

Maverick County Policy Monitoring Follow-up Visit December 1-2, 2009

Purpose of Task Force Monitoring Visit

In January 2002, the 77th Texas Legislature established the Task Force on Indigent Defense (“Task Force”). The mission of the Task Force is to improve the delivery of indigent defense services through fiscal assistance and professional support to State, local judicial, county, and municipal officials. The purpose of the Task Force is to promote justice and fairness to all indigent persons accused of criminal conduct, including juvenile respondents, as provided by the laws and constitutions of the United States and Texas. The Task Force is given a directive under Tex. Gov’t Code § 71.062(b) to monitor local jurisdictions’ compliance with the Fair Defense Act (“FDA”).

Background

A policy monitoring visit of Maverick County was conducted between October 14 and October 16, 2008. The report was issued on November 24, 2008 and made recommendations concerning the ability to request counsel at magistration and concerning the timing of subsequent appointments of counsel. The County response was sent on October 21, 2009. This response stated that the County had adopted a new magistration form with a space for noting whether counsel is being requested. The response further stated that the forms for requesting counsel are transmitted to the district and county courts, that a resulting appointment is made within one day of receipt of the request, and that these forms are available for both bonded and detained persons.

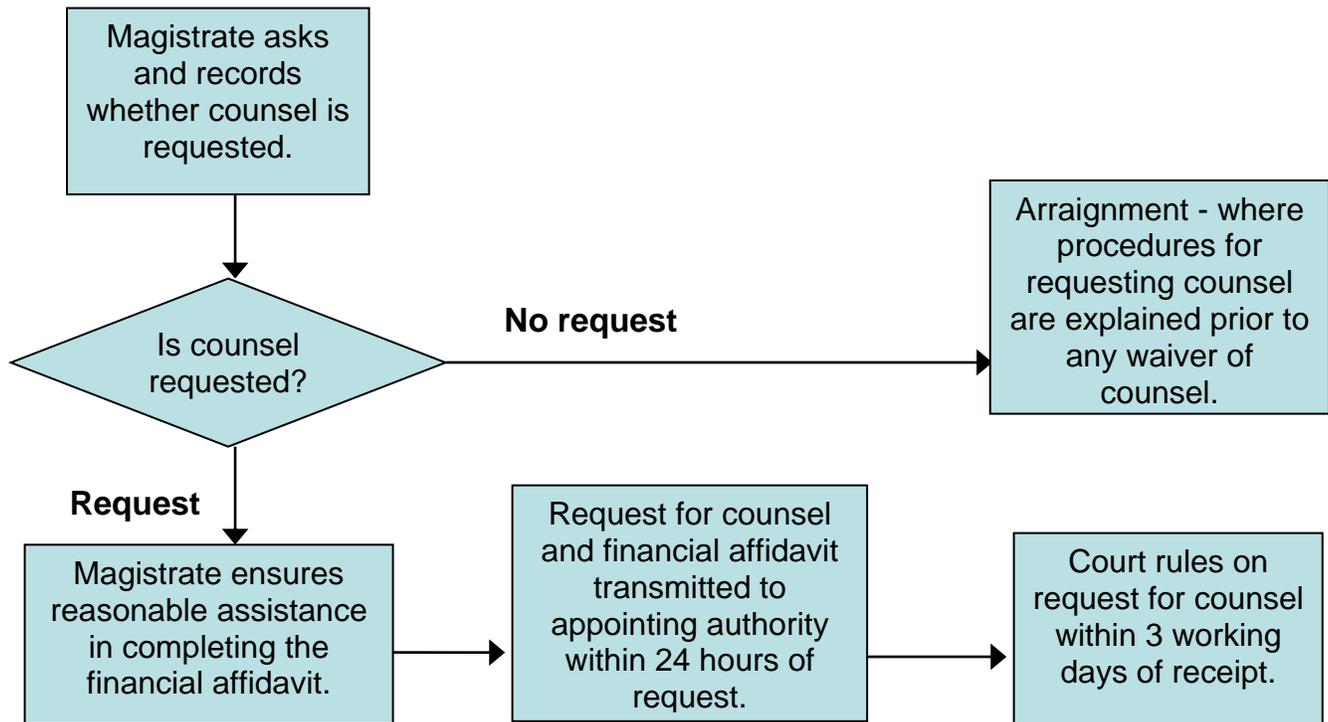
Overview of Follow-up Monitoring Review

Reviewers Joel Lieurance and Dominic Gonzales conducted a follow-up visit to Maverick County on December 1 and 2, 2009. The purpose of this visit was to examine whether action plans had been put in place to handle recommendations from the October 2008 visit. On this follow-up visit, Reviewers met with the county judge, a court administrator for a district court, three justices-of-the-peace, the county attorney, and jail staff. Reviewers examined records of magistrate’s warnings from the jail and Justice-of-the-Peace #2; felony appointment information from the jail and the district clerk’s office; misdemeanor case files from the county clerk’s office; and attorney payment records from the auditor’s office. Phone interviews with the Eagle Pass Municipal Judge, the sheriff and jail staff, the local administrative district judge, and the county judge were conducted after the visit to agree on plans to rectify problems in submitting completed affidavits of indigence to the courts.

Magistrate’s Warnings

Magistrate’s warnings are given to arrestees for class A and B misdemeanor offenses as well as for felony offenses. Under Article 15.17(e) of the Texas Code of Criminal Procedure, a record is to be made of the magistrate asking whether the arrestee wants to request appointed counsel and of the arrestee’s response to the question. If the arrestee requests counsel, Article 15.17(a) requires the magistrate to “ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time”. Once the arrestee indicates that counsel is being requested, “the magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts’ designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel.”

