



# **Policy Monitoring Review of Montgomery County's Indigent Defense Systems**

**June 2021**



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

## Contents

Executive Summary.....	4
Background .....	4
Program Assessment .....	5
Requirement 1: Conduct Prompt and Accurate Article 15.17 Proceedings .....	5
Requirement 2: Determine Indigence According to Standards Directed by the Indigent Defense Plan.....	8
Requirement 3: Establish Minimum Attorney Qualifications .....	10
Requirement 4: Appoint Counsel Promptly .....	11
Requirement 5: Institute a Fair, Neutral, and Nondiscriminatory Attorney Selection Process .....	16
Requirement 6: Report Data Required by Statute .....	19
Conclusion .....	19
Summary of Findings and Recommendations .....	20
Appendix: Monitoring Review Checklist .....	21

## Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act through policy reviews.<sup>1</sup> TIDC observed court, interviewed officials, and reviewed FY2019 data from Montgomery County, and made five findings of noncompliance. In adult cases, TIDC found that judges did not always inform defendants of the right to counsel or rule on requests for counsel. Recent changes to front-end procedures—such as screening defendants for eligibility for appointed counsel before the 15.17 hearing—should help address these findings. In juvenile cases, TIDC found that, for juveniles who were not detained, the court sometimes failed to timely appoint counsel or order the retention of counsel.

TIDC thanks Montgomery County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical and financial assistance to remedy these issues. TIDC will conduct a follow-up review regarding its findings within two years.<sup>2</sup>

## Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) policy reviews.<sup>3</sup> These reviews are conducted to promote local compliance with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes.

This review focused on the first five of the six FDA core requirements:<sup>4</sup>

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE

TIDC staff members Wesley Shackelford, Lindsay Bellinger, Claire Buetow, and Joel Lieurance conducted the review virtually. TIDC examined FY2019 data, including misdemeanor and felony case files; summary records examined by juvenile probation; the local indigent defense plan; appointment lists; and records of attorney continuing

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b). TIDC conducted this review virtually.

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

<sup>3</sup> TEX. GOV'T CODE § 79.037(a)–(b).

<sup>4</sup> 1 TEX. ADMIN. CODE § 174.28.

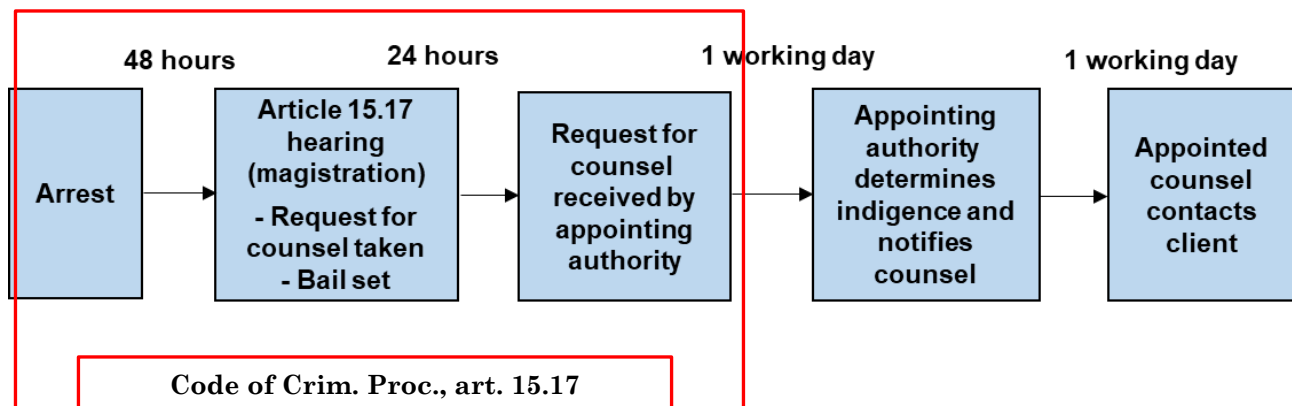
legal education (CLE) hours. TIDC interviewed judges and court staff and observed online Article 15.17 hearings, felony dockets, and misdemeanor dockets.

