



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

**September 2019**



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Honorable Chris Hill McKinney, Collin County Judge  
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**MISSION**

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

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## **Background**

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (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.

In September 2015, Senator Rodney Ellis, Representative Senfronia Thompson, and Representative Ron Reynolds directed a formal request to TIDC Executive Director Jim Bethke to conduct an assessment of Waller County's indigent defense system. In December 2015, Waller County Commissioner Jeron Barnett made a similar request to Executive Director Bethke. TIDC conducted an initial monitoring review and issued a policy monitoring report in August 2016. The report found that the County did not meet all of the FDA requirements (see Table 1 for a summary of findings from the initial and follow-up visits).

TIDC staff members, Claire Buetow, Debra Stewart, and Joel Lieurance conducted follow-up visits between February 28 and March 1, 2019, and between May 6 and May 7, 2019. This report addresses unresolved Fair Defense Act issues related to three core FDA requirements:<sup>2</sup>

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

REQUIREMENT 6: STATUTORY DATA REPORTING

For this review, TIDC examined data from FY2018 (October 2017 – September 2018), including felony, misdemeanor, and juvenile case files and data maintained by the County Auditor's Office. TIDC observed magistrate warnings and spoke with County officials and staff regarding procedures for taking counsel requests and transmitting those requests to the appointing judges.

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

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

**Table 1: History of Monitoring Findings**

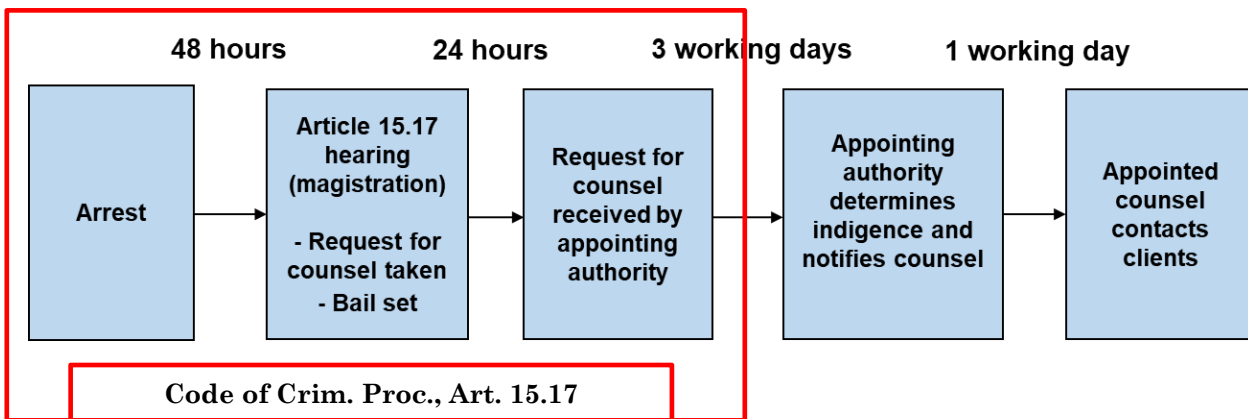
FDA Core Requirement	Description and Initial Year of Finding	Status after May 2019 Review	
		Satisfied	Pending
1. Prompt Magistration	Waller County’s designation as to who had authority to appoint counsel was unclear. (2016)	√ (2019)	
1. Prompt Magistration	Arrestees were not receiving assistance in completing assistance in completing affidavits of indigence. Requests for counsel were not promptly transmitted to the courts. (2016)		√
1. Prompt Magistration	Some justices of the peace were not submitting requests for counsel in their Texas Judicial Council Monthly Activity Reports. (2016)		√
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. (2016)		√
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. (2016)		√
4. Prompt Appointment	In misdemeanor cases, procedures did not ensure requests for counsel were ruled upon prior to waivers of counsel. (2016)	√ (2019)	
4. Prompt Appointment	In juvenile cases, timeliness in sample cases (when a petition is served on the juvenile) did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2016)		√
6. Data Reporting	Waller County included general court expenditures in its Indigent Defense Expense Report. (2016)	√ (2019)	