Figure 1: Process for Handling Requests for Counsel as Dictated by Articles 15.17 and 1.051



When the October 2008 policy monitoring visit was conducted, the magistration form did not include any space to indicate whether counsel was being requested. The monitoring report made a recommendation for the form to be updated. At the December 2009 visit, Reviewers found that the magistration form has been updated to list whether counsel is being requested (See Appendix). On this visit, Reviewers examined magistration forms to determine whether arrestees are requesting counsel. Reviewers examined 33 magistration forms and found that counsel was requested in 4 of the 12 misdemeanor arrests examined (33% requesting) and in 10 of the 21 felony arrests examined (48% requesting). The fact that the magistration form now contains a place to request counsel and the fact that requests are being made for both felony and misdemeanor offenses are indications that the County is complying with Article 15.17(e).

In Maverick County, magistrate’s warnings are given by the Eagle Pass Municipal Judge at the Eagle Pass Police Station and by justices-of-the-peace at the County Jail. If an arrestee is given magistrate’s warnings at the Eagle Pass Police Station, he/she is not later given warnings a second time after being transferred to the County Jail. Reviewers examined records that showed when persons requested counsel at magistration (regardless of where they received magistrate’s warnings), the affidavit of indigence would often be filled out on a later date. According to persons interviewed, the affidavit of indigence is not provided at magistration, but when jail staff interviews the arrestee.

Follow-up Recommendation 1: Article 15.17(a) requires that the magistrate ensure reasonable assistance in completing the forms necessary for requesting counsel at the time of magistration. To comply with this requirement, the affidavit of indigence must be made available at magistration. Reasonable assistance in completing the forms must also be provided. This recommendation applies

both to persons receiving magistrate’s warnings from the Eagle Pass Municipal Judge and the Maverick County Justices-of-the-Peace.

Potential Solution to Remedy the Problem: Affidavits of indigence should be available at all magistrate’s warning hearings for persons requesting counsel, whether conducted at the County Jail or at the Eagle Pass Police Department. Maverick County jail staff will provide assistance in completing the forms when the assistance is needed. Arrestees who are given magistrate’s warnings at the Eagle Pass Police Department will give their affidavits of indigence to Maverick County jail staff upon transfer to the County Jail. County Jail staff will provide assistance in completing the affidavit of indigence to these transferred arrestees if assistance is needed.

Additional Response (state whether you agree with the solution and if not, give an alternative solution):

Contact person(s): _____

Completion date: _____

Once affidavits of indigence are completed, the affidavits are periodically transported to the courts by jail staff. The transmittal of the request appears to typically be beyond the 24 hour deadline from when the arrestee first indicated that he/she wants appointed counsel.

