



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

**April 2022**



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**Mission:** Protecting the right to counsel, improving public defense.

## **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.

### **November 2008 Initial Monitoring Review**

In November 2008, TIDC 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 appointed 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 paperwork would be sent to the county judge who rules on requests within 24 hours of receipt.

### **September 2013 Follow-up Monitoring Review**

TIDC 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, there were still issues with ensuring defendants received assistance in completing affidavits of indigence and with transmitting affidavits to the appointing authority. 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.

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

### **October 2017 Second Follow-up Monitoring Review**

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

TIDC staff conducted a second follow-up monitoring review and issued a report in October 2017. This report found the county had addressed front-end issues to ensure affidavits of indigence were completed and counsel requests were promptly sent to the appointing courts. However, issues with untimely appointments remained, and TIDC found uncounseled pleas involving defendants who had requested counsel without a ruling on the request.

**Table 1: History of Monitoring Findings**

FDA Core Requirement	Description and Initial Year of Finding	Status before 2022 Review	
		Satisfied	Pending
1. Prompt Magistration	The magistrate warning form did not include a space to record a counsel request. (2008)	✓ (2013)	
1. Prompt Magistration	Magistrates did not have a process to ensure assistance in completing affidavits or to ensure those affidavits were sent to the appointing authority within 24 hours of the request being made. (2008)	✓ (2017) <sup>2</sup>	
4. Prompt Appointment	In felony cases, timeliness in sample cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2008)		✓
4. Prompt Appointment	In misdemeanor cases, timeliness in sample cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2013)		✓
4. Prompt Appointment	In misdemeanor cases, the court did not rule on all counsel requests prior to procuring a waiver of counsel. (2013)		✓

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<sup>2</sup> TIDC file review for the current report found there may still be issues with how requests are sent to the appointing authority.

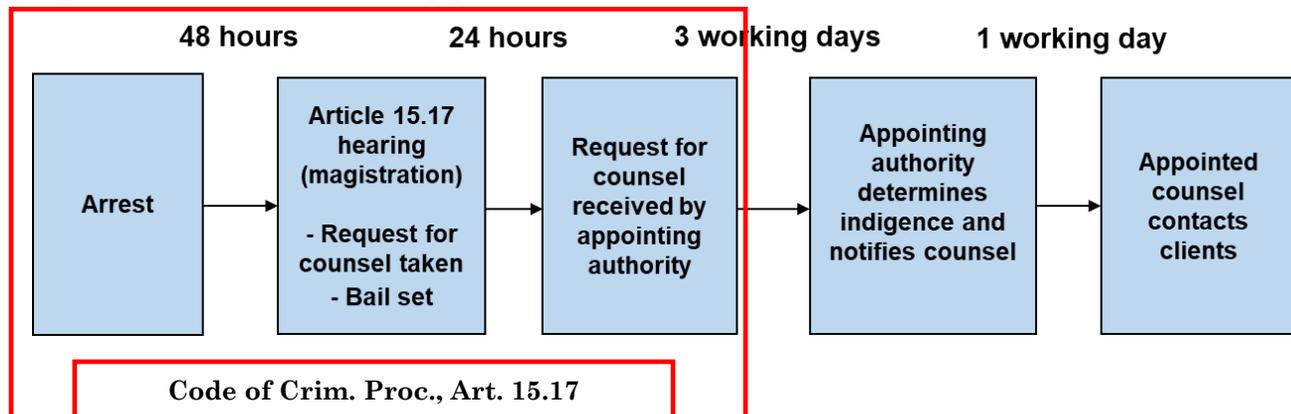
## Third Follow-Up Review

TIDC’s policy monitoring rules require follow-up reviews of counties where the report included noncompliance findings.<sup>3</sup> Staff members Nicolas Sawyer and Joel Lieurance conducted a third follow-up review with on-site visits to Zavala County on October 19, October 21, and November 10, 2021. TIDC examined the following records: the local indigent defense plan; felony and misdemeanor case files that were filed between October 2019 and February 2020 and maintained by the district and county clerks; and magistrate warning forms maintained by the justice courts.

