



Follow-up Review of Wichita County's Indigent Defense Systems

November 26, 2012



Texas Indigent Defense Commission
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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.

Monitoring Background

The Texas Indigent Defense Commission (Commission) conducted initial policy monitoring visits to Wichita County in October and November 2010. The Commission issued a report in February 2011 that made several recommendations related to the timely appointment of counsel. Most notably the Commission recommended providing arrestees with reasonable assistance in completing affidavits of indigence at the time of magistrate warnings and promptly transmitting requests for counsel to the indigent defense coordinator. The Commission's initial review found that there were some late appointments and some pro se pleas that did not appear to meet the requirements of Article 1.051 of the Code of Criminal Procedure when requests were not promptly forwarded to the indigent defense coordinator.

Wichita County gathered criminal justice officials and staff together in order to respond to the monitoring report. On July 25, 2011, the County submitted a response that provided that the Sheriff's Office would provide affidavit of indigence forms to arrestees prior to magistrate warnings so that paperwork requesting appointed counsel could be complete at the time of the magistrate warnings. The County's response further indicated that inmates would not return to their cells until the affidavits of indigence had been completed and turned in. See Appendix A for a listing of recommendations from the 2010 report and the accompanying responses.

Overview of Follow-up Monitoring Review

The Commission's policy monitor, Joel Lieurance, conducted a follow-up visit to Wichita County on July 11 and 12, 2012. In this report, the term "monitor" is used to refer to actions conducted by Commission staff. On this follow-up visit, the monitor met with the following people: the county judge, the indigent defense coordinator, and the chief public defender. The monitor examined electronic misdemeanor and felony case records from a public computer station with access to the county and district clerks' records. This report examines whether the County successfully implemented procedures that address each of our past recommendations. The monitor did not examine areas in which the County did not previously receive a recommendation.

Timely Appointments of Counsel

The monitor's 2010 report made three recommendations: one involving the transmission of requests for counsel made at magistration to the appointing authority; one involving the timeliness of counsel appointments; and one involving waivers of counsel. All three recommendations are related to the timeliness of court rulings upon requests for counsel. Because of this inter-relationship, the monitor will first examine the timeliness of indigence determinations and then investigate the root cause of late indigence determinations.

On this most recent visit, the monitor examined 39 felony cases and 40 misdemeanor cases that were filed in October and November 2011. The monitor only considered requests for counsel made on or after July 25, 2011 (the date Wichita's submitted its action plans regarding the Commission's prior report). From this combined sample of felony and misdemeanor cases, the monitor found 38 requests for counsel made on or after July 25, 2011. See the following table for a summary of the timeliness of indigence determinations pulled for review.

Table: Timeliness of Appointments

	Felony Cases	Misdemeanor Cases	Combined Total
Total Records Reviewed	39	40	
Total Requests for Counsel made on or after July 25, 2011	21	17	38
Timely Appointments of Counsel	12	10	22
Timely Denials of Indigence	3	0	3
Percent of Timely Determinations of Indigence	71.4%	58.8%	65.8%
Late Determinations of Indigence	6	3	9
No Determination of Indigence	0	4	4

The Commission's administrative rules require the monitor to make a recommendation to a county if the monitor's sample of timely indigence determinations is less than 90% timely. In this instance, the monitor's sample of combined cases was just under 66% timely.

Follow-up Recommendation 1: Wichita County must examine its appointment processes for both felony and misdemeanor cases and must implement procedures that ensure timely appointment of counsel.

The monitor found that when the indigent defense coordinator received requests for counsel that they were promptly ruled upon. From the monitor's sample, all requests received by the indigent defense coordinator either had counsel appointed or indigence denied within one working day of the indigent defense coordinator receiving the request.

Unfortunately, the monitor's sample contained a total of thirteen cases where a request for counsel was made, but where the resulting indigence determination was either late or did not occur. The monitor found that eight of these late determinations were instances where the affidavit of indigence was completed more than three days after the request for counsel was originally initiated. The remaining five cases were instances where the arrestee requested counsel at magistration but bonded before completing an affidavit of indigence. The biggest impediment to timely appointments of counsel involves the transfer of completed requests to the indigent defense coordinator.

Magistrate Warnings / Ensuring Reasonable Assistance in Completing Financial Affidavits

Under Article 15.17(a), the magistrate is required to ensure reasonable assistance in completing the necessary forms for requesting counsel at the time of the magistrate warnings. Based on the monitor's review, it appears that this statutory requirement is not being met. Wichita County indicated in its response to the initial monitoring report that affidavits of indigence would be provided to arrestees prior to magistrate warnings and would be collected from arrestees prior to returning arrestees to their cells. Wichita's proposed solution seems to be a reasonable solution to the issue, but it does not appear to have been implemented across the board. If all of the requests for counsel in the sample

reviewed were collected at the time of magistrate warnings, one may expect that all of the requests for counsel would have been ruled upon in a timely manner.