Follow-up Recommendation 2: Article 15.17(a) requires that “the magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel.” To ensure that requests are promptly transferred to the courts, affidavits of indigence should be faxed from the jail to the county court for misdemeanors and to the district courts for felonies. This recommendation applies both to persons receiving magistrate’s warnings from the Eagle Pass Municipal Judge and the Maverick County Justices-of-the-Peace.

Potential Solution to Remedy the Problem: When the Maverick County Jail receives a request for counsel, requests for counsel will be promptly forwarded (within 24 hours of the request being made) to the courts by the jail. For misdemeanor requests, the requests will be faxed to the county court, whose fax number is 830-773-6450. For felony requests, the requests will be faxed to the 293rd district court, whose fax number is 830-758-1775.

Additional Response (state whether you agree with the solution and if not, give an alternative solution):

Contact person(s): _____

Completion date: _____

Appointment of Counsel

At the time of the October 2008 monitoring visit, requests for counsel were not typically made until the initial appearance. Since requests for counsel are now taken at magistration, the timeliness of appointments can be measured.

The monitoring report from the October 2008 visit made a recommendation that for bonded defendants, a process must be put in place to comply with *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). *Rothgery* held that a criminal defendant's initial appearance before a judicial officer (typically magistration), where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Felony Appointments

Reviewers examined 25 felony appointments to determine the timeliness of these appointments. The files examined consisted of appointments made between January 2009 and October 2009 and came from the district clerk's files as well as from the jail's files. Four of the appointments reviewed were for bonded persons. All of the appointments for bonded persons were made shortly after the request for counsel was made as shown by the table below.

| Maverick Felony Bonding Appointment Timeliness | Sample Size | Number from sample | Percent |
|---|--------------------|---------------------------|----------------|
| Number of Appointments Examined | 4 | | |
| Bonded persons received counsel in: | | | |
| 0 work days | | 3 | 75% |
| 1 work day + 24 hour transfer | | 1 | 25% |

Twenty-one (21) of the appointments were for non-bonding persons. Some of these non-bonding cases involved persons who were not arrested but rather given a summons for an initial appearance. At the initial appearance, they were given an opportunity to request counsel. The sample data gives an indication that requests made in-court are promptly ruled upon and are always timely. However, requests made out-of-court often are not ruled upon timely. One factor causing untimely appointments was the fact that requests were not promptly transferred to the courts. The Task Force

may conduct an additional visit to determine whether obstacles in making timely appointments have been removed. See the table below showing the timeliness of appointments for non-bonding persons.

| Maverick Felony Non-Bonding Appointment Timeliness | Sample Size | Number from sample | Percent |
|---|-------------|--------------------|---------|
| Number of Appointments Examined | 21 | | |
| Non-bonding persons received counsel in: | | | |
| 0-3 work days + 24 hour transfer (timely appointments) | | 12 | 57.1% |
| More than 3 work days (untimely appointments ranging from 5 – 27 work days) | | 9 | 42.9% |

Follow-up Recommendation 3: Article 1.051 allows the courts three working days to appoint counsel for persons deemed indigent. When requests for counsel are made out-of-court, the appointments are often beyond statutory deadlines. Problems in transferring requests may have been a large factor contributing to untimely appointments. The courts must ensure that when requests are made out-of-court, that determinations of indigence occur within three working days of the request being made (with an additional 24 hours allowed for transferring the request).

Response:

Contact person(s): _____

Completion date: _____

Misdemeanor Appointments

Reviewers also examined 23 misdemeanor case files from the county clerk’s office. According to records supplied by the auditor’s office, there were no misdemeanor attorney appointments in FY 2009. However, Reviewers did find records of appointments in FY 2010. All but one of these appointments were made at the November 20, 2009 arraignment docket. The other appointment was made on the November 30, 2009 arraignment docket. All of the appointments showed a request for counsel being made on the date of appointment. Since Reviewers found misdemeanor requests for counsel in the magistration data that was reviewed, Reviewers believe that the misdemeanor requests for counsel made at magistration were not being put into the case file, and may not have been submitted to the county clerk or to the county court.

Follow-up Recommendation 4: Article 1.051 allows the courts three working days to appoint counsel for persons deemed indigent. An additional 24 hours are allowed for the transfer of the request to the

courts. When requests for counsel are made at magistration, a determination of indigence must be made within three working days (with an additional 24 hours allowed for the transfer of the request).

