



Policy Monitoring Review of Kinney County's Indigent Defense Systems

July 2022



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Mission: Protecting the right to counsel, improving public defense

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Executive Summary

The Texas Indigent Defense Commission (TIDC) examined arrests in Kinney County between April 1 and September 30, 2021. TIDC found that, for defendants who appeared before a Kinney County magistrate and requested counsel at the Article 15.17 hearing, there was no method to complete financial paperwork at the time of the hearing. Additionally, the magistrate did not forward requests to the appointing authority within 24 hours of being made.

TIDC also found the Kinney County Judge did not appoint counsel timely. For arrests occurring prior to Operation Lone Star (OLS), some requests for counsel were never ruled upon, and those defendants entered uncounseled pleas. Case file review also showed the Kinney County Justice Court did not accurately report requests for counsel during magistrate warnings to the Office of Court Administration (OCA) during FY21.

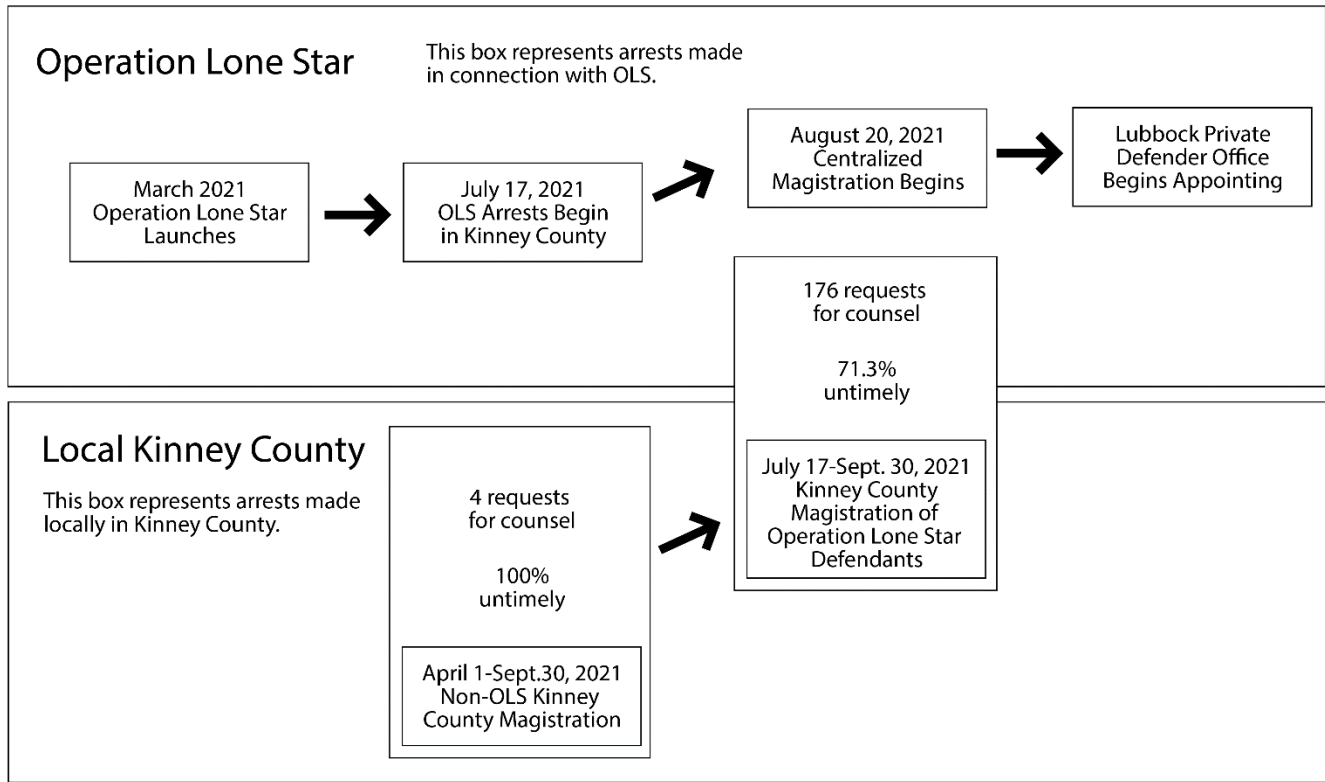
Background

TIDC monitors local jurisdictions' compliance with the Fair Defense Act through on-site reviews.¹ These reviews seek to promote local compliance with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes where needed. On October 13, 2021, Representative Nicole Collier, Chair of the House Committee on Criminal Jurisprudence, requested that TIDC conduct policy and fiscal monitoring reviews of Kinney County's misdemeanor indigent defense system. This policy monitoring report was prepared in response to that request.

Governor Abbott launched OLS in March 2021. In May, Governor Abbott issued a disaster declaration covering much of the border region. The declaration directed the Department of Public Safety to "use available resources to enforce all applicable federal and state laws to prevent the criminal activity along the border, including criminal trespassing, smuggling, and human trafficking, and to assist Texas counties in their efforts to address those criminal activities." On August 20, 2021, the Texas Department of Emergency Management launched a central magistration facility in Del Rio (Centralized Magistration) to provide magistrate warnings for OLS arrestees from Val Verde and Kinney counties. Before that time, OLS defendants arrested in Kinney County received magistrate warnings locally. On August 30, 2021, the Supreme Court of Texas issued an emergency administrative order, 21-9104, authorizing TIDC to create and implement an emergency OLS indigent defense plan. TIDC designated the Lubbock Private Defender Office to appoint counsel for OLS cases. This report covers only the appointment of counsel for those magistrated locally in Kinney County under the Kinney County Indigent Defense Plan.