## **Program Assessment**

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

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

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



#### ***Waller County's Article 15.17 Procedures***

Following arrest, officers bring arrestees to the Waller County Jail for booking and processing. At least once per day, the magistrate arrives at the jail to determine probable cause, set bail, and admonish arrestees of their rights. If an arrestee requests counsel, all magistrates have authority to appoint counsel, but according to the indigent defense plan, the preferred procedure is to forward the affidavit of indigence to the court of dispositive jurisdiction, and that court determines indigence. When magistrates appoint counsel, jail staff must coordinate the filing of these documents with the district and county clerks' offices.

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.18(a). A list of contacts to send counsel requests made by arrestees from out-of-county warrants is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

Article 15.17(a) requires the magistrate ensure reasonable assistance to arrestees in completing the necessary forms for requesting appointment of counsel at the time of the Article 15.17 hearing. Article 15.17(a) further requires the magistrate transmit requests for counsel made at the Article 15.17 hearing to the appointing authority within 24 hours of the request. In Waller County, jail staff provide the affidavit of indigence to the arrestee upon request for counsel. Jail staff scan the forms to ensure relevant information is completed, and then electronically forward the forms to the district or county clerks that same day. In some instances, clerks may spot issues with the affidavits and send the forms back to the jail.

TIDC assessed the effectiveness of this process in its analysis of timely appointments. Some arrestees in our sample requested counsel, but the requests were never ruled upon. When TIDC made further inquiries, the courts and clerks stated they never received the requests. The process for transmitting counsel requests to the courts requires improvement. Waller County must ensure that when arrestees request counsel at the Article 15.17 hearing, reasonable assistance in completing the forms is provided to the arrestee, and the request and all paperwork are sent to the courts within 24 hours of the request being made.

***Texas Judicial Council Monthly Court Activity Reports***

Justices of the peace must report summary data of Article 15.17 hearings to the Office of Court Administration (OCA) as part of the Texas Judicial Council Monthly Court Activity Reports. These summary data points include the number of magistrate warnings given and the number of persons who request counsel at Article 15.17 hearings.<sup>7</sup> Two of the justices of the peace did not report any requests for counsel during FY2018. Justices of the peace must report the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports.

**Table 2: Judicial Council Monthly Activity Reports (Oct. 2017 – Sept. 2018)**

<b>Article 15.17 Warnings and Requests for Counsel Reported by Justices of the Peace</b>	<b>JP1</b>	<b>JP2</b>	<b>JP3</b>	<b>JP4</b>
Misdemeanor Warnings (A & B)	288	83	93	188
Misdemeanor Requests for Counsel (A & B) <sup>8</sup>	710	0	0	21
Felony Warnings	248	55	54	113
Felony Requests for Counsel	184	0	0	20

<sup>7</sup> 1 TEX. ADMIN. CODE § 171.7. Additionally, 1 TEX. ADMIN. CODE § 171.28(c) states: “. . . Policy monitoring may also include a review of statutorily required reports to the Office of Court Administration and Commission. . . .”

<sup>8</sup> These are reported totals and may differ from actual totals.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

**Conduct prompt and accurate magistration proceedings.**

**August 2016 Finding 1:** Waller County magistrates do not follow uniform procedures for handling requests for counsel. Magistrates must follow the appointment procedures adopted in Waller County's Indigent Defense Plan. If the County wishes to alter its appointment authority procedures, the judges may adopt and submit a revised plan consistent with Article 26.04(b). *Successfully Addressed.*

**August 2016 Finding 2:** All arrestees are not receiving reasonable assistance in completing financial affidavits at the time of the Article 15.17 hearing. As a result, requests for counsel are not promptly transmitted to the appointing authority. Article 15.17(a) requires Waller County magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel so that all arrestees who request counsel can have the request ruled upon within statutorily required timeframes. *Issue Pending.*

