



**Second Follow-up Policy Monitoring  
Review of Deaf Smith County's  
Indigent Defense Systems**

**July 2020**



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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 2013, TIDC conducted an informal review of Deaf Smith County's misdemeanor appointment procedures and found that requests for counsel at magistration were not transmitted to the county judge, so no counsel was appointed for unrepresented defendants. In March 2015, TIDC conducted a limited scope review and again found that requests were not transferred to the county judge. Defendants with pending counsel requests often entered uncounseled pleas. In August 2017, TIDC conducted a follow-up review and found that requests were transferred, but some were not ruled upon timely or never ruled upon by the county judge. In some cases, defendants who had requested counsel entered uncounseled pleas.

**Table 1: History of Monitoring Findings**

FDA Core Requirement	Description and Initial Year of Finding	Status before 2020 Review	
		Satisfied	Pending
4. Prompt Appointment	The timeliness of indigence determinations in sample misdemeanor cases did not meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2015)		✓
4. Prompt Appointment	Local procedures did not ensure requests for counsel were ruled upon prior to waivers of counsel. (2015)		✓
4. Prompt Appointment	The language on the waiver of counsel form did not closely match the language of Article 1.051(g). (2017)		✓

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b); 1 TEX. ADMIN. CODE § 174.28.

## **Current Review**

TIDC's policy monitoring rules require follow-up reviews of counties where the report included noncompliance findings.<sup>2</sup> TIDC staff members Kathleen Casey-Gamez and Scott Ehlers visited Deaf Smith County on August 21, 2019 to conduct the second follow-up review. The review focused on the ability to obtain appointed counsel in misdemeanor cases and examined the following core requirements of the Fair Defense Act:

**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.**

As sources of information for the review, TIDC observed a misdemeanor arraignment docket. TIDC examined misdemeanor case files, the local indigent defense plan, and the annual Indigent Defense Expenditure Report.

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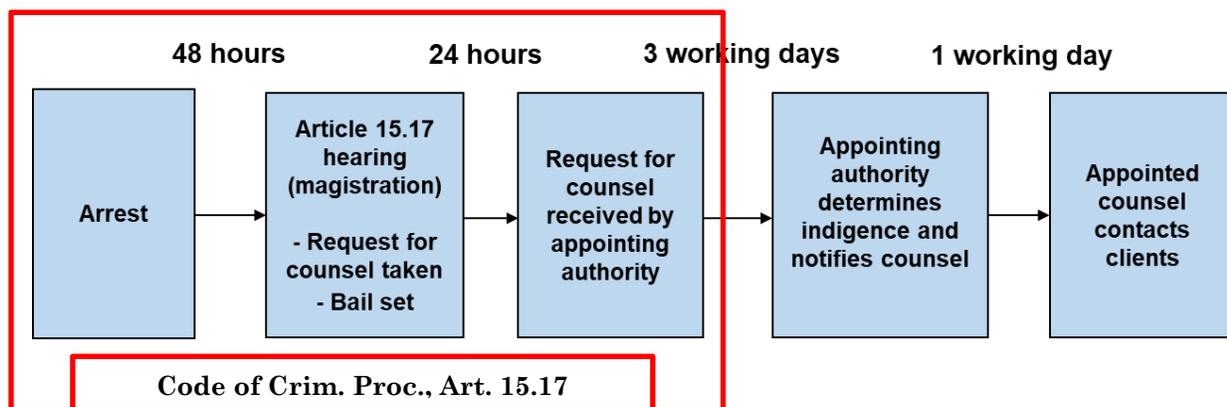
<sup>2</sup> 1 TEX. ADMIN. CODE § 174.28(d)(3).