## 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>5</sup> At this hearing, the magistrate must inform the person of his or her 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>6</sup> Magistrates must transmit requests for counsel to the appointing authority within 24 hours.<sup>7</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>8</sup>

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



#### *Local Practices for Conducting Magistrate Warnings*

This past year, Montgomery County modified its pretrial practices to provide defense counsel for newly arrested defendants when they appear before a magistrate.<sup>9</sup> TIDC observed multiple Article 15.17 hearings over zoom on August 6, 7, and 10, 2020. Defendants appeared before a magistrate at the jail shortly after arrest; the judge and all other non-defendant participants (a prosecutor, a defense attorney, and an

<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. 15.17(a).

<sup>8</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>.

<sup>9</sup> In Montgomery County, attorneys previously did not represent defendants at the Article 15.17 hearing. Many of the case files reviewed by TIDC operated under the old system without counsel present at the hearing.

interpreter) appeared virtually. The defense attorney<sup>10</sup> did not meet with defendants prior to the hearing.

The judge commenced the hearing with a group admonition:

A good defense attorney is here to represent you at no cost to you. If you don't want him to represent you, tell me when you come up. ... The county is providing his experience and expertise to you for free. If you're released on bond and haven't been interviewed for a lawyer, you will get information about interviewing with the attorney appointment office. If you cannot afford an attorney, you have the right to request the appointment of an attorney.

The judge continued with the remaining warnings required by Article 15.17. After the warnings, the judge asked a Spanish interpreter to read the warnings to the group in Spanish.<sup>11</sup>

The magistrate first addressed defendants who had requested a review of previously set bail bonds. Defendants can request a bail bond review if they wish to challenge the amount originally set at the Article 15.17 hearing. The review is set for the next business day after the Article 15.17 hearing. To begin, the prosecutor argued in favor of the original bail bond setting. Then the defense attorney argued for reduced bail.<sup>12</sup>

After the bond review hearing, the magistrate addressed defendants with new charges. The prosecutor read aloud the probable cause affidavit and recited the defendant's criminal history. Defense counsel periodically challenged the bail amounts recommended by the prosecutor. In some instances, defendants tried to argue about their respective cases, but defense counsel advised them to stop, because the evidence could be used against them. The magistrate then made probable cause determinations, set bail, and asked whether defendants wanted to request counsel.

On August 7, the magistrate set personal bonds for some defendants, but did not ask defendants who received a personal bond whether they wished to request counsel. After the hearing, TIDC informed the court that Article 15.17 required the magistrate to ask all defendants whether they want to request counsel, regardless of whether the defendant is given a personal bond. The magistrates met about this matter and corrected it, as observed by TIDC staff on August 10. Article 15.17(e) requires

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<sup>10</sup> The defense attorney at the Article 15.17 hearing provides limited scope representation (limited to the hearing). If the defendant requests counsel and is determined to be indigent, an attorney will be appointed who continues representing the defendant through case disposition.

<sup>11</sup> The interpreter did not translate the judge's words, but gave the 15.17 warnings in her words after the judge's explanation of the hearing.

<sup>12</sup> At the time of TIDC's observations, local hearing procedures were in flux. Officials stated they had asked attorneys to meet with defendants prior to bond review hearings, but based on the nature of some arguments, it was unclear whether they had done so.

magistrates to ask and record whether each defendant requested counsel, regardless of bail bond status. As part the follow-up review, TIDC will verify that magistrates continue to ask all arrestees whether they want to request appointed counsel.

At the time of TIDC’s observations, defendants who requested counsel interviewed with the Office of Indigent Defense after the hearing. Montgomery County has since changed these procedures so that defendants interview with the Office prior to the hearing.<sup>13</sup> The Office asks defendants questions regarding their income, assets, dependents, and public benefits and appoints counsel for those who qualify as indigent.

**1.a. Timeliness of Warnings**

An arrested person must be brought before a magistrate within 48 hours of arrest.<sup>14</sup> TIDC presumes a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>15</sup> To determine the timeliness of Article 15.17 warnings in Montgomery County, TIDC staff examined 395 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing. All but one sample case had Article 15.17 hearings occurring within two days of arrest, indicating Montgomery County is providing warnings in a timely manner (see Table 1).

