



Texas Indigent Defense Commission

Policy Monitoring Follow-up Review -- Zavala County

September 24, 2013



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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

FY2009 Review

The Commission conducted an initial policy monitoring review of Zavala County in FY2009 with an on-site visit made on October 15, 2008 and issued a report on November 24, 2008. The report made three recommendations:

1. The magistrate warning form needed to include a space to document requests for counsel.
2. Methods for documenting requests for counsel, providing assistance with paperwork, and transmitting requests to the appointing authority needed to be developed.
3. Counsel needed to be appointing in a timely manner.

Commission staff made a drop-in visit on December 3, 2009 to assist the County in responding to the report, and Zavala County responded to our monitoring report on December 4, 2009. The County response noted that the magistrate warning form had been updated to include a space to request counsel. The response further noted that once financial information is completed, that the information is sent to the county judge who rules on requests within 24 hours of receipt.

On January 9, 2013 the policy monitor sent a letter to the County stating that in its FY2012 Indigent Defense Expense Report that the County reported no misdemeanor cases paid for the year. This data was worrisome because the data would seem to indicate that recommendations from the FY2009 report had not been implemented. Commission staff, Bryan Wilson and Joel Lieurance, made a drop-in visit on January 29, 2013 and discussed the letter with the county judge and the county auditor. The judge stated that he appointed counsel for misdemeanor cases in FY2012 but that counsel did not request reimbursement for attorney fees. Staff replied that the Commission would conduct a follow-up monitor review to verify that the County's response to the FY2009 report had been implemented.

Overview of 2013 Follow-up Monitoring Review

The policy monitor, Joel Lieurance, conducted the follow-up review with a visit to Zavala County on August 27, 2013. The purpose of this review was to examine whether the recommendations from the FY2009 report had been addressed. During the on-site review, the monitor met with the county judge and two justices-of-the-peace. The monitor analyzed a sample of eighteen felony case files and fifteen misdemeanor case files that were disposed in CY2013.

Status of Recommendations from November 2009 Review

Zavala County must respond to each recommendation that has not been successfully addressed with a detailed action plan describing how it will resolve each issue.

November 2009 Recommendation 1: The County must update its magistration form to comply with Article 15.17(e) and with its indigent defense plan. The new form must state whether the individual is requesting counsel. *Successfully addressed.*

November 2009 Recommendation 2: Pursuant to Article 15.17, the defendant must be informed of his/her right to appointed counsel and must be asked whether or not he/she is requesting court appointed counsel. This request must be documented. The resulting determination of whether counsel is assigned or indigence denied must also be documented. Procedures for assisting with requests for counsel and for transferring these requests to the appointing authority must be established to meet the requirements of both the indigent defense plan and Article 15.17. These procedures apply to all persons receiving the Article 15.17 hearing (felonies and class A and B misdemeanors). *Not Addressed.*

November 2009 Recommendation 3: A process needs to be put in place to ensure that those who have requested counsel receive a determination of indigence within statutory timelines. 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. 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. *Not addressed when counsel is requested at the Article 15.17 hearing.*

Additional Recommendation from September 2013 Review

September 2013 Recommendation: The court must rule upon all requests for counsel prior to any waiver of counsel in accordance with Article 1.051(f-2) of the Code of Criminal Procedure.

Judicial Council Monthly Court Activity Reports

Prior to the review, the monitor examined justice court data reported to the Office of Court Administration (OCA) as part of the Texas Judicial Council Monthly Court Activity Reports. This data indicated that between July 2012 and June 2013 justices-of-the-peace in Zavala County had conducted Article 15.17 hearings for 62 felony offenses and 272 misdemeanor offenses. Of these hearings, zero felony arrestees requested counsel, and five misdemeanor arrestees requested counsel. See the following table. If these reports are accurate, it is a sign that some arrestees are able to request counsel at the Article 15.17 hearing, but is also a sign that very few people are requesting counsel. Many justice courts have had difficulty completing these reports, and so the accuracy of the data is in question.

Table 1: Justice Court Reports (July 2012 – June 2013)

Jurisdiction	Felony Requests	Felony Warnings	Percent Felony Requests	Misdemeanor Requests	Misdemeanor Warnings	Percent Misdemeanor Requests
JP1	No reports		N/A	No reports		N/A
JP 2	0	36	0.0%	5	128	3.9%
JP 3	0	26	0.0%	0	144	0.0%
JP 4	0	0	N/A	0	0	N/A
Zavala Combined	0	62	0.0%	5	272	1.8%
Statewide JP Reports	28,911	100,271	28.8%	33,224	137,685	24.1%

Case File Review

To ascertain whether the recommendations from the FY2009 review had been addressed, the monitor analyzed a sample of eighteen felony case files and fifteen misdemeanor case files. In the initial review the monitor found that magistrate warnings were not part of the case file, and requested that these forms be gathered for this review.

