



Limited Scope Review of Milam County's Indigent Defense Systems

April 2018

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Background of Limited Scope Policy Monitoring Review

The Texas Indigent Defense Commission (“Commission”) monitors local jurisdictions’ compliance with the Fair Defense Act (“FDA”) through on-site reviews.¹ These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed. Additionally, the review process aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

In June 2016, staff conducted a drop-in review in Milam County, and examined a small sample of misdemeanor case files, observed a misdemeanor docket, and spoke with the county judge and various county employees about local procedures for handling counsel requests. The drop-in review revealed that while arrestees often requested counsel at the Article 15.17 hearing, many of these requests were not ruled upon, and a large portion of these same arrestees entered uncounseled pleas.

As a result of the June 2016 drop-in review, staff conducted a limited scope monitoring review to examine methods for handling counsel requests in misdemeanor cases. Throughout this report, Commission staff will be referenced as “monitor.” This review encompasses the policy monitoring core requirements listed below:²

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

The monitor conducted an on-site review from February 12 - 13, 2018.³ The monitor examined 100 misdemeanor case files from the county clerk’s office and supplemented those records with data maintained by the county court administrator.⁴ The monitor’s report follows with accompanying findings and recommendations.

¹ TEX. GOV’T CODE § 79.037(a)–(b).

² A full monitor review will cover all seven core requirements. This review does not cover:

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS; OR

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.

REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.

REQUIREMENT 7: STATUTORY DATA REPORTING.

³ The review team consisted of policy monitors Morgan Shell and Joel Lieurance.

⁴ The period of review covered cases filed in FY2017 (October 2016 – September 2017).

Program Assessment

Requirement 1: Conduct prompt and accurate Article 15.17 proceedings.

Under Article 15.17 of the Code of Criminal Procedure, arrestees must be brought before a magistrate within 48 hours of the arrest, and the arrestee must be asked if he/she would like to request counsel. If the arrestee requests counsel, the magistrate must ensure reasonable assistance is provided in completing the forms necessary to request counsel. These forms must be transmitted to the appointing authority within 24 hours of the request being made.

Timeliness of Warnings

A county is presumed to be in substantial compliance with the prompt magistrate warnings 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 Milam County, the monitor calculated the number of days between arrest and the Article 15.17 hearing from sample misdemeanor cases.⁶ Magistrate warnings occurred within two days of arrest for all sample cases, signaling Milam County has processes in place to promptly bring arrestees before a magistrate.

Table 1: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	77	—
0 days	31	40.3%
1 day	45	58.4%
2 days	1	1.3%
Timely Hearings	77	100.0%
More than 2 days	0	0%

The monitor observed that magistrate warnings were generally available in the case files maintained by the county clerk. The forms appear to have arrived in the county clerk's office after having been transmitted to the appointing authority. Counsel was regularly requested at the Article 15.17 hearing (39% of sample cases), which indicates that arrestees typically understand and avail themselves of the right to appointed counsel.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate Article 15.17 proceedings.

No findings.

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

⁶ The monitor could not determine the timeliness of the Article 15.17 hearing for all 100 sample cases.

Requirement 2: Determine indigence according to standards directed by the indigent defense plan.

Article 26.04(l) of the Code of Criminal Procedure requires the courts to adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) provides guidance on factors counties may consider when determining indigence.⁷

For adult criminal cases in Milam County, the indigent defense plan specifies the local standard of indigence. In making determinations of indigence the plan states:

Only the accused's financial circumstances as measured by the financial standards stated in this rule shall be used as the basis for determining indigence.

The standard in Milam County presumes an individual is indigent if:

- 1. At the time of requesting appointed counsel, the accused or accused's dependents are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;*
- 2. 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, or*
- 3. The accused's net household income does not exceed the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register, and the accused is assessed to not have sufficient resources to retain counsel after taking into account the factors listed under "ii" below.*

From the monitor's examination of 100 sample misdemeanor case files, the monitor found 47 requests for counsel. Of these 47 requests, the county court denied indigence in 20 cases for the following reason: "Denied due to defendant voluntarily signing waiver to proceed pro se." This denial is neither based on the indigence standard stated in the plan nor on a failure to reasonably obtain relevant information showing whether the defendant met the financial standard. In making determinations of indigence, the court must follow Article 26.04(l)-(m) as well as its indigent defense plan and rule upon counsel requests according to whether the defendant has met the local standard of indigence.

