



# **Follow-up Policy Monitoring Review of Gaines County's Indigent Defense Systems**

**June 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.

## **Contents**

Background .....	4
Current Review .....	5
Program Assessment .....	6
Requirement 1: Conduct Prompt and Accurate Article 15.17 Proceedings .....	6
Requirement 4: Appoint Counsel Promptly .....	7
Conclusion .....	11
Recommendations from the June 2020 Review .....	12

## Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) through on-site reviews.<sup>1</sup> These reviews seek to promote local compliance and accountability with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes.

TIDC conducted an initial review of Gaines County in 2013. The review assessed Gaines County's compliance with six core requirements of the Fair Defense Act<sup>2</sup> and made nine compliance recommendations. TIDC conducted a follow-up review in 2017 and found that four recommendations had been addressed and five had not.

**Table 1: History of Monitoring Findings**

FDA Core Requirement	Description and Year of Finding	Status before 2020 Review	
		Satisfied	Pending
1. Prompt Magistration	Gaines County must implement procedures to ensure assistance in completing the necessary forms for requesting counsel at the time of the Article 15.17 hearing. (2013, 2017)		✓
1. Prompt Magistration	Gaines County must implement procedures to transmit all requests for counsel to the appointing authority within 24 hours of the request. (2013, 2017)		✓
4. Prompt Appointment	Gaines County and the 106th District Court must implement procedures to ensure that determinations of indigence in felony cases fall within the time frames set by the FDA. (2013, 2017)		✓
4. Prompt Appointment	Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases. In particular, the court must rule upon all requests for counsel. (2013, 2017)		✓
4. Prompt Appointment	Gaines County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. The procedure must provide that the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises of the right to counsel and explains the process for requesting counsel. Article 1.051(f-1)(1), Code of Criminal Procedure prohibits an attorney		✓

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

<sup>2</sup> 1 TEX. ADMIN. CODE § 174.28.

	representing the state from initiating or encouraging a waiver of counsel from an unrepresented defendant. (2013, 2017)		
4. Prompt Appointment	Pro se pleas must include written waivers of counsel as required by Article 1.051(f), Code of Criminal Procedure. (2013)	✓ (2017)	
4. Prompt Appointment	The county court must follow the procedures set in its indigent defense plan and in Article 1.051(f-2) and explain the procedures for requesting counsel to defendants appearing in court without counsel.	✓ (2017)	
5. Attorney Selection Process	The parties to the contract for felony defense services must follow the terms of the contract according to the contract's caseload limitations. Excessive caseloads could compromise the quality of representation provided for indigent clients. (2013)	✓ (2017)	
5. Attorney Selection Process	The County must ensure that procedures are in place to meet the requirements of 1 TAC § 174.25 and Article 26.05(c) so that itemized fee vouchers are submitted and approved by the appointing authority prior to payment by the financial officer. (2013)	✓ (2017)	

## Current Review

TIDC's policy monitoring rules require follow-up reviews of counties where the report included noncompliance findings.<sup>3</sup> TIDC staff members Joel Lieurance and Claire Buetow visited Gaines County on February 18, 2020 to review misdemeanor and felony case files and magistrate forms and to interview local officials.

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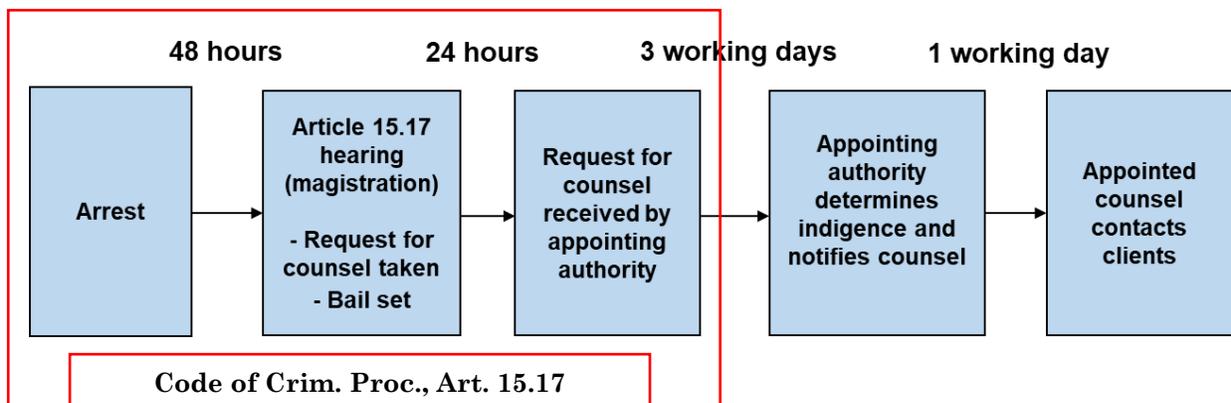
<sup>3</sup> 1 TEX. ADMIN. CODE § 174.28(d)(3).