**Table 1: Timeliness of Article 15.17 Hearings**

	<b>Sample Size</b>	<b>Percent</b>
Article 15.17 hearing occurs x days after arrest:	395	
0 days	101	25.6%
1 day	290	73.4%
2 days	3	0.8%
<b>Timely Hearings</b>	<b>394</b>	<b>99.7%</b>
More than 2 days	1	0.3%

**1.b. Ability of Arrested Persons to Request Counsel**

At the Article 15.17 hearing, the magistrate must inform an arrested person of the right to counsel, ask whether he or she wants to request counsel, and record whether

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<sup>13</sup> The Montgomery County Court Indigent Defense Plan now states:

For defendants appearing before a magistrate in the Montgomery County Jail, the Office of Indigent Defense will ensure assistance in completing an Affidavit of Financial Condition for the arrestee prior to the magistrate court. If defendant requests court appointed attorney at the time of magistration, the Office of Indigent Defense certifies the accuracy of their Affidavit for the purpose of determining eligibility for court appointed counsel.

<sup>14</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>15</sup> 1 TEX. ADMIN. CODE § 174.28(c)(1). Article 15.17(a) requires magistrate warnings occur within 48 hours of arrest. To simplify time measurement, TIDC assumes warnings are timely if they occur within 2 days of arrest.

the person requests counsel.<sup>16</sup> Of sample case files examined by TIDC, 72% of felony arrestees requested counsel, and 52% of misdemeanor arrestees requested counsel. This is an indication that arrested persons understand their right to counsel at the Article 15.17 hearing and regularly request counsel.

***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel.<sup>17</sup> In Montgomery County, the forms necessary for requesting counsel are completed at interviews with financial screeners at the Office of Indigent Defense. These forms are now completed prior to the Article 15.17 hearing.

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a person requesting counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>18</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.<sup>19</sup> Affidavits of indigence are completed with a financial screening interview at the Office of Indigent Defense. Currently, affidavits of indigence are completed prior to the Article 15.17 hearing.<sup>20</sup> Immediately after the 15.17 hearing, the magistrate notifies the Office of requests for counsel so it can appoint counsel.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings**

**FINDING 1:** Article 15.17(e) requires magistrates to ask and record whether each defendant requests counsel. Magistrates must ask each defendant whether he or she requests counsel, regardless of bail bond status.

**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:

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<sup>16</sup> TEX. CODE CRIM. PROC. ART. 15.17(a), (e).

<sup>17</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>18</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>19</sup> TEX. CODE CRIM. PROC. ART. 15.18 (a-1).

<sup>20</sup> Prior to our review, defendants would complete the affidavit at the Office of Indigent Defense on the next day. If the defendant made bail prior to the interview at the Office, the jail provided the paperwork to the Office.



In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans.

### ***2.a. Indigence Determinations in Adult Criminal Cases***

For adult criminal cases in Montgomery County, a person is presumed indigent if he or she has a household income at or below 125 percent of the Federal Poverty Guidelines and non-exempt assets less than \$2,500.<sup>21</sup> A defendant who does not meet these financial standards above may nevertheless be determined indigent if the defendant is otherwise unable to retain private counsel without substantial hardship.

### ***2.b. Indigence Determinations in Juvenile Cases***

In juvenile cases, if the income of the person responsible for the juvenile is less than 125 percent of the Federal Poverty Guidelines, the juvenile is presumed to be indigent.<sup>22</sup> The juvenile may also be determined to be indigent if (1) the responsible person is eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing or (2) the difference between monthly net household income and reasonable necessary expenses is less than \$500.

### ***Assessment***

TIDC observed indigence determinations by the Office of Indigent Defense and found that Montgomery County is in substantial compliance with Requirement 2 for both adult and juvenile cases.

## **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

### **Determination of Indigence**

Requirement satisfied. No findings.

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<sup>21</sup> The Montgomery District Court Indigent Defense Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=360>. The Montgomery County Court Indigent Defense Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=266>.

<sup>22</sup> The Montgomery Juvenile Board Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=299>.

### **REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

Under Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.<sup>23</sup> Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters.

#### ***3.a. Felony and Misdemeanor Cases***

The district and county courts require all felony and misdemeanor attorneys to obtain at least 6 criminal CLE hours annually or be board certified in criminal law. Attorneys who speak a foreign language may be given a special language designation. Misdemeanor attorneys, felony appeals attorneys, and misdemeanor appeals attorneys each have their own lists and are appointed on an assigned counsel basis.

Montgomery County has recently moved from a rotational felony appointment system to a contract system. Felony contract attorneys must obtain at least 10 criminal CLE hours annually. Contract attorneys are assigned to a specific court for a year-long term. Contracts limit new felony appointments in Montgomery County to 119 defendants per 15-month contract term.

#### ***3.b. Juvenile Cases***

The juvenile courts require all attorneys to obtain at least 6 juvenile CLE hours annually or be board certified in juvenile law. Attorneys who speak a foreign language may be given a special language designation. Attorneys are appointed primarily through a contract system. Juvenile appeals attorneys have their own list and are appointed on an assigned counsel basis.

Since 2011, Montgomery County has maintained a juvenile contract system. The contract splits juvenile cases between three attorneys. The contract sets a maximum of 200 juvenile cases per year for each attorney.<sup>24</sup>

#### ***Assessment***

TIDC reviewed appointment lists and CLE records, and found that Montgomery County has procedures for managing appointment lists and for ensuring that all

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<sup>23</sup> Title 1 TEX. ADMIN. CODE §§ 174.1 – 4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

<sup>24</sup> The contract requires attorneys “shall conform to the standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973”. This standard set a maximum of 200 juvenile cases per year.

attorneys on the lists meet their annual CLE requirement. TIDC finds Montgomery County is in substantial compliance with Requirement 3.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3**

**Establish Minimum Attorney Qualifications**

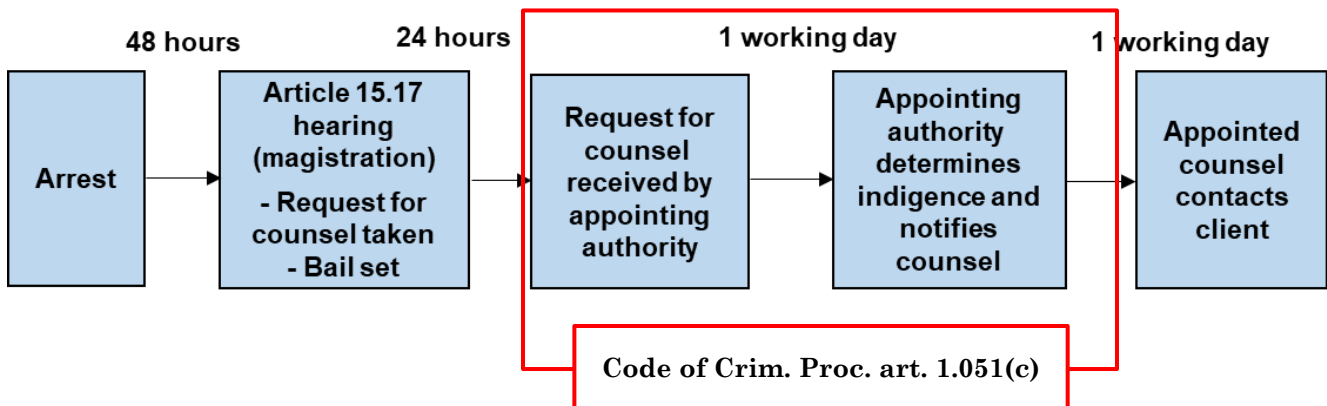
Requirement satisfied. No findings.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

*Adult Cases*

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

In Montgomery County, defendants who request counsel interview with the Office of Indigent Defense. For defendants requesting counsel at the first appearance docket, this interview occurs after the court explains the right to counsel to defendants. For defendants requesting counsel at the Article 15.17 hearing, the interview formerly occurred after the Article 15.17 hearing. Sometimes defendants who promptly made bail would not be screened.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel. This review examined cases filed in FY2019 (October 2018 to September 2019).

**4.a. Timeliness of Appointment in Felony Cases**

TIDC examined 246 sample felony cases filed in FY2019. Counsel was timely appointed in 137 of 164 cases in which counsel was requested (**84% timely**). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. Counsel was not appointed in a timely manner for cases in which defendants made bail shortly after the Article 15.17 hearing without being screened for indigence. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline in felony cases.<sup>25</sup>

**Table 2: Times to Appointment in Montgomery County Felony Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	246		
Total cases with a counsel request		164	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		44	
1 work day + 24 hour transfer		93	
<b>Total timely appointments / denials</b>		<b>137</b>	<b>84%</b>
2 - 4 work days + 24 hour transfer		3	
More than 4 work days + 24 hour transfer		20	
No ruling on request		4	
Total untimely appointments / denials		27	16%

**4.b. Timeliness of Appointments in Misdemeanor Cases**

TIDC examined 286 sample misdemeanor cases filed in FY2019. Counsel was timely appointed in 102 of 138 cases in which counsel was requested (**74% timely**). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. Counsel was not appointed in a timely manner for cases in which defendants made bail shortly after the Article 15.17 hearing without being screened for indigence. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline in misdemeanor cases.<sup>26</sup>

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<sup>25</sup> The County has recently changed its procedures so that the Office of Indigent Defense screens defendants before 15.17 hearings. If properly implemented, these new procedures should address report findings related to the timely appointment of counsel in adult cases.

<sup>26</sup> See previous note.

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

	Sample Size	Number from sample	Percent
Number of case files examined	286		
Total cases with a counsel request		138	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		56	
1 work day + 24 hour transfer		46	
<b>Total timely appointments / denials</b>		<b>102</b>	<b>74%</b>
2 to 4 work days + 24 hour transfer		7	
More than 4 work days + 24 hour transfer		20	
No ruling on request		9	
Total untimely appointments / denials		36	26%

*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, he or she must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).<sup>27</sup>

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. In four of those instances, defendants made bail shortly after requesting counsel. 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)). Montgomery County must ensure that its procedures

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<sup>27</sup> The waiver language of Article 1.051(g) states:

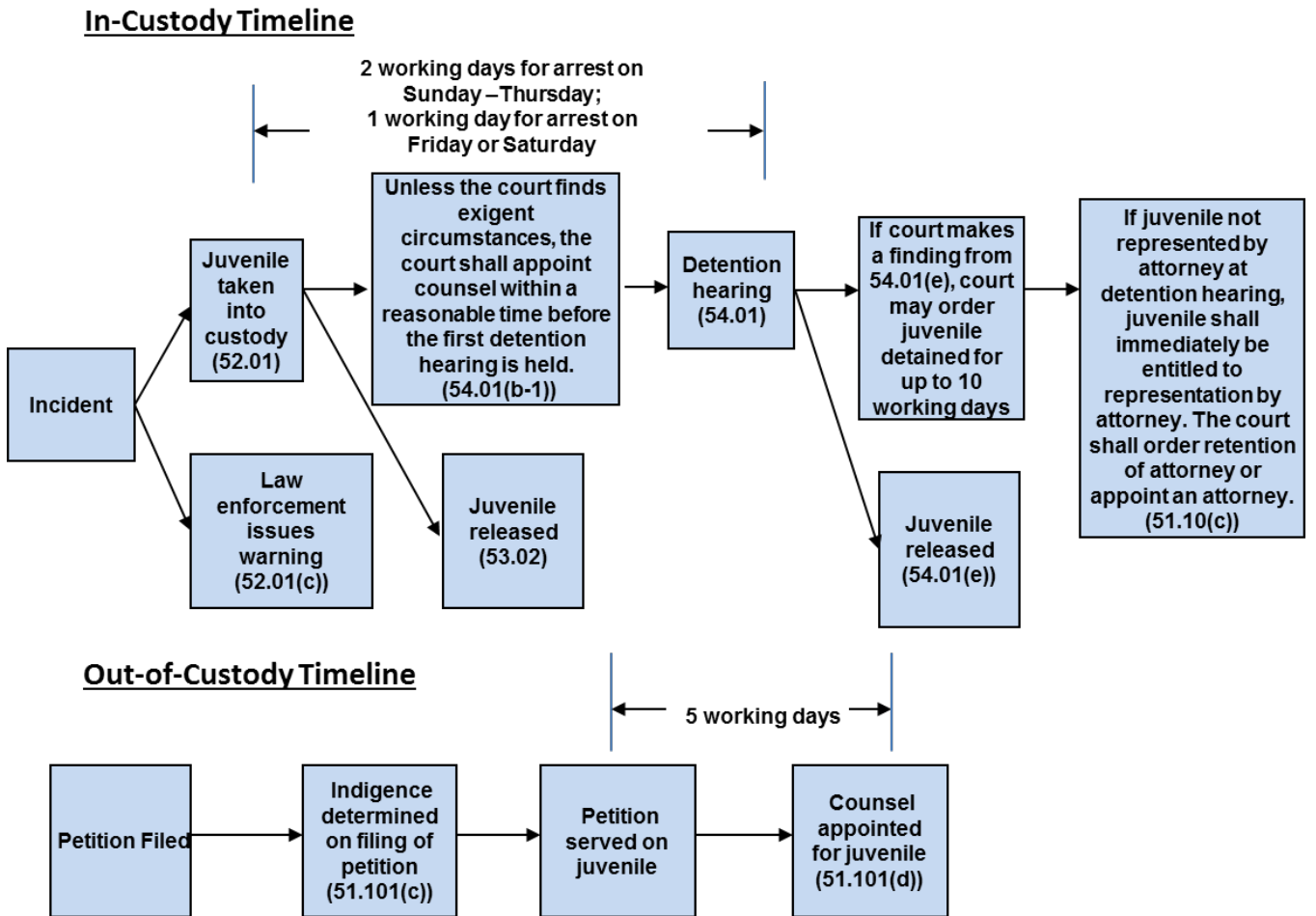
"I have been advised this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right 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)"

for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

**4.d. Juvenile Cases**

Counsel must be appointed for juveniles alleged to have engaged in delinquent conduct when the juvenile is brought to a detention hearing and when the juvenile is served with a copy of the petition alleging misconduct.<sup>28</sup> Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile.

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**



<sup>28</sup> TEX. FAM. CODE § 51.10(f).

### *Juvenile Detention Hearings*

To assess the timeliness of Montgomery County’s appointment procedures in juvenile cases, Montgomery County staff examined 35 cases filed in FY2019 (October 2018 – September 2019). Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing, unless appointment is not feasible due to exigent circumstances.<sup>29</sup> Of the 35 sample cases, 32 involved detention hearings. Counsel was present for the initial detention hearing in all 32 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

### *Appointment After Service of the Petition*

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile. Of 35 sample cases, all involved service of the petition on the juvenile. Counsel was timely appointed for 27 of these cases (**77% timely**), which does not meet TIDC’s 90% threshold. For cases in which the juvenile is not detained, Montgomery County must implement procedures that ensure timely appointments of counsel.

**Table 4: Times to Appointment in Montgomery County Juvenile Cases**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	35		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings		32	
<b>Cases with attorney present at initial hearing</b>		<b>32</b>	<b>100%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b>			
Case files in which juvenile served with a petition	35		
Counsel appointed within 5 working days of service		17	
Indigence denied or counsel retained within 5 working days of service <sup>30</sup>		10	
<b>Total cases with timely presence of counsel</b>		<b>27</b>	<b>77%</b>
Cases where counsel not present in a timely fashion		8	23%

<sup>29</sup> TEX. FAM. CODE §54.01(b-1) states:

Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

<sup>30</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Appoint Counsel Promptly**

**FINDING 2 (FELONY CASES):** Montgomery County's felony appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), district courts must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)'s timeline.

**FINDING 3 (MISDEMEANOR CASES):** Montgomery County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), statutory county courts must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)'s timeline.

**FINDING 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)). Montgomery 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).

**FINDING 5 (JUVENILE CASES):** For cases in which the juvenile is not detained, Montgomery County's juvenile appointment process did not meet TIDC's threshold for appointment of counsel (90% timely). Section 51.101(d) of the Family Code requires the appointment of counsel within five working days of petition service on the juvenile. Montgomery County must implement procedures that ensure timely appointments of counsel in cases in which a petition is served on the juvenile.

## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner.

### ***5.a. Felony Courts***

The primary method for appointing counsel in Montgomery County felony courts is through a contract system. Contract Defender Rules (Title 1, Rules 174.10 – 174.25 of the Texas Administrative Code) require an open application process and specific elements to be addressed in each contract.

The Office of Indigent Defense emails an application notice to the Montgomery County Bar Association. Judges review attorney applications, and approved attorneys



may execute a contract with the County. Contract attorneys are assigned to specific district courts for 15-month terms. Each court has 11 contract attorneys assigned to it.

