



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

March 2023



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

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Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.¹ In this second follow-up review, TIDC interviewed local officials and staff and reviewed FY2021 case file records. TIDC found that three of the previous report's findings remained pending:

- (1) Lack of assistance with financial affidavits and untimely transmittal of counsel requests to appointing courts.
- (2) Untimely appointments of counsel in misdemeanor cases.
- (3) Defendants waiving counsel before the court has ruled on the request.

TIDC thanks Wharton County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its finding within two years.²

Background

In July 2014, TIDC issued a limited scope report of Wharton County's indigent defense practices. The limited scope report covered the ability of misdemeanor arrestees to request and obtain appointed counsel. The report found that, at the Article 15.17 hearing, magistrates only asked defendants who did not expect to make bail whether they wanted to request appointed counsel. When misdemeanor defendants came to court, requests for counsel were not always ruled on prior to a waiver of counsel. This waiver of counsel form did not track the language found in Article 1.051(g) of the Code of Criminal Procedure. TIDC's case sample did not contain enough counsel requests to make an analysis of the timeliness of counsel appointments.

In October 2017, TIDC issued a follow-up report. This report found that magistrates asked each defendant if counsel was requested, but when defendants requested counsel, affidavits of indigence were not immediately filled out, and there were gaps in transmitting those affidavits to the appointing courts. As a result, appointments were not always timely, and sometimes, defendants waived counsel without the court ruling on the request for counsel. The review also found the form memorializing a defendant's choice to waive counsel had been revised to track Article 1.051(g).

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

Current Review

TIDC’s policy monitoring rules require follow-up reviews where the report included noncompliance findings.³ Staff members Joel Lieurance and Kristin Meeks conducted a second follow-up review of Wharton County, with site visits on July 26-27, 2022, and October 26, 2022. TIDC examined whether Wharton County successfully addressed the findings and recommendations from the October 2017 report. The review focused on two core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

TIDC examined misdemeanor case files, observed an Article 15.17 hearing, and met with jail staff, a justice of the peace, and the judge for the 329th District Court.

Table 1: History of Monitoring Findings

FDA Core Requirement	Description and Initial Year of Finding	Status after 2023 Review	
		Satisfied	Pending
1. Magistrate Warnings	Magistrates must ask each arrestee if counsel is requested. (2014)	✓ (2017)	
1. Magistrate Warnings	Magistrates must ensure reasonable assistance with affidavits of indigence and must transmit this paperwork to the appointing courts within 24 hours (2017)		✓
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. (2017)		✓
4. Prompt Appointment	The court must rule upon all requests for counsel prior to a waiver of counsel. (2017)		✓
4. Prompt Appointment	Waivers of counsel must use language that closely tracks Article 1.051(g). (2014)	✓ (2017)	

³ 1 TEX. ADMIN. CODE § 174.28(d)(3).

Program Assessment

Description of Local Counsel Appointment Procedures

After arrest in Wharton County, defendants go before a magistrate for the Article 15.17 hearing. Most hearings are conducted by videoconference. At the hearing, a magistrate determines whether there is probable cause to detain the individual, sets bail, and asks defendants whether they would like to request counsel. Under Article 15.17 of the Code of Criminal Procedure, magistrates must record whether the defendant requested counsel.

According to interviews, if a defendant requests counsel, the defendant is given financial paperwork by jail staff. The defendant takes the paperwork back to the cell. After completion, jail staff will review the paperwork for completeness and, if complete, notarize and send it to the 329th District Court Coordinator. Incomplete affidavits are sent back to the defendant. The 329th District Court Coordinator appoints counsel or denies indigence for both felony and misdemeanor cases on the day she receives jail requests.

After cases are filed, defendants appear at the trial court. In misdemeanor cases, unrepresented defendants check in with the county court and mark whether they want to request appointed counsel. Defendants who request counsel in court are directed to fill out the financial affidavit, and they receive a ruling that same day.

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.⁴ 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.⁵ If the magistrate has authority to appoint counsel, the magistrate must appoint counsel according to the timelines set in Article 1.051.⁶ If the magistrate does not have authority to appoint counsel, the magistrate must transmit requests for counsel to the appointing authority within 24 hours.⁷ If a person is arrested on an out-of-county warrant, the

⁴ TEX. CODE CRIM. PROC. ART. 15.17(a).