## 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>4</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>5</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>6</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>7</sup>

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



In Gaines County, defendants are magistrated at the jail by the Justices of the Peace for Precincts 1 and 2, and occasionally by the County Judge. TIDC observed magistration at the jail on February 20, 2020. According to TIDC's observations, file review, and Office of Court Administration data, defendants are informed of their rights and can request counsel at magistration.

<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. 15.17(a).

<sup>7</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 2: Texas Judicial Council Monthly Court Activity Reports for  
Gaines County in FY2019 (Oct. 2018 – Sept. 2019)**

<b>Court</b>	<b>Misd. Requests</b>	<b>Misd. Warnings</b>	<b>Misd. Req. Rate</b>	<b>Felony Requests</b>	<b>Felony Warnings</b>	<b>Fel. Req. Rate</b>
JP1	104	162	64%	53	71	75%
JP2	100	208	48%	90	150	60%

As in the 2013 and 2017 reviews, when a person who was arrested requests counsel, they are provided financial forms to complete in their cells. They are not provided assistance in completing the forms, as required by Article 15.17(a).

Once arrested an person completes the form, they have it notarized at the jail, and the jail transmits it to the County or District Judge. Since 2017, the jail has scanned and emailed the forms rather than mailing them, and judges have date-stamped the applications when they receive them. TIDC was not able to obtain a sufficient sample of timestamped applications, but its case file examination revealed several applications that the Court received more than 24 hours allowed by Article 15.17(a), and sometimes beyond the times required for the Court to rule on the request.

Gaines County must implement procedures to complete and transfer the necessary forms within the 24-hour timeline.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings.**

**2020 RECOMMENDATION 1:** Gaines County must implement procedures to ensure assistance in completing the necessary forms for requesting counsel at the time of the Article 15.17 hearing. *Issue Pending.*

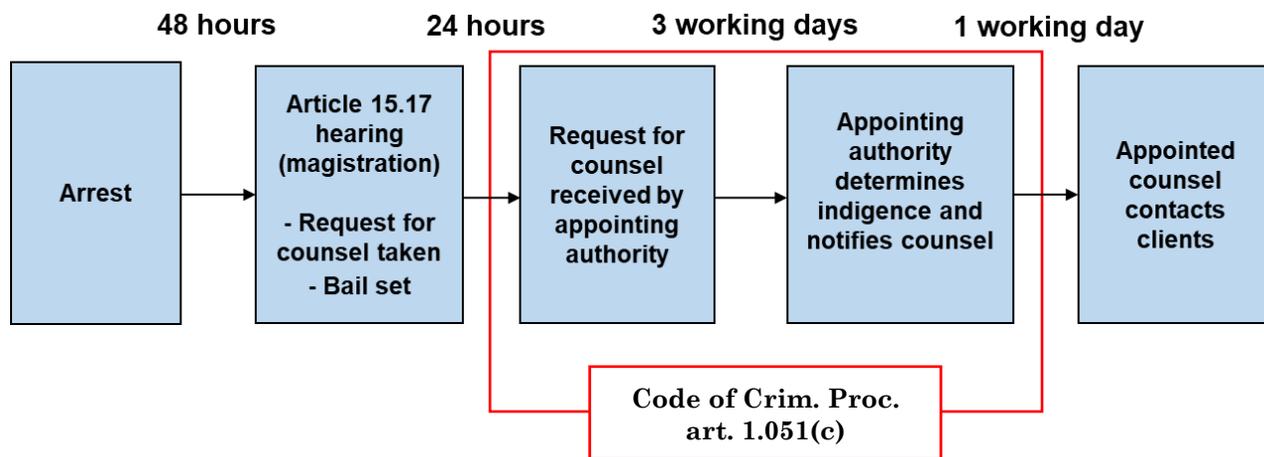
**2020 RECOMMENDATION 2:** Gaines County must implement procedures to transmit all requests for counsel to the appointing authority within 24 hours of the request. *Issue Pending.*

**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. 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>8</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 bond. Once adversarial judicial proceedings have been initiated, courts must provide a method for defendants to request and obtain appointed counsel.<sup>9</sup>

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



***Timeliness of Appointment in Felony Cases***

To assess the timeliness of Gaines County’s current appointment procedures in felony cases, TIDC staff examined 61 sample felony cases filed in FY2019 (October 2018 – September 2019). Counsel was appointed timely in 14 of 22 of cases with a request for counsel<sup>10</sup> (**64% timely**), which does not meet TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel in felony cases. Gaines County must implement procedures to ensure timely determinations of indigence in felony cases.