TIDC compared the contract terms with the requirements set by the Contract Defender Rules.<sup>31</sup> The contract terms met all requirements. Attorneys are paid \$87,500 per 15-month term (Spanish-speaking attorneys are paid \$93,750). The current contract sets a maximum caseload of 119 defendants per 15-month term. Attorneys appeared to follow the maximum caseloads under the contract, but all attorneys accepted additional appointed cases outside of the contract. In some instances, these totals were substantial.

### ***5.b. Misdemeanor Courts***

In assigned counsel systems, TIDC presumes a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if the top 10% of attorneys receiving cases at a given level receive no more than three times their respective share of appointments.<sup>32</sup> If a county can track appointments by list, this analysis is made according to each appointment list. A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

The misdemeanor courts use a rotational system of appointment. Under the rotational system, the court (or court's designee) appoints the attorney who is next on the appointment wheel, and once an appointment is received, the attorney moves to the bottom of the list. Most misdemeanor appointments are made by the Office of Indigent Defense when defendants are screened for indigence.<sup>33</sup>

TIDC examined the distribution of misdemeanor appointments during FY2019. TIDC attempts to consider only those attorneys who were on the appointment list for the entire year. TIDC split this analysis between special language designated attorneys and all other attorneys on the appointment lists. Based on this analysis, the distribution of appointments was within TIDC's threshold for presuming a jurisdiction's appointment system is fair, neutral, and nondiscriminatory (top ten percent receive less than 3.0 times their representative share).

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<sup>31</sup> 1 TEX. ADMIN. CODE § 174.28(c)(5)(A).

<sup>32</sup> 1 TEX. ADMIN. CODE § 174.28(c)(5)(D).

<sup>33</sup> TIDC has observed that, when courts designate this type of separate entity to appoint counsel, attorney appointments tend to be evenly distributed.

**Table 5: Share of Cases Paid to Top 10% of Attorneys in Montgomery County**

Level	Attorneys on List <sup>34</sup>	Top 10% Attorneys <sup>35</sup>	Respective Share of Cases <sup>36</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [Col. A]
Misd. - English	63	6	9.5%	17.3%	<b>1.8</b>
Misd. – Special Language	14	1	7.1%	14.6%	<b>2.0</b>

**5.c. Juvenile Courts**

The primary method for appointing counsel in the juvenile courts is through a contract system. TIDC has established Contract Defender Rules (Title 1, Rules 174.10 – 174.25 of the Texas Administrative Code) that require an open application process and specific elements to be addressed in each contract. TIDC measures the fairness of the selection process in contract cases according to whether an open solicitation process meeting the requirements of the Contract Defender Rules.

For the initial contract, the County Purchasing Office emails an application notice, for a three-year juvenile defense contract to every attorney on the County’s appointment list. The Juvenile Board reviews the applications and approves attorneys who are eligible to execute a contract with the County. After an attorney has entered into a contract with the County, the attorney may renew the contract for one additional three-year term by submitting a letter of intent and receiving approval from the Juvenile Board. If the Juvenile Board elects not to renew the contract, the County starts over with a new open solicitation.

TIDC compared the contract terms with the requirements set by the Contract Defender Rules. The contract terms met all requirements. The juvenile contract is allocated to one law firm with three attorneys for \$200,000 per year. The contract sets a maximum caseload per attorney of 200 juvenile defendants per year. Caseloads for the contract attorneys appear to follow the maximum caseload limits, but it is unclear how

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<sup>34</sup> TIDC considered an attorney had been on the list for the entire year if the attorney received payment for disposing a case in FY2019, the attorney was on the April 2019 list, and the attorney was on the September 2019 appointment list. If an attorney did not meet these three conditions, the attorney was excluded from the analysis.

<sup>35</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>36</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

these cases are distributed among the three attorneys.<sup>37</sup> Attorneys also accepted additional cases outside the contract.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5

**Attorney Selection Process**

Requirement satisfied. No findings.

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

Under Section 79.036(e) of the Texas Government Code, the county auditor (or other person designated by the commissioners' court) must annually prepare and send indigent defense data to the Commission. This data must include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Since FY2014, financial data reports must include attorney-level information.<sup>38</sup>

TIDC conducted a fiscal monitoring review of Montgomery County's indigent defense expenses and shares its findings in a separate report.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

**Statutory Data Reporting**

TIDC conducted a fiscal monitoring review of Montgomery County's indigent defense expenses and shares its findings in a separate report.