Follow-up Recommendation 2: Wichita County must ensure that reasonable assistance is provided to arrestees to complete affidavits of indigence at the time of magistration as required by Article 15.17 of the Code of Criminal Procedure.

Waivers of Counsel Under Article 1.051, Code of Criminal Procedure

Under Article 1.051(f-1) of the Code of Criminal Procedure, the attorney representing the state may not communicate with an uncounseled defendant who has requested counsel unless the court has denied the request, the defendant has been given a reasonable opportunity to retain counsel and the defendant has knowingly waived his right to retain counsel. If a defendant requests counsel, but the courts do not rule on the request, Article 1.051(f-1) appears to disallow the prosecutor from communicating with the defendant. If the defendant signs a waiver of counsel without a ruling on the initial request, Article 1.051(f) states that waivers of counsel obtained in violation of 1.051(f-1) or (f-2) are presumed invalid. In short, in order for a pro se plea to meet the requirements of Article 1.051, all requests for counsel must have been denied, and then a waiver of counsel must be obtained from the defendant.

Returning to the monitor's sample of cases, the monitor found five cases in which the defendant requested counsel at magistration and then bonded prior to completing the affidavit of indigence. All five of these cases were misdemeanors. Four of these cases resulted in defendants pleading pro se without a ruling on the request for counsel. One case resulted in the defendant making a new request for counsel and receiving appointed counsel on the day of the second request. Theoretically, all persons appearing in court should have had previous requests for counsel ruled upon. However, if "upstream" processes are not fully coordinated, the possibility arises that a number of waivers of counsel will not meet the requirements of Article 1.051. To ensure that waivers of counsel follow Article 1.051's requirements, the judges should examine whether defendants have previously requested counsel prior to the signing of a waiver.

Follow-up Recommendation 3: Wichita County must ensure that all requests for counsel are ruled upon before any waivers of counsel are signed, pursuant to Article 1.051(f-2). It appears that the root cause of invalid waivers of counsel is that if a defendant requests counsel at magistration that the courts are not always notified of the request.

Conclusion

The recommendations in this report are the same recommendations as in the original monitoring report. All recommendations are addressed to problems obtaining completed affidavits of indigence at the time of magistration. If Wichita County could overcome this procedural obstacle, the timeliness of appointments would easily pass our administrative threshold, and there would be no reason for concern that waivers of counsel may not meet the requirements set by Article 1.051.

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

Appendix A- Recommendations from the 2010 Report and Accompanying Responses

2010 Recommendation 1: Wichita County must ensure that reasonable assistance is provided to arrestees in completing affidavits of indigence at the time of magistration as required by Article 15.17 of the Code of Criminal Procedure.

Response: The application for court appointed attorney will be completed to the best of their ability at the time of Magistration. They will be given time prior to seeing the magistrate to complete the form.

Contact person(s): Deputy Chief Derek Meador, Wichita County Sheriff's Office
Completion date: Monday July 25, 2011.

2010 Recommendation 2: Wichita County must ensure that all requests for counsel are ruled upon before any waivers of counsel are signed, pursuant to Article 1.051(f-2). It appears that the root cause of invalid waivers of counsel is that if a defendant requests counsel at magistration that the courts are not always notified of the request.

Response: Your recommendation stated that Article 1.051(f-2) stated that the request for Counsel must be transmitted within 24 hrs to the Court. This article only applies if the Magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the County. Wichita County's Plan and Standing Rules and Orders for Procedures for timely and fair appointment of counsel for indigent accused persons under Magistrate Responsibilities, paragraph (f):

The Court Administrator shall be the designee for the County, County Courts at Law and the District Courts to receive, review and process the Application for Court Appointed Counsel. The Court Administrator shall be responsible for monitoring status of the Request for Counsel so the determination of indigence status and appointment of counsel by the appropriate judge is complete within 3 working days after receiving the Request for Counsel.

Will meet with the County Court Judges and recommend that on the form, Judge's Explanation of Rights to Defendant Without an Attorney/Waiver of Right to Counsel under DEFENDANT'S CHOICE that according to Article 15.17(g) that this statement be added to the form:

I wish to waive the right to apply for court appointed counsel and request the Court to proceed with my case without an attorney being appointed to me.

Contact person(s): Mitzi Brotherton, Wichita County Court Coordinator
Completion date: Monday July 25, 2011.

2010 Recommendation 3: Wichita County must examine its appointment processes for both felony and misdemeanor cases and must implement procedures that ensure timely appointment of counsel. Task Force rules require that a recommendation be made regarding timely appointments of counsel if less than 90 percent of the monitor's sample is timely.

Response: The Court Administrator's office has discussed with the Sheriff's Jail Administrator to implement the following procedure: The Jail Administrator / Jail staff is going to receive the completed application for Court Appointed Counsel after magistration and before the defendant is taken back to his/her cell; if the Court Appointed Counsel is requested at the time of magistration.

Contact person(s): Mitzi Brotherton, Wichita County Court Coordinator

Completion date: Monday July 25, 2011.