**August 2016 Finding 3:** Some justices of the peace are not submitting Article 15.17 requests for counsel in their Texas Judicial Council Monthly Court Activity Reports. The judges must report the number of persons requesting counsel to OCA to assure complete and accurate reports. *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 made at the Article 15.17 hearing.<sup>9</sup> To assess the timeliness of Waller County's appointment procedures in misdemeanor and felony cases, TIDC examined the time from request for counsel until appointment or denial of indigence. Under TIDC's monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of sample indigence determinations are timely.<sup>10</sup>

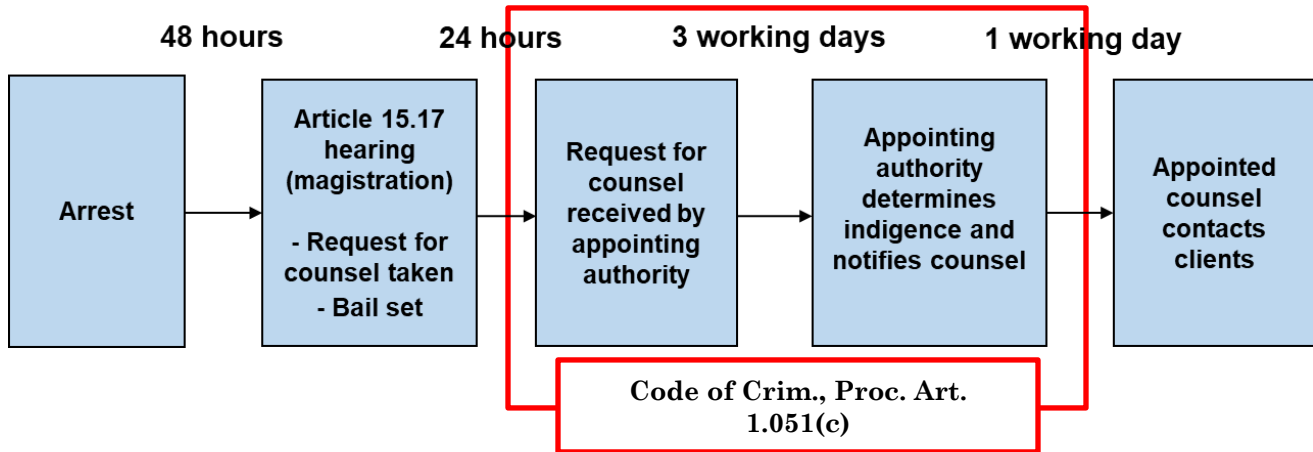
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<sup>9</sup> Article 1.051(j) requires the appointment of counsel for bonded defendants when adversarial judicial proceedings are initiated. *Rothgery v. Gillespie County* defined the initiation of adversarial judicial proceedings as the Article 15.17 hearing. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008).

<sup>10</sup> 1 TEX. ADMIN. CODE § 174.28(c)(4)(B).



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



***Timeliness of Appointments in Felony Cases***

To assess the timeliness of Waller County’s current appointment procedures in felony cases, TIDC examined 60 sample felony cases filed in FY2018. Of the case files examined, TIDC could determine times from a request for counsel until appointment of counsel or denial of indigence in 37 cases. Counsel was appointed in a timely manner in approximately 46% of cases with a request for counsel. This falls below TIDC’s threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. In order to meet the 90% timeliness threshold in felony cases, a system must be developed to promptly rule upon all counsel requests made at the Article 15.17 hearing. TIDC stands ready to provide technical assistance to Waller County in addressing these issues.

**Table 3: Times from Request to Appointment in Felony Cases**

	Number from Sample	Percent of Sample
Felony requests for counsel	37	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	15	40.5%
1 to 3 workdays + 24 hour transfer	2	5.4%
<b>Timely Rulings on Requests</b>	<b>17</b>	<b>45.9%</b>
4 to 10 workdays + 24 hour transfer	1	2.7%
More than 10 workdays	9	24.3%
No ruling on request	10	27.0%
<b>Untimely / No Rulings on Requests</b>	<b>20</b>	<b>54.1%</b>

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

To assess the timeliness of Waller County’s current appointment procedures in misdemeanor cases, TIDC examined 90 sample misdemeanor cases filed in FY2018. Of the case files examined, TIDC could determine times from a request for counsel until appointment of counsel or denial of indigence in 34 cases. Counsel was appointed in a

timely manner in approximately 76% of cases with a request for counsel. This falls below TIDC’s threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. In order to meet the 90% timeliness threshold in misdemeanor cases, a system must be developed to promptly rule upon all counsel requests made at the Article 15.17 hearing.

