



Policy Monitoring Follow-up Review – Zavala County

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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

November 2008 Initial Monitoring Review

In November 2008, Texas Indigent Defense Commission (Commission) staff issued a policy monitoring report of Zavala County's indigent defense practices. The policy monitoring report made three recommendations:

1. The magistrate warning form needed to include a space to document requests for counsel.
2. Methods needed to be developed to: a) document requests for counsel; b) provide assistance with paperwork; and c) transmit requests to the appointing authority.
3. Counsel needed to be appointing in a timely manner.

Zavala County's response noted the magistrate warning form had been updated to include a space to request counsel. The response further noted that once paperwork needed for assessing indigence is completed, 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, the county reported zero misdemeanor cases paid for the year. This data was worrisome because the data would seem to indicate the recommendations from the FY2009 monitoring report had not been implemented. Commission staff made an informal visit to the county, and the county judge stated that he appointed counsel for misdemeanor cases in FY2012, but counsel did not request reimbursement for attorney fees. Staff replied that the Commission would conduct a follow-up monitor review to verify the county's response to the FY2009 report had been implemented.

September 2013 Follow-up Monitoring Review

Commission staff conducted a follow-up monitoring review and issued a report in September 2013. This report found the county had updated its magistrate warning form to include a space to request counsel. However, the initial report's two other recommendations had not been addressed.¹ In addition, the report found that some misdemeanor arrestees who had requested counsel did not have their requests ruled upon, and they later entered uncounseled pleas. Article 1.051(f-1) of the Code of Criminal Procedure requires all requests to be ruled upon prior to a defendant's communication with the state's attorney.

Zavala County responded to the 2013 report by creating forms documenting that arrestees had received financial paperwork for requesting counsel and that the paperwork had been transmitted to the appointing authority. This documentation was meant to ensure that requests for counsel would not be lost.

¹ The two other recommendations cover issues for providing reasonable assistance to arrestees in completing the paperwork to request counsel, the prompt transmission of those requests to the court, and for the timely appointment of counsel.

Current Review

On July 17 and 20, 2017 and on September 13, 2017, Commission staff members Joel Lieurance, Brandon Bellows, and Scott Ehlers (collectively, “the monitor”) visited Zavala County to conduct a second follow-up review of the county’s indigent defense practices. The purpose of this review was to examine whether Zavala County successfully addressed the findings and recommendations from the previous reports. Recommendations that must be addressed are set inside a text box. A full summary of recommendations that have been made in the review process is listed in an earlier portion of this report. For this report, the monitor examined:

- 41 felony and 41 misdemeanor case files;²
- Magistrate warning records maintained by justices of the peace;
- Data reported to the Office of Court Administration (OCA) as part of its monthly Judicial Council Monthly Court Activity Reports; and
- Data reported to the Commission as part of its Indigent Defense Expense Report.

Statistics Showing Requests for Counsel from the Article 15.17 Hearing

In the 2013 review, the monitor examined data reported by justice courts to OCA, and observed that several judges did not realize OCA was collecting summary totals of counsel requests made at the Article 15.17 hearing. In the current review, the monitor found that the justices of the peace are now generally reporting counsel requests made at the Article 15.17 hearing. For FY2016, these reports indicated that arrestees made 76 felony requests for counsel and 117 misdemeanor requests for counsel at Article 15.17 hearings.

Table 1: Justice Court Reports (Sept. 2015 – August 2015)

Court	Felony Requests	Felony Warnings	% Felony Requests	Misd. Requests	Misd. Warnings	% Misd. Requests
JP 1	0	0	N/A	0	2	0%
JP 2	20	38	52.6%	31	145	21.4%
JP 3	56	65	86.2%	86	194	44.3%
JP 4	0	0	N/A	0	0	N/A
Zavala Combined	76	103	73.8%	117	341	34.3%

² The sample used FY2016 cases (filed between October 2015 and September 2016).

Timeliness of Indigence Determinations

When an arrestee is brought to an Article 15.17 hearing, the magistrate must ask the arrestee if he/she wants to request counsel. If the arrestee requests counsel, the magistrate must ensure reasonable assistance in completing the application, and must transmit the request and accompanying forms to the appointing authority within 24 hours of the request being made.³ Upon receipt of the counsel request, the court (appointing authority) has three working days to determine indigence, and appoint counsel for those determined to be indigent.⁴ The court cannot delay the appointment of counsel because the defendant makes bail.⁵

In response to the September 2013 report, the county devised a practice to track and rule on counsel requests. With this practice, jailers would document that they provided financial forms to arrestees requesting counsel and that they forwarded those forms to the courts. The monitor found several documentation sheets (some from magistrate records and some from the case files), and the presence of these records indicates that magistrates are ensuring that financial paperwork is promptly completed and transmitted to the appointing courts.

Felony Cases

To assess the timeliness of Zavala County's appointment procedures in felony cases, the monitor examined the time from request for counsel until appointment of counsel 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.⁶ The monitor examined 41 cases filed in FY2016 and found 34 requests for counsel. Counsel was appointed in a timely manner in just under 25% of cases. This falls below the Commission's threshold for presuming a jurisdiction's practices ensure timely appointment of counsel (90% threshold).⁷ Appointment of counsel was timely when the request was made in court, but was not timely when the request was made at an earlier time. To remedy this issue, methods must be put in place to promptly obtain requests for counsel made at the Article 15.17 hearing and to then determine indigence and rule on those requests within three working days.