⁷ Tex. Code Crim. Proc. art. 26.04(m) states:

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.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

Determine indigence according to standards directed by the indigent defense plan.

FINDING 1 AND RECOMMENDATION: Determinations of indigence do not always follow the financial standard established by the local indigent defense plan. In making determinations of indigence, the court must rule upon counsel requests according to whether the local financial standard of indigence has been met.

Requirement 4: Appoint counsel promptly.

In adult criminal cases, the court (appointing authority) has three working days from the receipt of a counsel request to determine indigence and appoint counsel for those determined to be indigent.⁸ The court cannot delay the appointment of counsel because the defendant makes bail.⁹

To assess the timeliness of Milam County's appointment procedures in misdemeanor cases, the monitor examined the time from request for counsel until appointment or denial of indigence. Under the Commission's monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor's sample are timely.¹⁰ The monitor examined 100 cases filed in FY2017 and found 47 requests for counsel. Counsel was timely appointed in about 40% of cases (see Table 2). This falls below the Commission's threshold for presuming a jurisdiction's practices ensure timely appointment of counsel.

⁸ Tex. Code Crim. Proc. art. 1.051(c). The three working days time frame applies to counties with a population under 250,000. Counties with a population over 250,000 have one working day.

⁹ Tex. Code Crim. Proc. art. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 991 (2008).

¹⁰ 1 TEX. ADMIN. CODE § 174.28.

Table 2: Timeliness of Misdemeanor Appointments

Milam Misdemeanor Appointment Sample	Sample Size	Number from sample	Percent
Number of Case Files Examined	100		
Number of Case Files Containing a Request for Counsel		47	
Appointment / Denial of Indigence Occurred in:¹¹	46		
0 work days		9	19.6%
1 – 3 work days + 24 hour transfer		9	19.6%
Total Timely Appointments		18	39.1%
4 to 10 work days + 24 hour transfer		6	13.0%
More than 10 work days + 24 hour transfer		15	32.6%
No ruling on request		7	15.2%
Total Untimely Appointments		28	60.9%

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.¹² Articles 1.051(f-1) and (f-2) require a waiver of counsel for the purpose of speaking with the prosecutor. Article 1.051(g) requires a waiver for the purpose of entering an uncounseled guilty plea.

Under 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is ruled upon, and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), 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. A pending request for counsel must be ruled upon before a waiver of counsel is allowed. If a defendant enters an uncounseled plea, he or she must sign a written waiver, the language of which must substantially conform to the language of 1.051(g).¹³

¹¹ The monitor excluded one of the sample cases as the timeliness could not be determined based on available records.

¹² Article 1.051(f) states:

A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.

¹³ The waiver language of Article 1.051(g) states:

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)

Initiation of Waivers

The monitor found that the initial appearance notification to defendants contained the following statement:

Unless you have requested a court appointed attorney, you may contact the County Attorney's office at 254-697-7013 to discuss your case. However, this is not required.

The Milam County notification to defendants could be understood by defendants as a direction for defendants to speak with the prosecutor. When the defendants receive this notice, the court has not yet explained the procedures for requesting counsel.

Article 1.051(f-1) specifically disallows the attorney representing the state from initiating waivers of counsel. Article 1.051(f-2) also disallows the court from encouraging defendants to communicate with the attorney representing the state until the court advises defendants 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. Milam County must put in place methods for the court to explain the procedures for requesting counsel and must give a reasonable opportunity for defendants to make this request prior to any direction that defendants speak with the prosecutor.

Ruling on Requests Prior to Waivers

The monitor found that when counsel was requested, all sample requests were ruled upon before defendants entered guilty pleas. Local practices attempted to identify and rule upon each request prior to a communication between the prosecutor and the defendant. While the monitor's sample contained seven cases in which requests were not ruled upon, all of these cases resulted in dismissals. The court has clearly put in place procedures to rule upon all counsel requests prior to allowing defendants to waive counsel.