**Table 4: Times from Request to Appointment in Misdemeanor Cases**

	Number from Sample	Percent of Sample
Misdemeanor requests for counsel	34	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	18	52.9%
1 to 3 workdays + 24 hour transfer	8	25.5%
<b>Timely Rulings on Requests</b>	<b>26</b>	<b>76.5%</b>
4 to 10 workdays + 24 hour transfer	2	5.9%
More than 10 workdays	3	8.8%
No ruling on request	3	8.8%
<b>Untimely / No Rulings on Requests</b>	<b>8</b>	<b>23.5%</b>

***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 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>11</sup>

The 2016 report found that some persons requesting counsel waived their right to counsel without the court ruling on their requests. In the present review, TIDC’s misdemeanor case sample did not include any defendants who entered uncounseled

<sup>11</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)"

pleas while having pending requests for counsel. Based on the case file review, Waller County has addressed this waiver of counsel issue.

***Timeliness of Appointments in Juvenile Cases***

Counsel must be appointed for juveniles charged with delinquent conduct or conduct indicating a need for supervision when the juvenile is brought to a detention hearing and when the juvenile is served with a copy of the petition alleging misconduct. Under Section 54.01(b-1) of the Family Code, 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. 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 for the juvenile.

To assess the timeliness of Waller County’s current appointment procedures for juveniles (in instances when a petition is served on a juvenile), the monitor examined seven juvenile cases filed in FY 2018.<sup>12</sup> Waller County was 29% timely in appointing counsel for juveniles who were served with a copy of the petition. This falls below TIDC’s 90% threshold for timeliness. The late appointments may be due to the court not having contact with parents in time to meet the five working day requirement of Section 51.101(d). To address the issue, the County may wish to pursue avenues for obtaining financial information sooner (such as gathering financial information during the juvenile court intake process).

**Table 5: Times to Appointment in Juvenile Cases**

<b>Waller Juvenile Appointment Sample Data</b>	<b>Sample Size</b>	<b>Number from sample</b>	<b>Percent</b>
Number of juvenile case files examined	7		
<b>TIMELINESS OF COUNSEL WHEN THE JUVENILE WAS SERVED WITH A PETITION (either appointment or retention)</b>			
Appointment of counsel occurred within 5 working days of petition being served on juvenile		2	28.6%
Retention of counsel (or order to retain) occurred within 5 working days of petition being served on juvenile		0	0%
<b>Total cases in which counsel present in a timely fashion</b>		<b>2</b>	<b>28.6%</b>
Total cases in which counsel not present in a timely fashion		5	71.4%

<sup>12</sup> The small sample size reflects a very small number of juvenile cases filed each year.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Appoint Counsel Promptly.**

TIDC is available as a resource to Waller County in developing procedures to address these findings.

**August 2016 Finding 4 (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in felony cases. *Issue Pending.*

**August 2016 Finding 5 (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. *Issue Pending.*

**August 2016 Finding 6 (misdemeanor cases):** The County does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. *Successfully Addressed.*

**August 2016 Finding 7 (juvenile cases):** The monitor's sample of attorney appointments where a juvenile was released from custody and served with a petition fell below the Commission's threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy the time frames in Section 51.101 of the Family Code. *Issue Pending.*

### **REQUIREMENT 6: STATUTORY DATA REPORTING.**

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 juvenile in each district court, county court, statutory county court, and appellate court. Since FY2014, financial data reports now include attorney-level information.<sup>13</sup>

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<sup>13</sup> TEX. GOV'T CODE § 79.036(a-1).