³ Tex. Code Crim. Proc. art. 15.17(a).

⁴ Tex. Code Crim. Proc. art. 1.051(c).

⁵ Tex. Code Crim. Proc. art. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 991 (2008).

⁶ 1 TEX. ADMIN. CODE § 174.28.

⁷ The monitor obtained magistrate warning forms for 30 of the 41 cases examined.

Table 2: Times to Appointment in Felony Cases

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	34	
Request for counsel ruled upon in 'x' workdays		
0 workdays	7	20.6%
1 workday + 24 hours allowed to transmit a request	1	2.9%
2 workdays + 24 hours transmission	0	0.0%
3 workdays + 24 hours transmission	0	0.0%
Timely Rulings on Requests	8	23.5%
4 – 7 workdays + 24 hours transmission	1	2.9%
More than 7 workdays	23	67.6%
No ruling on request	2	5.9%
Total Untimely / No Rulings on Requests	26	76.5%

Misdemeanor Cases

To assess the timeliness of Zavala County's appointment procedures in misdemeanor cases, the monitor examined the time from request for counsel until appointment of counsel or denial of indigence in 41 cases. From the sample, the monitor found 18 requests for counsel. Counsel was appointed in a timely manner in just under 20% of cases. This falls below the Commission's 90% threshold for presuming a jurisdiction's practices ensure timely appointment of counsel.⁸ Counsel was appointed promptly when the request was made in court, but was not timely when made at an earlier time.

Table 3: Times to Appointment in Misdemeanor Cases

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel ⁹	16	
Request for counsel ruled upon in 'x' workdays		
0 workdays	3	18.8%
1 workday + 24 hours allowed to transmit a request	0	0.0%
2 workdays + 24 hours transmission	0	0.0%
3 workdays + 24 hours transmission	0	0.0%
Timely Rulings on Requests	3	18.8%
4 – 7 workdays + 24 hours transmission	0	0.0%
More than 7 workdays	3	18.8%
No ruling on request	10	62.5%
Total Untimely / No Rulings on Requests	13	81.2%

⁸ The monitor obtained magistrate warning forms for 19 of 41 sample cases.

⁹ Two requests for counsel from the sample were made from other counties. The monitor excludes these out-of-county requests from an analysis of a county's ability to make timely determinations of indigence.

Second Follow-up Recommendation 1: 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.

Status: *Not addressed when counsel is requested at the Article 15.17 hearing.*

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made.¹⁰ Article 1.051(f-1) requires the defendant waive the right to retain counsel prior to speaking with the prosecutor. If the defendant wishes to waive the right to counsel for purposes of entering a guilty plea or going to trial, Article 1.051(g) then requires a signed waiver that shall be filed with and become part of the record for the purpose of entering an uncounseled guilty plea.

Under Article 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. If the defendant has requested counsel, the court may not direct or encourage the defendant to communicate with the prosecutor unless the court has denied the request for counsel and after the denial the defendant has been given a reasonable opportunity to retain counsel and has failed to do so or has waived the opportunity to retain private counsel. If a defendant wishes to enter an uncounseled plea, he or she must voluntarily and intelligently sign a written waiver, and the language must substantially conform to 1.051(g).¹¹

¹⁰ 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.

¹¹ 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)

Ten sample misdemeanor cases did not contain a record showing a ruling on a counsel request.¹² In five of these cases, defendants entered uncounseled pleas. Four of the sample cases did not result in a conviction but were dismissed in exchange for a guilty plea in a case not included in the monitor's sample. Under Article 1.051(f-1)(2), there can be no communication between the unrepresented defendant (who has requested counsel) and the prosecutor unless the request for counsel has been denied.

Second Follow-up Recommendation 2: The court must rule upon all requests for counsel prior to any waiver of counsel in accordance with Article 1.051(f-1) and (f-2) of the Code of Criminal Procedure.

Status: *Not Addressed.*

Conclusion

The monitor appreciates the professionalism and assistance provided by Zavala County officials and staff. County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the county's transition and process improvements regarding the report's recommendations. If officials in Zavala County desire technical assistance training, please contact our office so we can make such arrangements.

¹² The monitor only obtained magistrate warnings corresponding to 19 of the 41 sample case files. If additional magistrate warning forms had been obtained, the total number of defendants who entered uncounseled pleas while having a pending request for counsel may have been higher.

Status of Monitoring Recommendations

Prior Recommendations Not Successfully Addressed by the Current Review.

Based on prior monitoring reviews, there were two recommendations that Zavala County needed to address in order to comply with state law and TIDC administrative rules. Zavala County must respond to the following recommendations that have not been addressed with a detailed action plan describing how it will resolve each issue.

Recommendation 1: 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.

Initial Year Made: 2008

Status: *Not addressed (with the October 2017 review) when counsel is requested at the Article 15.17 hearing.*

Recommendation 2: The court must rule upon all requests for counsel prior to any waiver of counsel in accordance with Article 1.051(f-1) and (f-2) of the Code of Criminal Procedure.

Initial Year Made: 2013

Status: *Not Addressed with the October 2017 review.*

Successfully Addressed Recommendations

Recommendation: 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.

Initial Year Made: 2008

Status: *Successfully addressed with the September 2013 review.*

Recommendation: 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 is 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).

Initial Year Made: 2008

Status: *Successfully addressed with the October 2017 review.*