**Conclusion**

TIDC thanks Montgomery 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>39</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>37</sup> The number of cases covered by the contract has varied from 230 cases to 263 cases per year. All cases are reported as being assigned to William Pattillo.

<sup>38</sup> TEX. GOV'T CODE § 79.036(a-1).

<sup>39</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

## Summary of Findings and Recommendations

Montgomery County must respond in writing how it will address the report's findings.

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.**

**FINDING 1:** Article 15.17(e) requires magistrates to ask and record whether each defendant requests counsel. Magistrates must ask each defendant whether he or she requests counsel, regardless of bail bond status.

### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

**FINDING 2 (FELONY CASES):** Montgomery County's felony appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), district courts must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)'s timeline.

**FINDING 3 (MISDEMEANOR CASES):** Montgomery County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), statutory county courts must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)'s timeline.

**FINDING 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)). Montgomery 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).

**FINDING 5 (JUVENILE CASES):** For cases in which the juvenile is not detained, Montgomery County's juvenile appointment process did not meet TIDC's threshold for appointment of counsel (90% timely). Section 51.101(d) of the Family Code requires the appointment of counsel within five working days of petition service on the juvenile. Montgomery County must implement procedures that ensure timely appointments of counsel in cases in which a petition is served on the juvenile.

## Appendix: Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>40</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>41</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>42</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>43</sup>
- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>44</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>45</sup>
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>46</sup>

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<sup>40</sup> TEX. CODE CRIM. PROC. ART. 14.06(a).

<sup>41</sup> TEX. CODE CRIM. PROC. ART. 17.033.

<sup>42</sup> TEX. CODE CRIM. PROC. ART. 15.17(a). This box is not marked because TIDC observed that defendants who received a personal bond were not initially asked if they wanted to request counsel.

<sup>43</sup> *Id.*

<sup>44</sup> TEX. CODE CRIM. PROC. ART. 15.17(e).

<sup>45</sup> *See, e.g.*, TEX. CODE CRIM. PROC. ART. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. ART. 1.051); TEX. CODE CRIM. PROC. ART. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>46</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.<sup>47</sup>
- ☒ State the financial standard(s) to determine whether a defendant is indigent.<sup>48</sup>
- ☒ List factors the court will consider when determining whether a defendant is indigent.<sup>49</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.<sup>50</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>51</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>52</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- ☒ Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.<sup>53</sup>
- ☐ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>54</sup>

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<sup>47</sup> TEX. CODE CRIM. PROC. ART. 26.04(l)–(r).

<sup>48</sup> TEX. CODE CRIM. PROC. ART. 26.04(l).

<sup>49</sup> TEX. CODE CRIM. PROC. ART. 26.04(m).

<sup>50</sup> TEX. CODE CRIM. PROC. ART. 26.04(d).

<sup>51</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>52</sup> TEX. CODE CRIM. PROC. ART. 26.04(j)(4).

<sup>53</sup> TEX. FAM. CODE § 54.01(b-1). TEX. FAM. CODE § 51.10(c).

<sup>54</sup> TEX. FAM. CODE § 51.101(d).

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>55</sup>
- Persons out of custody: Counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>56</sup>
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>57</sup>

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>58</sup>
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>59</sup>

**NOT APPLICABLE:** The County does not have a public defender.

- Alternative appointment method:<sup>60</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

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<sup>55</sup> TEX. CODE CRIM. PROC. ART. 1.051(c).

<sup>56</sup> TEX. CODE CRIM. PROC. ART. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant’s initial appearance before a judicial officer, 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.”).

This box is not checked because several defendants requested counsel but made bail before being screened for indigence. Their requests often resulted in late appointments or no rulings on their requests.

<sup>57</sup> TEX. CODE CRIM. PROC. ART. 1.051(f-2).

This box is not checked because some misdemeanor defendants requested counsel but entered uncounseled pleas without their requests being ruled upon.

<sup>58</sup> TEX. CODE CRIM. PROC. ART. 26.04(a).

<sup>59</sup> TEX. CODE CRIM. PROC. ART. 26.044.

<sup>60</sup> TEX. CODE CRIM. PROC. ART. 26.04(g)–(h).