misdemeanor case files, so that one can determine the timeliness of indigence determinations. Counsel was appointed timely in 33 of 44 sample misdemeanor cases having a request for counsel (**75% timely**). This level of timeliness does not meet TIDC’s 90% threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel.

Late determinations of indigence occurred when defendants requested counsel at the Article 15.17 hearing but made bail shortly afterward. These requests were not ruled upon unless the defendant re-initiated a request at the initial appearance. All requests must be ruled on by the end of the third working day following receipt of the request for counsel.

**Table 3: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	63		
Total cases with a counsel request		44	
Appointment / denial of indigence occurred in:			
0 work days		14	
1 – 3 work days + 24 hour transfer		19	
<b>Total timely appointments / denials</b>		<b>33</b>	<b>75%</b>
More than 3 work days + 24 hour transfer		6	
No ruling on request		5	
Total untimely appointments / denials		11	25%

### ***Waivers of Counsel in Misdemeanor Cases***

Article 1.051(f-2) requires the court to advise the defendant of the right to counsel and the procedure for requesting appointed counsel (and give the defendant a reasonable opportunity to request appointed counsel) before the court directs or encourages the defendant to communicate with the attorney representing the state.<sup>16</sup> 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

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<sup>16</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

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 five sample misdemeanor cases. In one case, the defendant later entered an uncounseled plea. 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)). Kleberg 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).

At the time of the 2016 review, defendants entering uncounseled pleas would sign waivers of counsel, but the waivers did not match the language of Article 1.051(g). For the current review, the waiver language now matches Article 1.051(g).

#### FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

##### **Prompt Appointment**

**FINDING 4 AND RECOMMENDATION:** For the 2016 review, Kleberg County did not maintain records allowing the timely appointment of counsel to be tracked. Kleberg County must implement procedures to track whether felony and misdemeanor courts are appointing counsel in a timely manner. If the magistrate warning form submitted with the local indigent plan were in use and filed in the clerks' case files, this recommendation would be met.

*Successfully Addressed in the 2020 review.*

**FINDING 5 AND RECOMMENDATION:** TIDC's sample review of felony cases did not meet the 90% timeliness threshold. Kleberg County must implement procedures to make prompt determinations of indigence.

*New finding and recommendation.*

**FINDING 6 AND RECOMMENDATION:** TIDC's sample review of misdemeanor cases did not meet the 90% timeliness threshold. Kleberg County must implement procedures to make prompt determinations of indigence.

*New finding and recommendation.*

**FINDING 7 AND RECOMMENDATION:** Five sample misdemeanor defendants did not receive rulings on their counsel requests. 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)). Kleberg 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).

***New finding and recommendation.***

**FINDING 8 AND RECOMMENDATION:** For the 2016 review, the language used for waiving counsel did not closely track Article 1.051(g). Kleberg County must ensure that the County’s waiver of counsel is in substantially the same form as the waiver language of Article 1.051(g).

***Successfully Addressed in the 2020 review.***

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

Justices of the peace and municipal judges must report to the Office of Court Administration (as part of their Judicial Council Monthly Court Activity Reports) the number of individuals who receive Article 15.17 warnings and the number who request counsel at the hearings.<sup>17</sup> 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.

The 2016 report found that justices of the peace and municipal judges were not submitting accurate totals of magistrate warning data in their Texas Judicial Council Monthly Court Activity Reports. For the current review, TIDC found the reporting had significantly improved. Two JPs (JP1 and JP4), however, did not report requests although TIDC found instances of them taking requests in its file review.

**Table 4: Texas Judicial Council Monthly Court Activity Reports**  
FY 2018 (October 2017 – September 2018)

	Monthly Reports Submitted	Misdemeanor Requests	Misdemeanor Warnings	Felony Requests	Felony Warnings
Kingsville	12	206	286	100	127
JP1	12	0	309	0	132
JP2	12	93	106	73	73
JP3	12	134	239	69	121
JP4	0	n/a	n/a	n/a	n/a
<b>Total</b>		<b>433</b>	<b>949</b>	<b>242</b>	<b>453</b>

<sup>17</sup> 1 TEX. ADMIN. CODE § 171.7 – 8.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

**Data Reporting**

**FINDING 9 AND RECOMMENDATION:** Monthly court data reports to OCA were not accurate. Justices of the peace and municipal courts must report the number of persons receiving magistrate warnings and the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports.

***Issue Pending.***

**Conclusion**

TIDC enjoyed meeting with Kleberg County officials and staff and appreciates their cooperation during this review. TIDC stands ready to provide any assistance the County may need in addressing the issues identified in this report.

## **Summary of Findings and Recommendations Needing to be Addressed**

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

**FINDING 3 AND RECOMMENDATION:** Arrestees who make bail shortly after the Article 15.17 hearing often fail to complete affidavits of indigence. Kleberg County must ensure reasonable assistance in completing financial affidavits of indigence.

**FINDING 5 AND RECOMMENDATION:** TIDC's sample review of felony cases did not meet the 90% timeliness threshold. Kleberg County must implement procedures to make prompt determinations of indigence.

**FINDING 6 AND RECOMMENDATION:** TIDC's sample review of misdemeanor cases did not meet the 90% timeliness threshold. Kleberg County must implement procedures to make prompt determinations of indigence.

**FINDING 7 AND RECOMMENDATION:** Five sample misdemeanor defendants did not receive rulings on their counsel requests. 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)). Kleberg 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).

**FINDING 9 AND RECOMMENDATION:** Monthly court data reports to OCA were not accurate. Justices of the peace and municipal courts must report the number of persons receiving magistrate warnings and the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports.