



# **Policy Monitoring Follow-up Review – Deaf Smith County**

**August 2017**



Texas Indigent Defense Commission  
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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

Texas Indigent Defense Commission (Commission) staff visited Deaf Smith County in 2015 to make a limited scope review of the county’s indigent defense practices. In March 2015, the Commission issued the initial policy monitoring report, which made multiple recommendations to assist Deaf Smith County in meeting the core requirements of the Fair Defense Act. Recommendation topics covered: procedures for determining indigence in misdemeanor cases and procedures for conducting waivers of counsel.

## Current Review

Staff members Joel Lieurance and Brandon Bellows conducted the follow-up review with a visit to Deaf Smith County on June 8, 2017.<sup>1</sup> The purpose of this review was to examine whether the county successfully addressed the findings and recommendations from the March 2015 report. The monitor examined: misdemeanor case files; magistrate warning forms kept by the justice of the peace; data reported to the Commission as part of the annual Indigent Defense Expense Report (IDER); and Texas Judicial Council Monthly Court Activity Reports that were reported to the Office of Court Administration (OCA). The monitor’s report follows, and the county must respond to this report’s recommendations.

## Statistics Showing Requests for Counsel and Appointment of Counsel

Data reported to the Commission and to OCA indicate the percent of misdemeanor defendants who receive appointed counsel has increased marginally since the time of the monitor’s March 2015 review. However, the percentage is still well below the state average, and only a small fraction of those requesting counsel receive appointed counsel.

**Table 1: Deaf Smith County Court Misdemeanor Appointment Data**

Year <sup>2</sup>	2013	2014	2015	2016	Texas 2016
Misdemeanor Requests for Counsel Made to Justice of the Peace	226	181	216	201	n/a
Misdemeanor Charges Added (from OCA report)	615	571	590	542	481,253
Misdemeanor Cases Paid	2	6	27	10	214,674
% Misdemeanor Charges Defended with Appointed Counsel	0.3%	1.1%	4.6%	1.8%	44.6%

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<sup>1</sup> Throughout this report, references to Commission staff will use the term “monitor.”

<sup>2</sup> The fiscal year for Misdemeanor Charges Added is from September to August. All other fiscal years go from October to September.

## Timeliness of Indigence Determinations

When an arrestee is brought to an Article 15.17 hearing, the magistrate must ask the arrestee if he/she wants to request counsel. If the arrestee requests counsel, the magistrate must ensure reasonable assistance in completing the application, and must transmit the request and accompanying forms to the appointing authority within 24 hours of the request being made.<sup>3</sup> The appointing authority then has 3 working days to rule on the request.<sup>4</sup>

In the current review, the monitor reviewed 48 misdemeanor cases filed in FY2016 (October 2015 – September 2016). The monitor found records showing seventeen requests for counsel made by defendants from this sample. Fourteen of those requests were ruled upon, with one appointment and thirteen denials. Counsel was appointed in a timely manner in 25% of sample cases, and so fell below the Commission’s threshold (90% timeliness) for presuming a jurisdiction has procedures in place for timely appointments of counsel.<sup>5</sup> Three cases from the sample did not receive a ruling on the request.

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

<b>Deaf Smith Misdemeanor Appointment Sample Data</b>	Sample Size	Number from sample	Percent
Number of case files examined	48		
Appointment / denial of indigence occurred in: <sup>6</sup>	16		
0 work days		1	6.3%
1 work day + 24 hour transfer		2	12.5%
2 work days + 24 hour transfer		0	0.0%
3 work days + 24 hour transfer		1	6.3%
<b>Total Timely appointments / denials (0 – 3 work days)</b>		<b>4</b>	<b>25.0%</b>
Late appointments / denials (more than 3 work days)		9	56.3%
No ruling on request		3	18.8%
<b>Total Late Determinations of Indigence</b>		<b>12</b>	<b>75.0%</b>

<sup>3</sup> Tex. Code Crim. Proc. art. 15.17(a).

<sup>4</sup> Tex. Code Crim. Proc. art. 1.051(c).

<sup>5</sup> Thirteen sample requests were denied, but the denials were not dated. To determine the timeliness of indigence determinations, the monitor used the date the document was file stamped by the clerk as the date the denial occurred.

<sup>6</sup> This excludes a case in which counsel had been requested from a defendant incarcerated in another county. The monitor’s practice to this point has been to exclude out-of-county requests from an analysis of timely appointments.

**Policy Monitoring Recommendation 1:** Deaf Smith County must implement procedures to make timely appointments of counsel. Under Article 1.051(c) of the Code of Criminal Procedure, the court has three working days from receipt of request to appoint counsel for those deemed indigent.

## Methods to Determine Indigence

Of the thirteen sample denials of indigence, the monitor observed that several of the requests included affidavits in which defendants did not provide clear details showing the defendant's income, assets, or expenses. For instance, a defendant may have listed an employer but not marked a level of income or may have included zeros throughout most portions of the affidavit. Based on the monitor's observation of these forms, defendants may not fully understand how to successfully fill out the forms needed to request counsel. A defendant has a constitutional and statutory right to the appointment of counsel for representation connected to a jailable offense if he/she cannot afford to retain counsel.<sup>7,8</sup> The proper completion of government forms should not create an obstacle to this right.

One of the sample requests (which was not ruled upon) contained a statement noting the form was filled out with the assistance of the justice of the peace. This practice comports with the Article 15.17 requirement that the magistrate ensure reasonable assistance in completing the counsel request forms. The county may benefit by implementing processes which ensure all affidavits of indigence are fully complete before their submission for review.

## Methods to Accept Waivers of Counsel

At the time of the 2015 review, many misdemeanor arrestees requested counsel at the Article 15.17 hearing, but those requests were often not successfully transmitted to the county court. As a result, many arrestees entered uncounseled pleas without their requests for counsel being ruled upon.<sup>9</sup> Under Article 1.051(f-1), the prosecutor cannot communicate with a defendant until the request for counsel is denied, and the defendant waives the right to retain counsel. If a defendant wishes to enter an uncounseled plea, the defendant must sign a written waiver of counsel that substantially conforms to Article 1.051(g).<sup>10</sup> Under Article 1.051(f), waivers

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<sup>7</sup> U.S. CONST. amend. VI; *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>8</sup> Tex. Code Crim. Proc. art. 1.051(a) – (c).

<sup>9</sup> In the 2015 review, the monitor's sample contained 14 requests for counsel, and none of those requests were ruled upon.

<sup>10</sup> Tex. Code Crim. Proc. art. 1.051(g) states:

If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-

obtained in violation of Article 1.051(f-1) or (f-2) are presumed invalid. The 2015 report made a recommendation that Deaf Smith County put in place a system to rule upon all requests for counsel prior to any waiver of counsel.

In the current review, the monitor found records showing seventeen requests for counsel made by defendants. Fourteen of the requests were ruled upon, with one appointment and thirteen denials. While not seamless, this is a great improvement over the 2015 review. In the three cases in which counsel was requested but the court did not issue a ruling, all three defendants entered uncounseled pleas.

Additionally, three sample cases included defendants who entered uncounseled pleas, but there was no written waiver of counsel in the case file. Article 1.051(g) requires written waivers after the court determines the waiver is voluntarily and intelligently made.

**Policy Monitoring Recommendation 2:** Deaf Smith County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(2) of the Code of Criminal Procedure prohibits an attorney representing the state from communicating with a defendant who has requested the appointment of counsel unless the court has denied the request and subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or waives the opportunity to retain private counsel.

**Policy Monitoring Recommendation 3:** Defendants who enter uncounseled pleas must sign a written waiver that substantially conforms to the waiver from Article 1.051(g), and this waiver must become part of the record of the proceedings.

## Conclusion

The monitor appreciated the professionalism and assistance provided by Deaf Smith County officials and staff. Deaf Smith County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the County's transition and process improvements regarding the report's recommendations.

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representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:

"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)."

## **Status of Recommendations from the March 2015 Review**

**Policy Monitoring Recommendation 1:** Deaf Smith County must implement procedures to make timely appointments of counsel. Under Article 1.051(c) of the Code of Criminal Procedure, the court has three working days from receipt of request to appoint counsel for those deemed indigent. *Issue still pending.*

**Policy Monitoring Recommendation 2:** Deaf Smith County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(2) of the Code of Criminal Procedure prohibits an attorney representing the state from communicating with a defendant who has requested the appointment of counsel unless the court has denied the request and subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or waives the opportunity to retain private counsel. *Issue still pending.*<sup>11</sup>

## **Additional Recommendation from the August 2017 Review**

**Policy Monitoring Recommendation 3:** Defendants who enter uncounseled pleas must sign a written waiver that substantially conforms to the waiver from Article 1.051(g), and this waiver must become part of the record of the proceedings.

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<sup>11</sup> Policy Monitoring Recommendations 2 has been re-worded. The old recommendation stated:  
**Policy Monitoring Recommendation 2:** Deaf Smith County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(1), Code of Criminal Procedure prohibits an attorney representing the state from initiating or encouraging a waiver of counsel from an unrepresented defendant.