<sup>8</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

<sup>9</sup> 1 Tex. Admin Code § 174.51.

<sup>10</sup> If the defendant did not request counsel at magistration, did not retain counsel, and the court later appointed counsel, TIDC counts it as a request for counsel and timely appointment at arraignment (0 work days); this appears to be the regular practice documented in some files. If the defendant requested counsel at magistration and counsel had previously been appointed, TIDC also counts it as a timely appointment (0 work days).

**Table 3: Times to Appointment in Felony Cases in Gaines County (FY2019)**

	Sample Size	Number from sample	Percent
Number of case files examined	61		
Total cases with a counsel request <sup>11</sup>		22	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		11	
1 – 3 work days + 24 hour transfer		3	
<b>Total timely appointments / denials</b>		<b>14</b>	<b>64%</b>
More than 3 work days + 24 hour transfer		8	
No ruling on request		0	
Total untimely appointments / denials		8	36%

***Timeliness of Appointments in Misdemeanor Cases***

To assess the timeliness of Gaines County’s current appointment procedures in misdemeanor cases, TIDC staff examined 74 sample misdemeanor cases filed in FY2019 (October 2018 – September 2019). Counsel was appointed timely in 2 of 31 cases with a request for counsel<sup>12</sup> (**6% timely**), which does not meet TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel in misdemeanor cases.

Interviews with court staff indicated that applications received by the court may not be transmitted to the judge for approval or denial of counsel within statutory timelines, due to prioritization of other court business. Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases.

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<sup>11</sup> TIDC excluded cases from this analysis if TIDC found an appointment of counsel but could not match a magistrate warning form with the case.

<sup>12</sup> See previous note.

**Table 4: Times to Appointment in Misdemeanor Cases in Gaines County (FY2019)**

	Sample Size	Number from sample	Percent
Number of case files examined	74		
Total cases with a counsel request <sup>13</sup>		31	
Appointment / denial of indigence occurred in:			
0 work days		2	
1 – 3 work days + 24 hour transfer		0	
<b>Total timely appointments / denials</b>		<b>2</b>	<b>6%</b>
More than 3 work days + 24 hour transfer		5	
No ruling on request		24	
Total untimely appointments / denials		29	94%

***Waivers of Counsel in Misdemeanor Cases***

The County Court failed to rule on a defendant’s request for counsel in 24 sample misdemeanor cases. In eight cases, the defendant later entered an uncounseled plea. The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Gaines 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).

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4**

**Prompt Appointment of Counsel**

**2020 RECOMMENDATION 3:** Gaines County must implement procedures to ensure timely determinations of indigence in felony cases. ***Issue Pending.***

**2020 RECOMMENDATION 4:** Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases. ***Issue Pending.***

**2020 RECOMMENDATION 5:** As required by Article 1.051(f-2), Gaines County must rule upon all requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. In order to rule upon all requests for counsel, the courts must ensure procedures are in place to: (1) receive all requests, and (2) appoint counsel or document the denial of indigence. ***Issue Pending.***

<sup>13</sup> TIDC excluded cases from this analysis if TIDC found an appointment of counsel but could not match a magistrate warning form with the case.

## **Conclusion**

TIDC thanks Gaines County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.<sup>14</sup> TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

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<sup>14</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

## **Recommendations from the June 2020 Review**

The County must provide a written response to each of the June 2020 report recommendations. TIDC stands ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

### **Core Requirement 1. Conduct prompt and accurate magistration proceedings.**

**2020 RECOMMENDATION 1:** Gaines County must implement procedures to ensure assistance in completing the necessary forms for requesting counsel at the time of the Article 15.17 hearing. *Issue Pending.*

**2020 RECOMMENDATION 2:** Gaines County must implement procedures to transmit all requests for counsel to the appointing authority within 24 hours of the request. *Issue Pending.*

### **Core Requirement 4. Appoint counsel promptly.**

**2020 RECOMMENDATION 3:** Gaines County must implement procedures to ensure timely determinations of indigence in felony cases. *Issue Pending.*

**2020 RECOMMENDATION 4:** Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases. *Issue Pending.*

**2020 RECOMMENDATION 45:** As required by Article 1.051(f-2), Gaines County must rule upon all requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. In order to rule upon all requests for counsel, the courts must ensure procedures are in place to: (1) receive all requests and (2) appoint counsel or document the denial of indigence. *Issue Pending.*