## Program Assessment

### Requirement 1: Conduct Prompt and Accurate Article 15.17 Proceedings

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.<sup>3</sup> At this hearing, the magistrate must inform the accused of his or her right to counsel; inform the accused of the procedures for requesting counsel; and ensure the accused has reasonable assistance in completing the necessary forms for requesting assistance of counsel at the same time.<sup>4</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>5</sup> If an arrestee is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the arrestee were an arrested on an in-county warrant.<sup>6</sup>

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



Data reported to the TIDC and to the Office of Court Administration (OCA) indicate that a significant number of misdemeanor arrestees who go before a magistrate in Deaf Smith County request the appointment of counsel (see Table 1, below). Only about 1% of misdemeanor defendants ultimately receive appointed counsel. Statewide, about 46% of misdemeanor defendants receive appointed counsel.

<sup>3</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>4</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>5</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.18(a). A list of contacts to send counsel requests made by arrestees from out-of-county warrants is available at:

<http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

**Table 1: Deaf Smith County Court Misdemeanor Appointment Data<sup>7</sup>**

	2015	2016	2017	2018	Texas 2018
Misdemeanor Requests for Counsel Made to Justice of the Peace	216	201	186	148	n/a
Misdemeanor Cases Added (from OCA report)	590	542	709	679	467,851
Misdemeanor Cases Paid	27	10	7	8	214,494
% Misdemeanor Cases Defended with Appointed Counsel	5%	2%	1%	1%	46%

In previous reviews, there have been problems transmitting complete affidavits from the justice of the peace to the county courts. In 2015, there was no process to transmit affidavits from the justice of the peace to the county court. In 2017, TIDC found that the County had established a transmittal process, but the court ruled many of these affidavits were incomplete. For this review, TIDC examined case files to determine if requests were properly transferred and ruled upon. TIDC examined 40 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). Ten of the sample cases included a request for counsel. Nine (9) cases had a ruling and, in every case, counsel was denied. Eight (8) of nine denials noted the application was incomplete.

Article 15.17(a) of the Code of Criminal Procedure requires magistrates to take requests for counsel and “ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time.” TIDC’s case file review indicated that defendants may not have received reasonable assistance in several instances:

- One defendant submitted three affidavits, all of which were denied as incomplete without explanation.
- A defendant who was arrested for criminal trespass submitted two requests that stated that he was homeless and receiving public benefits from the MHMR. His application was denied twice as incomplete.
- Seven defendants who submitted requests never made bail, indicating that they may not have been financially able to retain counsel.
- Applications generally had most questions answered and were typed, making it unclear why they were denied as incomplete.

Deaf Smith County magistrates must ensure reasonable assistance in completing forms to request counsel.

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<sup>7</sup> The fiscal year for Misdemeanor Charges Added is from September to August. All other fiscal years go from October to September.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct Prompt and Accurate Article 15.17 Proceedings**

**FINDING 1:** Under Article 15.17(a) of the Code of Criminal Procedure, Deaf Smith County magistrates must ensure reasonable assistance in completing forms to request counsel.

***New Finding.***

**Requirement 2: Determine Indigence According to Standards Directed by the Indigent Defense Plan**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence. The local standards for determining indigence are set in each county’s indigent defense plans. The Deaf Smith indigent defense plan<sup>8</sup> states:

A defendant is considered indigent if the defendant is not financially able to employ counsel taking into account the nature of the criminal charge(s), the anticipated complexity of the defense, the estimated cost of obtaining competent private legal representation for the matter charged, *and the amount needed for the support of the defendant and the defendant’s dependents.* [emphasis added]

The plan later states that a person is considered indigent if their “net income [...] is below the latest available Federal Poverty Guidelines *for one person* [emphasis added],” which does not account for the amount needed to support dependents. Article 26.04(m) of the Code of Criminal Procedures allows “the number and age of dependents” to be factored into a determination of indigency and most, if not all, counties’ plans include this factor. Deaf Smith County must clarify the standard of indigence in its plan.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determine Indigence According to Standards Directed by the Indigent Defense Plan**

**FINDING 2:** Under Article 26.04(l) of the Code of Criminal Procedure, Deaf Smith County must clarify the standard of indigence in its plan.

***New Finding.***

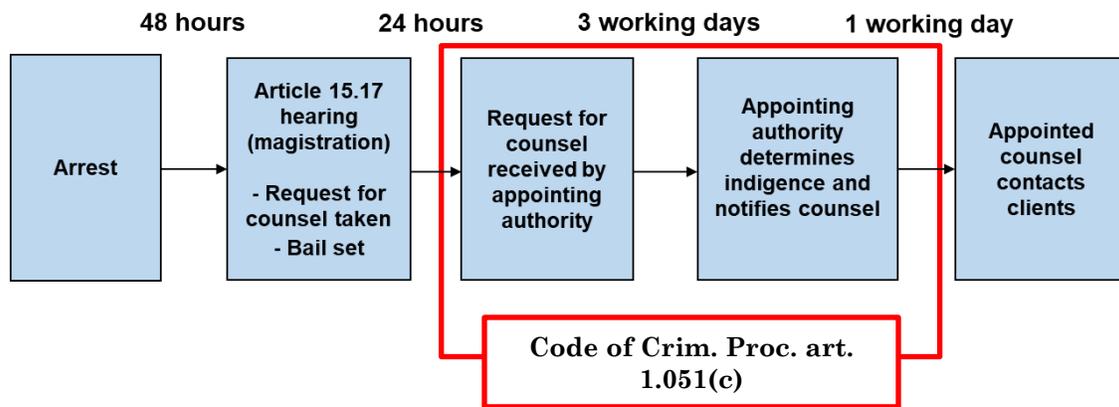
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<sup>8</sup> Deaf Smith County District and County Court Indigent Defense Plan, available at <https://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=371&ShowPending=1>.

## 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>9</sup> If a defendant is not represented by 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) at arraignment and any other judicial proceeding that may result in punishment by confinement, before the court directs or encourages the defendant to communicate with the attorney representing the state.

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



### *Timeliness of Appointments in Misdemeanor Cases*

To assess the timeliness of Deaf Smith County’s current appointment procedures in misdemeanor cases, TIDC staff examined 40 sample misdemeanor cases filed in FY2018 (October 2017–September 2018). None of the sample cases included a defendant having counsel. The sample contained 10 requests for counsel, 9 of which were made at the Article 15.17 hearing. Determinations of indigence were made in a timely manner in 9 of the 10 cases (**90% timely**).<sup>10</sup> This level of timeliness meets TIDC’s 90% threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel.

<sup>9</sup> See also 1 TEX. ADMIN. CODE § 174.28(c)(4) for TIDC rules on how the policy monitor measures prompt appointment of counsel.

<sup>10</sup> All requests that were ruled upon were denied.

**Table 3: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	40		
Total cases with a counsel request		10	
Appointment / denial of indigence occurred in:			
0 work days		3	
1 – 3 work days + 24 hour transfer		6	
<b>Total timely appointments / denials</b>		<b>9</b>	<b>90%</b>
More than 3 work days + 24 hour transfer		0	
No ruling on request		1	
Total untimely appointments / denials		1	10%

***Observation of a Misdemeanor Arraignment Docket***

TIDC observed a misdemeanor arraignment docket on August 21, 2019. The judge called defendants before him and asked each how he or she would like to plead. Prior to pleading, the court did not advise the defendant of the right to counsel or explain the procedures for requesting appointed counsel, but instead asked questions like, “Did you have time to get an attorney?” or “Did you have plenty of time to seek counsel if you want it?” If a defendant entered an oral guilty plea or a plea of true for a motion to revoke probation, the defendant was given paperwork to complete.

The paperwork given to each defendant included the charge against him or her, the possible range of punishment, and a waiver of counsel form.<sup>11</sup> The waiver of counsel form explained that the defendant has a right to ask the court for a lawyer if the defendant cannot afford one and listed some of the disadvantages of proceeding without counsel. Through the paperwork, the defendant entered an open plea, and “ask[ed] the court to set...punishment.” Once the paperwork was complete, the prosecutor offered the plea recommendation to the judge, the judge made a finding that the plea was voluntarily and intelligently made and pronounced the sentence against the defendant.

At the time of the 2017 review, defendants entering uncounseled pleas would sign waivers of counsel, but the waivers did not match the language of Article 1.051(g). For the current review, the waiver language now matches Article 1.051(g).

At the time of 2015 and 2017 reviews, defendants with pending requests for counsel never had their request ruled on, and some plead guilty with pending requests. This raised the possibility of a violation of Article 1.051(f-2), which requires the court to advise defendants of the right to counsel and rule on pending requests before directing them to

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<sup>11</sup> For defendants in arrears on fines and court costs, many case files included a waiver of the right to pay the costs and an election to discharge the fines and court costs through incarceration.

waive counsel and communicate with the prosecutor. For the current review, the court hearing misdemeanor cases failed to rule on a defendant's request for counsel in one sample misdemeanor case, and the defendant later entered an uncounseled plea. Since, according to TIDC's observations, uncounseled defendants in Deaf Smith County now enter open pleas with the court without having spoken to the prosecutor, there is not a violation Article 1.051(f-2).

This procedure, however, creates additional dangers and disadvantages of self-representation, because defendants are not aware of what their punishment will be before entering their plea. Defendants are also not informed of their right to counsel at the hearing until they waive it through the plea paperwork, after entering an initial oral guilty plea.<sup>12</sup> Under Article 1.051(f) and (g), a waiver of counsel must be voluntarily and intelligently made.

Deaf Smith County may consider taking additional precautions against invalid waivers of counsel by ensuring that defendants understand their right to retained or appointed counsel before entering an uncounseled plea to an unknown sentence. TIDC is attaching a form and questionnaire that Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties use to assist defendants in their decision to either seek counsel or represent themselves (see Appendix). The form notes some collateral consequences of a guilty plea. The questionnaire asks about the defendants' educational level and legal knowledge.

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<sup>12</sup> People who cannot understand English or who have intellectual disabilities may have particular difficulty with understanding the written advisal.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Appoint counsel promptly.**

**FINDING 3:** Deaf Smith County must implement procedures to make timely appointments or denials of counsel. Under Article 1.051(c) of the Code of Criminal Procedure, the court has three working days from receipt of request to appoint counsel for those deemed indigent.

***Successfully addressed.***

**FINDING 4:** Deaf Smith County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(2) of the Code of Criminal Procedure prohibits an attorney representing the state from communicating with a defendant who has requested the appointment of counsel unless the court has denied the request and subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or waives the opportunity to retain private counsel.

***Successfully addressed.***

**FINDING 5:** Defendants who enter uncounseled pleas must sign a written waiver that substantially conforms to the waiver from Article 1.051(g), and this waiver must become part of the record of the proceedings.

***Successfully addressed.***

## **Conclusion**

TIDC appreciated the professionalism and assistance provided by Deaf Smith County officials and staff. Deaf Smith 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.

## **Status of Findings and Recommendations**

**FINDING 1:** Under Article 15.17(a) of the Code of Criminal Procedure, Deaf Smith County magistrates must ensure reasonable assistance in completing forms to request counsel. *New Finding.*

**FINDING 2:** Under Article 26.04(l) of the Code of Criminal Procedure, Deaf Smith County must clarify the standard of indigence in its plan. *New Finding.*

**FINDING 3:** Deaf Smith County must implement procedures to make timely appointments or denials of counsel. Under Article 1.051(c) of the Code of Criminal Procedure, the court has three working days from receipt of request to appoint counsel for those deemed indigent. *Successfully Addressed.*

**FINDING 4:** Deaf Smith County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(2) of the Code of Criminal Procedure prohibits an attorney representing the state from communicating with a defendant who has requested the appointment of counsel unless the court has denied the request and subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or waives the opportunity to retain private counsel. *Successfully Addressed.*

**FINDING 5:** Defendants who enter uncounseled pleas must sign a written waiver that substantially conforms to the waiver from Article 1.051(g), and this waiver must become part of the record of the proceedings. *Successfully Addressed.*

**Appendix – Judge’s Explanation of Rights to Defendants Without an Attorney**

(Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties)

Cause Number: \_\_\_\_\_

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY, TEXAS

**JUDGE'S EXPLANATION OF RIGHTS  
TO DEFENDANTS WITHOUT ATTORNEY**

As a defendant in a criminal case, you have three options:

1. You may hire an attorney;
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you;
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be reset to give you time to do so.