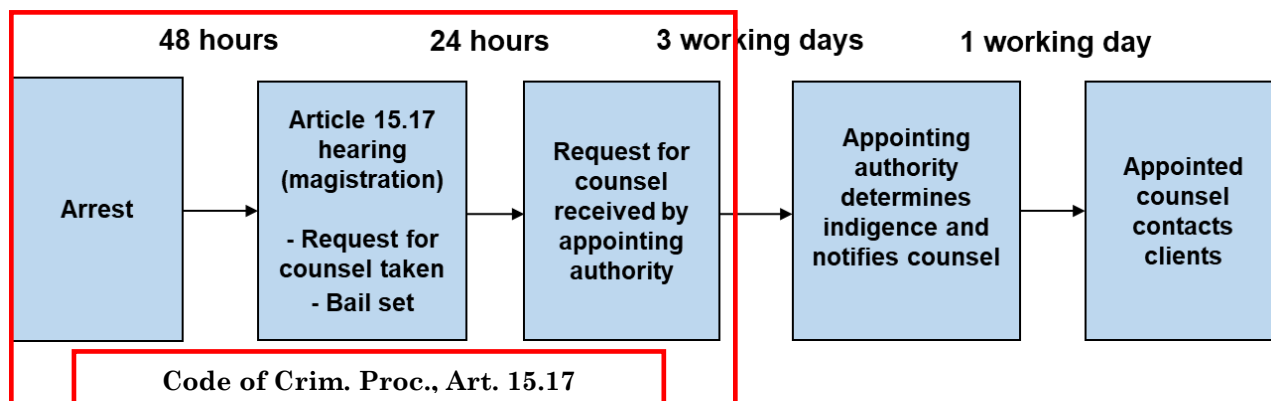
⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁶ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁷ TEX. CODE CRIM. PROC. ART. 15.17(a).

magistrate must perform the same duties as if the person were arrested on an in-county warrant.⁸

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



The Ability of Arrestees to Request Counsel

At the Article 15.17 hearing, the magistrate must inform the accused of the right to counsel, ask whether the accused wants to request counsel, and receive the accused’s request for counsel.⁹ The magistrate must make a record of each step of this exchange.¹⁰ TIDC found that defendants regularly request counsel at the Article 15.17 hearing. Overall, about 44% of felony defendants and 39% of misdemeanor defendants request counsel at the hearing.

Table 2: Texas Judicial Counsel Monthly Court Activity Reports for Wharton County (April 2021 – September 2021)

	Misd. Requests	Misd. Warnings	% Misd. Request	Felony Requests	Felony Warnings	% Felony Request
JP1	64	149	43%	81	159	51%
JP2	47	157	30%	40	125	32%
JP3	38	96	40%	50	107	47%
JP4	69	160	43%	75	165	45%
Total	218	562	39%	246	556	44%

Reasonable Assistance in Completion of Financial Forms and Transmission to the Appointing Authority

At the Article 15.17 hearing, the magistrate must ensure the arrestee has reasonable assistance in completing the necessary forms for requesting counsel.¹¹

⁸ TEX. CODE CRIM. PROC. ART. 15.18(a). A list of contacts to send out-of-county requests is available at: <http://tfdc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

⁹ TEX. CODE CRIM. PROC. art. 15.17(a).

¹⁰ TEX. CODE CRIM. PROC. art. 15.17(e).

¹¹ TEX. CODE CRIM. PROC. art. 15.17(a).

Counsel requests and associated financial paperwork must be sent to the appointing authority within 24 hours of the request being made.¹²

Case file review revealed several instances in which defendants requested counsel at the Article 15.17 hearing, but those requests were not ruled on. To receive appointed counsel, defendants had to request counsel a second time at the initial court appearance.¹³ The 329th District Court Coordinator noted that she rules on requests when she receives them, and there are often delays in getting requests to her.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

Finding 1 and Recommendation: Article 15.17(a) requires the magistrate to ensure that assistance in completing financial paperwork for counsel requests is provided at the time of the Article 15.17 hearing. Article 15.17(a) further requires this paperwork to be transmitted to the appointing authority within 24 hours of the request being made. Wharton County must implement procedures to ensure that all arrestees who request counsel have associated financial paperwork promptly completed and transmitted to the appointing authority within 24 hours of the request being made.

Issue Pending.