Additional Observations Regarding Withdrawals of Requests

This report has previously noted 47 sample misdemeanor defendants requested counsel, but 20 of these requests were denied so the defendant could proceed pro se. If these denials were construed as withdrawals of requests, the withdrawals would have to meet constitutional standards. Under constitutional standards, a withdrawal of a counsel request is permissible provided that the defendant initiates the withdrawal. The ultimate test of whether a withdrawal is permissible hinges on whether the withdrawal is voluntarily, knowingly, and intelligently made.¹⁴ Article 1.051(f-2) prohibits the trial court from directing or encouraging the defendant to talk to the prosecutor while the defendant's request is pending.

¹⁴ 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

Appoint Counsel Promptly.

FINDING 2 AND RECOMMENDATION: Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The county must implement practices that satisfy the appointment timeline in Article 1.051(c)(1).

FINDING 3 AND RECOMMENDATION: Through the initial appearance notification, defendants are encouraged to communicate with the attorney representing the state prior to the trial court explaining the procedures for requesting counsel. The court must explain the procedures for requesting counsel prior to communications between the attorney representing the state and the defendant.

Conclusion

The monitor appreciated the professionalism and assistance provided by Milam County officials and staff. Milam County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, we will monitor the county's transition and adjustments to the Commission's findings.

Summary of Findings and Recommendations

Milam County must respond in writing how it will address each of these recommendations.

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

No findings.

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.

FINDING 1 AND RECOMMENDATION: Determinations of indigence do not always follow the financial standard established by the local indigent defense plan. In making determinations of indigence, the court must rule upon counsel requests according to whether the local financial standard of indigence has been met.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

FINDING 2 AND RECOMMENDATION: Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The county must implement practices that satisfy the appointment timeline in Article 1.051(c)(1).

FINDING 3 AND RECOMMENDATION: Through the initial appearance notification, defendants are encouraged to communicate with the attorney representing the state prior to the trial court explaining the procedures for requesting counsel. The court must explain the procedures for requesting counsel prior to communications between the attorney representing the state and the defendant.

Appendix – Monitoring Checklist

The monitoring review of the FDA’s core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.¹⁵
 - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.¹⁶
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.¹⁷
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.¹⁸
- A record must be made of the following:
 - the magistrate informing the accused of the accused’s right to request appointment of counsel;
 - the magistrate asking whether accused wants to request appointment of counsel;
 - and whether the person requested court appointed counsel.¹⁹
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.²⁰

NOT APPLICABLE: The indigent defense plan authorizes the magistrate to appoint counsel.
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused’s request for counsel within 24 hours of the request being made.²¹

¹⁵ TEX. CODE CRIM. PROC. art. 14.06(a).

¹⁶ TEX. CODE CRIM. PROC. art. 17.033.

¹⁷ TEX. CODE CRIM. PROC. art. 15.17(a).

¹⁸ *Id.*

¹⁹ TEX. CODE CRIM. PROC. art. 15.17(e).

²⁰ *See, e.g.*, TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

²¹ TEX. CODE CRIM. PROC. art. 15.17(a).

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS
DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- Provide detailed procedures used to determine whether a defendant is indigent.²²
REQUIREMENT NOT SATISFIED: This box is not checked because the procedures for determining indigence do not always follow those stated in the plan.
- State the financial standard(s) to determine whether a defendant is indigent.²³
- List factors the court will consider when determining whether a defendant is indigent.²⁴

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.²⁵
- Persons out of custody: Counsel must be appointed at the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.²⁶
REQUIREMENT NOT SATISFIED: The above boxes are not checked because the percent of timely appointments did not meet the Commission's 90% threshold for presuming a jurisdiction's appointment system to be timely.
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.²⁷
REQUIREMENT NOT SATISFIED: This box is not checked because the initial appearance notification encourages defendants to communicate with the attorney representing the state.

²² TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

²³ TEX. CODE CRIM. PROC. art. 26.04(l).

²⁴ TEX. CODE CRIM. PROC. art. 26.04(m).

²⁵ TEX. CODE CRIM. PROC. art. 1.051(c).

²⁶ TEX. CODE CRIM. PROC. art. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, 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.”).

²⁷ TEX. CODE CRIM. PROC. art. 1.051(f-2).