If you want an attorney and do *not* have the money to hire one, you must fill out a financial questionnaire so that the Court can determine whether or not you qualify for court-appointed counsel.

You may not speak to the prosecutor about your case unless you sign a written waiver of your right to be represented by an attorney.

Be aware that there are dangers in self-representation. You face possible jail time of up to one year for Class A, and six months for Class B misdemeanors. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, service on a jury in the future, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens (including possible deportation, exclusion from reentry, and denial of naturalization benefits), suspension of driver's license, professional licenses, and employment.

If you wish to represent yourself, you must mark the appropriate space below and answer the attached 'Self-Representation' Questionnaire. If you are permitted by the Court to proceed without an attorney, you may change your mind at any time and immediately request that an attorney be appointed by the Court.

\_\_\_\_\_  
Judge Presiding

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**DEFENDANT'S CHOICE** [mark initials next to only **ONE** choice]

\_\_\_\_\_ I want to reset this case to hire my own attorney.

\_\_\_\_\_ I have hired an attorney, whose name is: \_\_\_\_\_

\_\_\_\_\_ I want to apply for court-appointed counsel.

\_\_\_\_\_ I have a court-appointed attorney, whose name is: \_\_\_\_\_

\_\_\_\_\_ I want to waive my right to an attorney and represent myself [COMPLETE THE ATTACHED QUESTIONNAIRE BEFORE SUBMITTING THIS FORM].

Defendant: \_\_\_\_\_ Date: \_\_\_\_\_

## Right to Self-Representation Questionnaire

Defendants have a right to represent themselves if they knowingly and willingly waive the right to appointed counsel. *Faretta v. Cal.*, 422. U.S. 806 (1975). The Court may grant your request to proceed without a lawyer if you are able to show the ability to effectively do so.

Please answer the following questions regarding your ability to represent yourself.

1. Do you understand that under the 6<sup>th</sup> Amendment to the Constitution of the United States you have a right to assistance of counsel? \_\_\_\_\_
2. Do you understand that you have the right to have counsel appointed for you if you cannot afford to employ counsel? \_\_\_\_\_
3. Do you understand how to conduct legal research? \_\_\_\_\_
4. Have you ever studied law? \_\_\_\_\_
5. Are you familiar with the Rules of Evidence? \_\_\_\_\_
6. Are you familiar with the Code of Criminal Procedure? \_\_\_\_\_
7. Do you understand the rules of preservation of error? \_\_\_\_\_
8. Are you familiar with and do you understand that you must abide by the Rules of Appellate Procedure? \_\_\_\_\_
9. Do you understand what constitutes proper voir dire? \_\_\_\_\_
10. Do you understand what should, and should not be contained in the court's charge to the jury? \_\_\_\_\_
11. Have you ever before represented yourself in a criminal action? \_\_\_\_\_
12. Did you finish high school? \_\_\_\_\_
13. Do you have a college degree? \_\_\_\_\_
14. Do you understand that you will be on your own and will receive no advice, guidance or help from the court? \_\_\_\_\_
15. Do you understand the appellate court will not create arguments for you? \_\_\_\_\_
16. Do you understand that it is generally unwise to represent yourself? \_\_\_\_\_
17. Understanding these questions, is it still your desire to represent yourself and give up your right to be represented by an attorney? \_\_\_\_\_
18. Is your decision freely and voluntarily made? \_\_\_\_\_

Signed on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Cause No: \_\_\_\_\_

\_\_\_\_\_  
Sign your Name here