



# **Policy Monitoring Review of Scurry County's Indigent Defense Systems**

**November 2019**



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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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## **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 May 2017, TIDC conducted an informal drop-in review of Scurry County to monitor local procedures for appointing counsel in misdemeanor cases. TIDC examined a small sample of misdemeanor cases and found that the county court did not receive all requests for counsel. When misdemeanor arrestees requested counsel, their requests were not typically ruled upon.

Historically, the percent of misdemeanor defendants receiving appointed counsel in Scurry County has been significantly lower than the statewide average (see Table 1). TIDC conducted a limited scope review to ensure that misdemeanor arrestees have the ability to request and to receive appointed counsel.

**Table 1: Misdemeanor Cases Paid as a Percentage of New Cases Added**

<b>Year</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>Texas 2018</b>
Misdemeanor Cases Added (from OCA report)	357	379	322	277	234	467,851
Misdemeanor Cases Paid	24	14	9	5	11	214,494
% Misdemeanor Cases Paid	7%	4%	3%	2%	5%	46%

## **Methodology**

TIDC staff members Joel Lieurance and Claire Buetow visited Scurry County to conduct a limited scope review on July 15, 2019. The review focused on the ability of misdemeanor arrestees to request and obtain appointed counsel. TIDC compared local practices to two core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

TIDC examined 80 misdemeanor cases filed in FY2018 (October 2017 – September 2018) and interviewed local officials.

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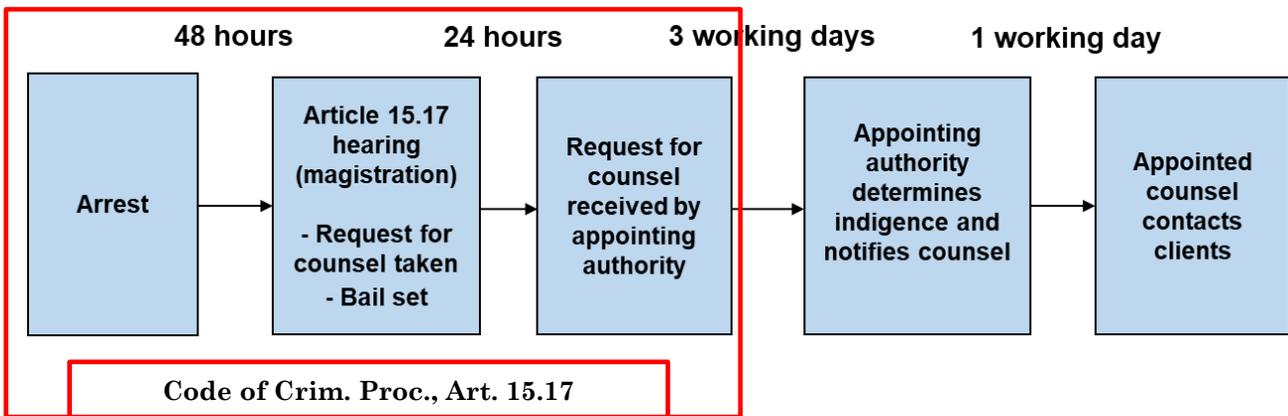
<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b).

## Program Assessment

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

A person must be brought before a magistrate within 48 hours of arrest.<sup>2</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 of counsel.<sup>3</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>4</sup>

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



### ***Timeliness of Warnings***

A county is presumed to be in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings sampled are conducted within 48 hours of arrest.<sup>5</sup> To determine the timeliness of Article 15.17 warnings in Scurry County, TIDC calculated the number of days between arrest and the Article 15.17 hearing for 30 cases. Magistrate warnings occurred within two days of arrest for all sample cases, indicating that Scurry County has procedures in place to promptly bring arrestees before a magistrate.

<sup>2</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 1 TEX. ADMIN. CODE § 174.28. If the hearing occurred within two days of arrest, the monitor presumed warnings were timely.

**Table 2: Timeliness of Article 15.17 Hearings**

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	30	—
0 days	13	43.3%
1 day	16	53.3%
2 days	1	3.3%
<b>Timely Hearings</b>	<b>30</b>	<b>100.0%</b>
More than 2 days	0	0%

***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>6</sup> The magistrate must make a record of each step of this exchange.<sup>7</sup>

Justices of the Peace and Municipal Judges must report this data to OCA as part of their Judicial Council Monthly Court Activity Reports. 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. Both Scurry County justices of the peace reported receiving a significant number of counsel requests, indicating that arrestees have the ability to request counsel at the Article 15.17 hearing.