***Unallowable Expenses Reported on the Indigent Defense Expense Report***

The 2016 report found that Waller County included general court expenses in its Indigent Defense Expense Report (IDER). These expenses included the cost of mental health evaluations that were not for the exclusive use of the defense.

In the current review, TIDC interviewed personnel in the Waller County auditor’s office and reviewed supporting documents for fiscal data submitted to the Commission. The monitor found general court expenses were not included in the FY2018 IDER. Waller County has successfully addressed this finding from the 2016 report.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6**

**Statutory Data Reporting.**

**August 2016 Finding 8:** The monitor found that the County included some general court expenditures with indigent defense expenses in the FY15 Indigent Defense Expense Report (IDER). The County should implement a procedure to attach approved defense motions for allowable expenditures to the related voucher so that only costs incurred for indigent defense are included on the IDER. ***Successfully Addressed.***

**Conclusion**

TIDC enjoyed meeting with Waller County officials and staff and appreciates their cooperation during this review. TIDC stands ready to provide any assistance the County may need in addressing the issues identified in this report.

## Status of Past Findings

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

**August 2016 Finding 1:** Waller County magistrates do not follow uniform procedures for handling requests for counsel. Magistrates must follow the appointment procedures adopted in Waller County's Indigent Defense Plan. If the County wishes to alter its appointment authority procedures, the judges may adopt and submit a revised plan consistent with Article 26.04(b). *Successfully Addressed in 2019.*

**August 2016 Finding 2:** All arrestees are not receiving reasonable assistance in completing financial affidavits at the time of the Article 15.17 hearing. As a result, requests for counsel are not promptly transmitted to the appointing authority. Article 15.17(a) requires Waller County magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel so that all arrestees who request counsel can have the request ruled upon within statutorily required timeframes. *Issue Pending.*

**August 2016 Finding 3:** Some justices of the peace are not submitting Article 15.17 requests for counsel in their Texas Judicial Council Monthly Court Activity Reports. The judges must report the number of persons requesting counsel to OCA to assure complete and accurate reports. *Issue Pending.*

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

**August 2016 Finding 4 (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in felony cases. *Issue Pending.*

**August 2016 Finding 5 (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. *Issue Pending.*

**August 2016 Finding 6 (misdemeanor cases):** The County does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. *Successfully addressed in 2019.*

**August 2016 Finding 7 (juvenile cases):** The monitor's sample of attorney appointments where a juvenile was released from custody and served with a petition fell below the Commission's threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy the time frames in Section 51.101 of the Family Code. *Issue Pending.*

**Core Requirement 6. Statutory Data Reporting.**

**August 2016 Finding 8:** The monitor found that the County included some general court expenditures with indigent defense expenses in the FY15 Indigent Defense Expense Report (IDER). The County should implement a procedure to attach approved defense motions for allowable expenditures to the related voucher so that only costs incurred for indigent defense are included on the IDER. *Successfully addressed in 2019.*

## **Findings and Recommendations from the September 2019 Review**

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

**September 2019 Finding 1 and Recommendation:** All arrestees are not receiving reasonable assistance in completing financial affidavits at the time of the Article 15.17 hearing. As a result, requests for counsel are not promptly transmitted to the appointing authority. Article 15.17(a) requires Waller County magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel so that all arrestees who request counsel can have the request ruled upon within statutorily required timeframes.

**September 2019 Finding 2 and Recommendation:** Some justices of the peace are not submitting Article 15.17 requests for counsel in their Texas Judicial Council Monthly Court Activity Reports. The judges must report the number of persons requesting counsel to OCA to assure complete and accurate reports.

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

**September 2019 Finding 3 and Recommendation (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in felony cases.

**September 2019 Finding 4 and Recommendation (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**September 2019 Finding 5 and Recommendation (juvenile cases):** The monitor's sample of attorney appointments where a juvenile was released from custody and served with a petition fell below the Commission's threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy the time frames in Section 51.101 of the Family Code.