Felony Cases

Of the eighteen felony case files that were part of the monitor's sample, the monitor threw out five because they were for motions to revoke probation whose original case had been filed more than two years ago. Of the remaining thirteen felony cases examined, six contained a magistrate warning form for the offense in question. Two of these magistrate warning forms stated that the defendant did not request counsel. The other four magistrate warning forms did not mark whether the defendant requested counsel.

Of the thirteen cases examined by the monitor, all were disposed with appointed counsel. Since there were no documented requests for counsel at the Article 15.17 hearing, requests for counsel were based upon the date noted on the affidavit of indigence. Based upon this date, all appointments of counsel were timely, and twelve of the thirteen appointments were made on the date of the request (most likely in court).

In five of the felony cases, counsel did not submit a request for reimbursement of attorney fees. This observation is in line with the county judge's statement that some appointed attorneys do not request payment.

Misdemeanor Cases

The monitor examined fifteen misdemeanor case files. Fourteen of these cases contained a magistrate warning form for the offense in question. Three of these cases showed that the defendant requested counsel at the Article 15.17 hearing; six did not request counsel at the Article 15.17 hearing; five forms did not contain a mark as to whether the defendant had requested counsel.

Of the fifteen misdemeanor cases examined, thirteen went pro se, and two had appointed counsel. The two appointments of counsel were for defendants who requested counsel in court and not at the Article 15.17 hearing. The three cases where counsel was requested at the Article 15.17 hearing did not receive appointed counsel and pled pro se without a denial of indigence. Two of these three cases included a comment on the magistrate warning form stating that the defendant needed paperwork (seeming to indicate that affidavits of indigence were not provided for the requesting defendant).

Summary of Case File Review

Table 2: Summary of Case Files Examined

	Felony Case Files Examined	Misdemeanor Case Files Examined
Requested Counsel at Article 15.17 Hearing	0	3
Did Not Request Counsel at Article 15.17 Hearing	2	6
No Mark on Magistrate Warning Form Indicating Whether the Defendant Requested Counsel	4	5
Requests for Counsel	13	5
Appointments of Counsel	13	2
Denials of Indigence	0	0
Timely Determinations of Indigence	13	2
Pro Se Cases	0	13
Cases with Appointed Counsel	13	2
Cases with Retained Counsel	0	0

While the magistrate warning form now includes a space to note a request for counsel, some forms were not marked as required by Article 15.17(e) of the Code of Criminal Procedure. When defendants had requested counsel at the Article 15.17 hearing, processes did not appear to be in place to provide paperwork to the defendant and then to transmit the paperwork to the appointing judge within 24 hours of the request. Such processes must be put in place. In those instances when defendants request counsel, but later plead pro se without a denial of indigence, the associated waiver of counsel is presumed invalid under Article 1.051(f)-(f-2). Article 1.051(f) - (f-2) states:

*(f) 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**.*

(f-1) In any adversary judicial proceeding that may result in punishment by confinement, the attorney representing the state may not:

- (1) initiate or encourage an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel; or*
- (2) communicate with a defendant who has requested the appointment of counsel, 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:*

(A) has been given a reasonable opportunity to retain and has failed to retain private counsel; or

(B) waives or has waived the opportunity to retain private counsel.

(f-2) 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.

Processes must be put in place to identify all requests for counsel. Prior to any waiver of counsel, pending requests for counsel must be denied.

Status of November 2009 Recommendation 1: Successfully addressed. The County has updated its magistration form, complying with Article 15.17(e) and with its indigent defense plan. The new form includes a place to note whether counsel is being requested.

Status of November 2009 Recommendation 2: Not addressed. Pursuant to Article 15.17, the defendant must be informed of his/her right to appointed counsel and must be asked whether or not he/she is requesting court appointed counsel. This request must be documented. The resulting determination of whether counsel is assigned or indigence denied must also be documented. Procedures for assisting with requests for counsel and for transferring these requests to the appointing authority must be established to meet the requirements of both the indigent defense plan and Article 15.17. These procedures apply to all persons receiving the Article 15.17 hearing (felonies and class A and B misdemeanors).

Status of November 2009 Recommendation 3: Not addressed when counsel is requested at the Article 15.17 hearing. A process needs to be put in place to ensure that those who have requested counsel receive a determination of indigence within statutory timelines. 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. 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.

September 2013 Recommendation: The court must rule upon all requests for counsel prior to any waiver of counsel in accordance with Article 1.051(f-2) of the Code of Criminal Procedure.

Conclusion

Zavala County has made some progress in addressing past recommendations. Additional work must be done. Magistrates must ask all arrestees (for class B misdemeanor offenses and higher) whether or not they are requesting appointment of counsel. Magistrates must note whether counsel is requested, ensure that immediate assistance with paperwork is provided, and then ensure that requests are transmitted to the appointing authority within 24 hours of the request being made. The court must rule upon all requests for counsel. A system where the appointing court can monitor whether defendants have requested counsel at the Article 15.17 hearing may be necessary to ensure that all requests for counsel are ruled upon.

The monitor thanks Zavala County officials and staff for their cooperation with this review. Zavala 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 Commission findings.