**Table 3: Texas Judicial Council Monthly Court Activity Reports for Scurry County (Oct. 2017 – Sept. 2018)**

Court	Misd. Requests	Misd. Warnings	Misd. Req. Rate	Felony Requests	Felony Warnings	Fel. Req. Rate
JP1	52	79	65.8%	55	97	56.7%
JP2	63	130	48.5%	96	168	57.1%
Countywide JPs	115	209	55.0%	151	265	57.0%

***Completion and Transmission of Financial Forms to the Appointing Authority***

At the Article 15.17 hearing, the magistrate must ensure the arrestee has reasonable assistance in completing the necessary forms for requesting counsel.<sup>8</sup> Within 24 hours of a defendant requesting counsel, the request and financial paperwork must

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

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

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

be transmitted to the person authorized to appoint counsel.<sup>9</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.<sup>10</sup>

TIDC obtained magistrate warning records from the Scurry County Sheriff's Office. The forms were not part of the clerk's case file. Based on interviews, the court does not typically receive magistrate warning forms. Article 15.17 requires requests and associated financial paperwork be transmitted to the person authorized to appoint counsel within 24 hours of the request having been made. TIDC is available to provide technical assistance to ensure that requests for counsel are promptly sent to the court.

To address transmittal issues, County officials and staff may wish to meet together to discuss methods for ensuring financial information is received from defendants and promptly handed to the courts. See the Appendix at the end of this report listing possible methods for transmitting counsel requests from the jail to the courts.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings.**

**FINDING AND RECOMMENDATION 1:** Article 15.17(a) requires requests for counsel to be transmitted to the courts within 24 hours of the requests being made. Scurry County must ensure that whenever a request for counsel is made at the Article 15.17 hearing, the arrestee is provided with reasonable assistance in completing financial paperwork. The request and financial paperwork must be sent to the courts within 24 hours of the request being made.

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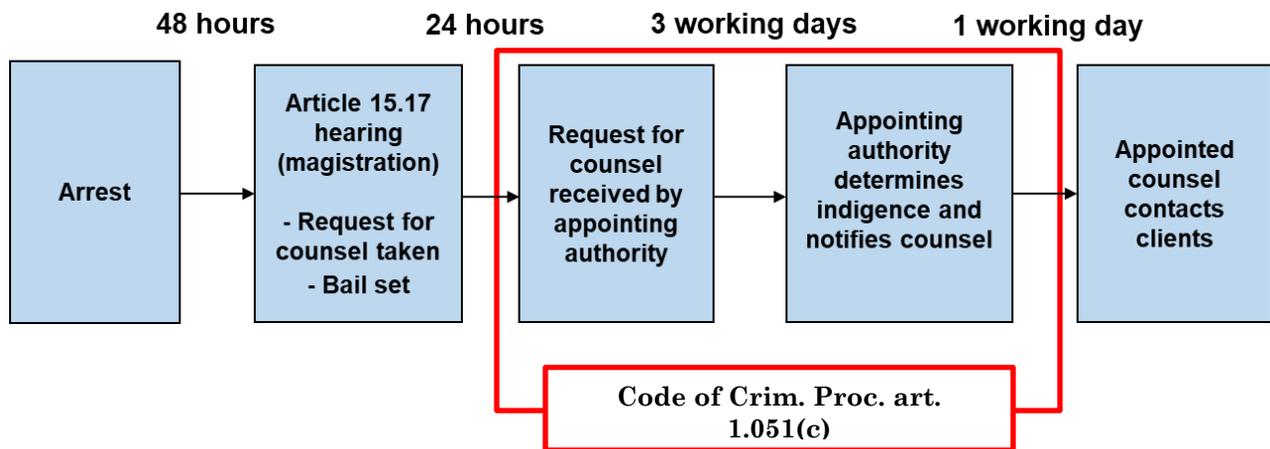
<sup>9</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>10</sup> TEX. CODE CRIM. PROC. art. 15.18 (a-1).

## 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>11</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>12</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>13</sup>

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



### *Timeliness of Appointments in Misdemeanor Cases*

To assess the timeliness of Scurry County’s current appointment procedures in misdemeanor cases, TIDC staff examined 80 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). With help from sheriff’s office staff, TIDC was able to obtain magistrate warning forms for 31 of the 80 case files. Defendants requested counsel on 13 of these 31 forms.<sup>14</sup> Defendants made five additional requests later at misdemeanor dockets, and all five of these requests were withdrawn (one involving a defendant who had also requested counsel at the Article 15.17 hearing). No counsel requests were ruled upon (**0% timely**). This does not meet TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel.

<sup>11</sup> The time frame is one working day for counties with a population over 250,000.

<sup>12</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

<sup>13</sup> 1 TEX. ADMIN. Code § 174.51.

<sup>14</sup> One of these requests was later withdrawn.