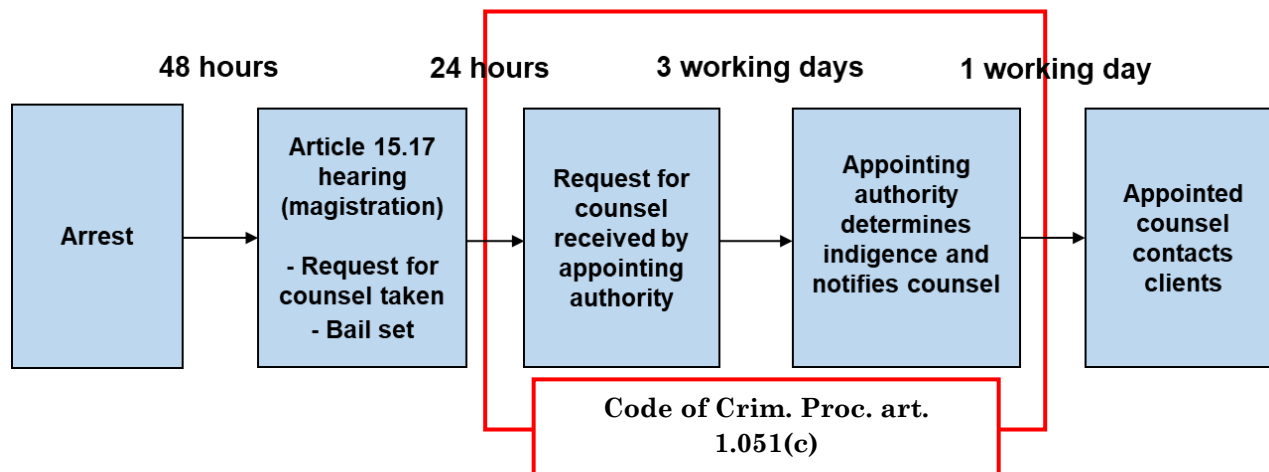
¹² TEX. CODE CRIM. PROC. art. 15.17(a).

¹³ In ten sample cases, defendants requested counsel at the Article 15.17 hearing but did not receive a ruling, and then re-requested in the trial court after the case was filed.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

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



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 the 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. Under TIDC's monitoring rules, a county is presumed to be following the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor's sample are timely.¹⁴

Timeliness of Appointments in Misdemeanor Cases

TIDC staff examined 115 sample misdemeanor cases filed in the second half of FY2021 (April 2021 – September 2021). From this sample, TIDC found 43 counsel requests. Counsel was appointed in a timely manner in 35% of cases with a request for counsel.¹⁵ This falls below TIDC's threshold of 90% for presuming a jurisdiction's procedures ensure timely appointment of counsel. Wharton County must put in place procedures to ensure timely determinations of indigence in misdemeanor cases.

¹⁴ 1 TEX. ADMIN. CODE § 174.28.

¹⁵ TIDC found 46 counsel requests but excluded three cases from this analysis. The reasons for exclusion were as follows: one was an out-of-county request; in another, we could not determine timeliness; and in a third, the defendant retained counsel the day after the request.

Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be timely ruled upon.

Table 3: Times to Appointment in Misdemeanor Cases

	Number from Sample	Percent of Sample
Total records examined	115	
Requests for counsel	43	
Request for counsel ruled on in 'x' workdays		
0 workdays	11	
1 to 3 workdays + 24 hours allowed to transmit a request	4	
Timely Rulings on Requests	15	35%
Between 4 and 7 workdays	4	
More than 7 workdays	13	
No ruling on request	11	
Untimely / No Rulings on Requests	28	65%

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel, allowing 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).¹⁶

TIDC found four sample cases in which misdemeanor defendants requested counsel at the Article 15.17 hearing and later entered uncounseled pleas without their requests being ruled on. The absence of a ruling on a pending request raises the

¹⁶ 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)”

possibility of statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Wharton 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.

2023 Finding 2 and Recommendation: Wharton County must put in place procedures to ensure timely determinations of indigence in misdemeanor cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be timely ruled upon. *Issue Pending.*

2023 Finding 3 and Recommendation: As required by Article 1.051(f-2), Wharton County must rule upon all requests for counsel prior to a defendant's waiver of the right to retain counsel. 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.*

Conclusion

TIDC thanks Wharton County officials and staff for their assistance in completing this review. TIDC will conduct a third follow-up review regarding its noncompliance findings within two years.¹⁷ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

¹⁷ 1 TEX. ADMIN. CODE § 174.28(c)(2).

Findings and Recommendations from the March 2023 Review

Wharton County must provide a written response to each of the report's findings within 60 days after the report is received by the County. 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 Article 15.17 proceedings.

2023 Finding 1 and Recommendation: Article 15.17(a) requires the magistrate to ensure that assistance in completing financial paperwork for counsel requests is provided at the time of the Article 15.17 hearing. Article 15.17(a) further requires this paperwork to be transmitted to the appointing authority within 24 hours of the request being made. Wharton County must implement procedures to ensure that all arrestees who request counsel have associated financial paperwork promptly completed and transmitted to the appointing authority within 24 hours of the request being made. *Issue Pending.*

Core Requirement 4. Appoint Counsel Promptly.

2023 Finding 2 and Recommendation: Wharton County must put in place procedures to ensure timely determinations of indigence in misdemeanor cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be timely ruled upon. *Issue Pending.*

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