### 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 person of the right to counsel, inform the person of the procedures for requesting counsel, and ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.<sup>5</sup> Magistrates must transmit requests for counsel to the appointing authority within 24 hours.<sup>6</sup> If a person is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the person were arrested on an in-county warrant.<sup>7</sup>

**Figure1a: Timeline for Appointment of Counsel in Adult Criminal Cases**



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

<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 out-of-county requests is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

*Local Practices for Conducting Magistrate Warnings*

In Zavala County, defendants who are in jail are promptly brought before a magistrate for Article 15.17 hearings. If a defendant requests counsel, there is a checklist to note whether any of the following four items occurred:

- the accused received the affidavit of indigence;
- the accused completed the affidavit and returned it to the magistrate;
- the accused refused to complete the affidavit of indigence; and
- the affidavit had been transmitted to the appropriate court.

TIDC's file review included magistrate warning forms in which all four checklist options were marked, in spite of the impossibility of the second and third items both occurring. Several forms did not include marks indicating that the request had been forwarded to the appointing authority. TIDC case file examination found 14 counsel requests that were not ruled upon and checklists indicated the appointing authority did not receive 13 of these 14 requests. TIDC believes the checklist used by magistrates can potentially identify breakdowns in transmitting counsel requests to the court. Unfortunately, this system requires magistrates and jail staff to accurately mark the checklist and to follow up with any missing actions.

TIDC again finds that magistrates did not ensure reasonable assistance with affidavits of indigence or transmit all counsel requests to the appointing authority within 24 hours of the request being made. Zavala County must implement procedures that ensure reasonable assistance with the completion of affidavits and with their transmission to the appointing authority. The checklist could aid in ensuring both events occur promptly.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings.**

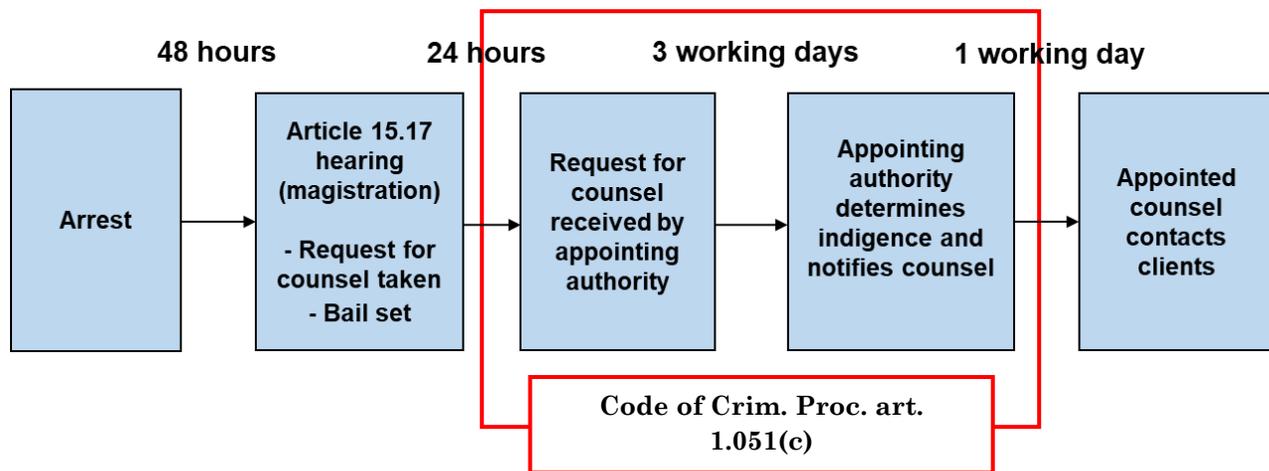
**April 2022 Finding and Recommendation 1:** Article 15.17(a) of the Code of Criminal Procedure requires magistrates to ensure reasonable assistance with the completion of forms necessary to request counsel. Article 15.17(a) also requires these forms to be transmitted to the appointing authority within 24 hours of the request. Neither of these events consistently occurred. Zavala County must put in place procedures to ensure both of these events occur whenever a defendant requests counsel at the Article 15.17 hearing.

## REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

### *Adult Cases*

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request.