**Table 4: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	80		
Total cases with a counsel request <sup>15</sup>		12	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		0	
1 – 3 work days + 24 hour transfer		0	
<b>Total timely appointments / denials</b>		<b>0</b>	<b>0%</b>
<b>More than 3 work days + 24 hour transfer</b>			
No ruling on request		12	
Total untimely appointments / denials		12	0%

### *Waivers of Counsel*

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 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 12 sample misdemeanor cases. In 11 of the cases, defendants later entered uncounseled pleas. The absence of a ruling on a pending counsel request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and

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<sup>15</sup> Additional requests may have been made, but TIDC did not obtain magistrate warning forms for all sample cases.

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

invalid waiver (Art. 1.051(f-2)). Scurry 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).

### ***Additional Observation Concerning Withdrawals of Counsel Requests***

This report noted that all five sample defendants who attempted to request counsel at a misdemeanor docket later withdrew their requests for counsel. Under constitutional standards, a withdrawal of a counsel request is permissible, but it must be voluntarily, knowingly, and intelligently made.<sup>17</sup> Statutorily, Article 1.051(f-2) disallows the trial court from directing or encouraging the defendant to talk to the prosecutor while the defendant's request is pending.

## **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4**

### **Prompt Appointment**

**FINDING and RECOMMENDATION 2:** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. Scurry County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING and RECOMMENDATION 3:** The absence of a ruling in 12 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Scurry 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).

## **Conclusion**

TIDC appreciated the professionalism and assistance provided by Scurry County officials and staff. Scurry County officials appear willing to make necessary changes to improve the indigent defense system. TIDC stands ready to provide technical assistance to the County in addressing issues raised in the report. As mandated by statute, TIDC will continue to monitor the County's progress on meeting the requirements of the Fair Defense Act.

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<sup>17</sup> 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).

## **Summary of Findings and Recommendations**

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

**FINDING AND RECOMMENDATION 1:** Article 15.17(a) requires requests for counsel to be transmitted to the courts within 24 hours of the requests being made. Scurry County must ensure that whenever a request for counsel is made at the Article 15.17 hearing, the arrestee is provided with reasonable assistance in completing financial paperwork. The request and financial paperwork must be sent to the courts within 24 hours of the request being made.

**FINDING and RECOMMENDATION 2:** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. Scurry County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING and RECOMMENDATION 3:** The absence of a ruling in 12 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Scurry 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).

## Appendix: Methods to Transmit Counsel Requests to the Courts

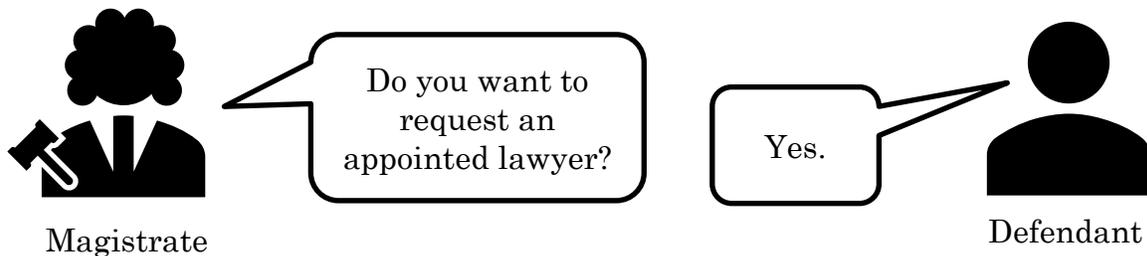
Under Article 15.17(a) of the Code of Criminal Procedure, magistrates must transfer requests for counsel to the appointing authority within 24 hours of receiving them. Counties have three main methods for transferring requests from a jail to a court:



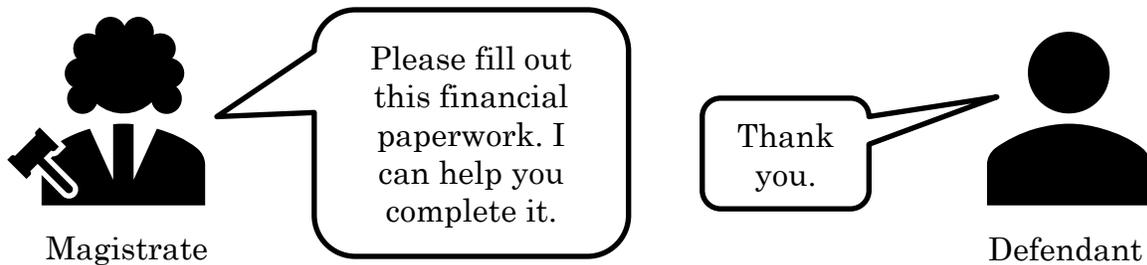
Misdemeanor arrests go to the county court and felony arrests go to the district court.

### Example Procedure

#### **Step 1: Take the request.**



#### **Step 2: Ensure financial paperwork is promptly completed.**



#### **Step 3: Transmit the request to the court.**