Response:

Contact person(s): _____

Completion date: _____

Additional Information Regarding Waivers of Counsel

The Task Force did not cover issues regarding waivers of counsel on this visit. We are including literature about waivers of counsel along with this report. Statutes covering waivers of counsel were amended in 2007 with the 80th Legislative Session. Specifically, Article 1.051(f-1) of the Code of Criminal Procedure disallows the prosecutor from attempting to obtain a waiver of counsel from an unrepresented defendant or from communicating with any defendant with a pending request for counsel (i.e. a request for counsel made at magistration without either an appointment or a denial of counsel). Article 1.051(f-2) requires the courts to explain the procedures for requesting counsel before encouraging the defendant to speak with the prosecutor. The courts and the prosecutors may need to amend local procedures in order to meet the requirements of Article 1.051 concerning waivers of counsel.

Conclusion

The Task Force is required to provide support to counties to improve indigent defense services. Targeted assistance and discretionary grants may be available to the County. We have hired two new staff positions to assist counties in applying for available support. Grants may be available for such items as public defender offices, case management software, and pre-trial indigent service departments. If interested in applying for a grant, please contact Bryan Wilson at 512-936-6996.

The Task Force would like to thank County officials for their hospitality and cooperation on this visit. To ensure that these recommendations are followed, Reviewers may make an additional visit to the County.

Appendix

Law Enforcement Agency: _____
 Date Of Arrest: _____
 Time Of Arrest: _____
 Place Of Arrest: _____

Court #: _____
 County/State: _____
 Warrant #, If Any: _____
 Bail Set: \$ _____

HAS A PROBABLE CAUSE AFFIDAVIT BEEN FILED? YES NO

MAGISTRATE'S WARNING

THE STATE OF TEXAS
 COUNTY OF _____

§
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Before me, the undersigned, magistrate of _____ County, Texas on the _____ day of _____, at _____ O'clock AM/PM, appeared _____ I gave said person the following warning:

- You are charged with the offense of _____ a felony a misdemeanor
- You have a right to hire an attorney to represent you.
- You have the right to have an attorney present prior to and during any interview and questioning by peace officers or attorneys representing the State.
- You have the right to remain silent.
- You are not required to make a statement, and any statement you make can and may be used against you in court.
- You have the right to stop any interview or questioning at any time.
- You have the right to have an examining trial (felonies only).
- You have the right to request appointment of counsel if you cannot afford counsel. *

***THE MAGISTRATE SHALL ENSURE THAT THE PERSON IS INFORMED OF THE FOLLOWING PROCEDURES:**

- a. That an application for a court appointed attorney must be completed to determine if he/she qualifies for a court appointed attorney;
- b. That reasonable assistance will be provided to him/her when filling out the application for a court appointed attorney, if needed;
- c. That a financial affidavit must be signed;
- d. That an affidavit is a written or printed declaration or statement of facts made voluntarily and confirmed by oath before a person having authority to administer such oath;
- e. That if he/she meets indigence standards he/she will qualify for court appointed attorney; and,
- f. Attorney should attempt to contact him/her by the end of the first working day after appointment and to interview him/her as soon as practicable after appointment. If appointment is made when the accused is before the court, the accused will be given attorney's name, address, and phone number.

If you are not a United States citizen and you have been arrested or detained, you may be entitled to have us notify your country's consular representatives here in the United States. Do you want us to notify your country's consular officials?

No. _____ YES. _____

If you responded "YES," what country? _____

If you are a citizen of a country that requires us to notify your country's consular representative, we shall notify them as soon as possible.

THE ACCUSED DOES / DOES NOT WANT TO REQUEST COURT APPOINTED ATTORNEY.
 Circle One

I acknowledge that I was given the above warning (This is NOT an admission of guilt):

Magistrate _____

Person warned _____

Place of warning: _____

Time: _____

Date: _____

Accused refused to sign acknowledgement of warning: _____

Witness (if any):

Name: _____

Address: _____

Magistrate
 Remarks: _____

This hearing was interpreted by: _____
 (Name of Interpreter)

**Note: THIS IS A TWO-SIDED FORM: SPANISH ONE SIDE, ENGLISH OTHER SIDE
 ESTE FORM TIENE DOS LADOS: EN ENGLIS UN LADO Y ESPANOL EN LO OTRO**