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



Under Article 15.17 and local procedures, the first opportunity for most defendants to request counsel is at the Article 15.17 hearing, when a defendant appears before a magistrate and is informed of the charges against him or her. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has his or her first opportunity to request counsel at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial of indigence. TIDC examined all cases filed in the first part of FY2020 (October 2019 to February 2020).

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

TIDC examined all 9 felony cases filed between October 2019 and February 2020.<sup>8</sup> TIDC was able to match magistrate warning forms with only one sample felony defendant. If one assumes that this defendant was the only one who requested counsel at the Article 15.17 hearing, then counsel was appointed in a timely fashion

<sup>8</sup> The sample size used for this analysis was very small. TIDC chose the filing period from October 2019 to February 2020 to mitigate against COVID-19 effects. If Zavala County wishes, TIDC could make a second analysis of felony appointment procedures using the period from March 2020 to September 2020.

for 4 of the 6 felony defendants with a counsel request (**67% timely**). This falls below TIDC's 90% threshold for presuming a jurisdiction's practices ensure timely appointment of counsel. Zavala County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

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

TIDC examined all misdemeanor cases filed between October 2019 and February 2020. Cases were filed against 62 defendants. TIDC was able to match magistrate warning forms with 21 of the defendants. If one assumes that defendants requested counsel at the Article 15.17 hearing only in those cases in which TIDC matched magistrate warning forms, counsel was appointed in a timely fashion for 3 of the 21 defendants with a counsel request (**14% timely**). This falls below TIDC's 90% threshold for presuming a jurisdiction's practices ensure timely appointment of counsel. Zavala County must implement practices that satisfy Article 1.051(c)(1)'s timeline in misdemeanor cases. Of the 18 cases that did not receive timely rulings, 17 checklists indicated the request did not make it to the county judge.

**Table 2: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Total Cases Examined	62		
Total cases with a counsel request		21	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		2	
1 – 3 work days + 24 hour transfer		1	
<b>Total timely appointments / denials</b>		<b>3</b>	<b>14%</b>
4 - 6 work days + 24 hour transfer		0	
More than 6 work days + 24 hour transfer		4	
No ruling on request		14	
Total untimely appointments / denials		18	86%

***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. 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 denied, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must explain the procedures for requesting counsel to an unrepresented defendant and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state.

If a defendant enters an uncounseled plea, the defendant must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).

TIDC found five sample cases in which misdemeanor defendants requested counsel at the Article 15.17 hearing and later entered uncounseled pleas without their requests being ruled upon. 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)). Zavala 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

**Appoint Counsel Promptly.**

**April 2022 Finding and Recommendation 2 (FELONY CASES):** Zavala County's felony appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), a county must rule on all requests for counsel within three working days. Zavala County must implement practices that satisfy Article 1.051(c)(1)'s timeline. The sample size in this analysis was very small. If Zavala County wishes, TIDC could make a second analysis of felony appointment procedures using the period from March 2020 to September 2020.

**April 2022 Finding and Recommendation 3 (MISDEMEANOR CASES):** Zavala County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), a county must rule on all requests for counsel within three working days. Zavala County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**April 2022 Finding and Recommendation 4 (MISDEMEANOR CASES):** 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)). Zavala 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 appreciates the professionalism and assistance provided by Zavala County officials and staff. Zavala County must respond to the report's findings and recommendations with a detailed action plan describing how it will resolve each issue. Some of the findings have been in place since 2008. Because of this delay in correcting past findings, TIDC will discuss these issues at our May 20, 2022 Policies and Standards Committee Meeting.

## **Monitoring Findings and Recommendations Remaining to be Addressed**

Zavala County must respond to the following findings and recommendations with a detailed action plan describing how it will resolve each issue.

**April 2022 Finding and Recommendation 1:** Article 15.17(a) of the Code of Criminal Procedure requires magistrates to ensure reasonable assistance with the completion of forms necessary to request counsel. Article 15.17(a) also requires these forms to be transmitted to the appointing authority within 24 hours of the request. Neither of these events consistently occurred. Zavala County must put in place procedures to ensure both of these events occur whenever a defendant requests counsel at the Article 15.17 hearing.

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