¹ TEX. GOV'T CODE § 79.037(a)–(b).

Figure 1: Timeline of Indigent Defense Systems in Kinney County



Historically, the percentage of misdemeanor defendants receiving appointed counsel in Kinney County has been lower than the statewide average (see Table 1). In addition, TIDC has received complaints and reviewed media reports that Kinney County is not timely appointing counsel.

Table 1: Misdemeanor Cases Paid as a Percentage of New Cases Disposed

Fiscal Year (Oct. – Sept.)	Texas 2021	2021	2020	2019	2018	Kinney 4-year avg.
Misdemeanor Cases Disposed (from OCA report)	329,246	31	36	49	94	53
Misdemeanor Cases Paid	143,702	1	0	1	13	4
% Misdemeanor Cases Defended with Appointed Counsel	44%	3%	0%	2%	14%	7%

Methodology

TIDC staff members Joel Lieurance and Nicolas Sawyer visited Kinney County to conduct a limited scope review from November 6th to 9th, 2021, including arrests for local and OLS charges. This report examines indigent defense processes for defendants brought through Kinney County Magistration. The report then compares those processes with statutory requirements. The review focuses on the ability of misdemeanor arrestees to request and obtain appointed counsel from hearings

conducted in Kinney County. TIDC compared local practices to three core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE.

TIDC gathered information about procedures for handling misdemeanor arrests in Kinney County occurring between April 1st and September 30th, 2021. TIDC interviewed local officials and examined data and records from various entities including the Kinney County Sheriff's Office,² OCA, Kinney County Clerk's Office, Texas Department of Public Safety, TIDC implementation team, and LPDO. The report analyzes defendants whose magistrate warnings took place:

(1) In Kinney County before OLS (11 defendants); or

(2) In Kinney County during OLS (180 defendants).

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.³ At this hearing, the magistrate must inform the person of the right to counsel and procedures for requesting counsel. If the person requests appointed counsel, the magistrate must ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.⁴ Magistrates must transmit requests for counsel to the appointing authority within 24 hours.⁵ 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.⁶

² Due to typos in the names of the defendants in the Kinney County Sheriff's Office data, calculations may be off by slight margins.

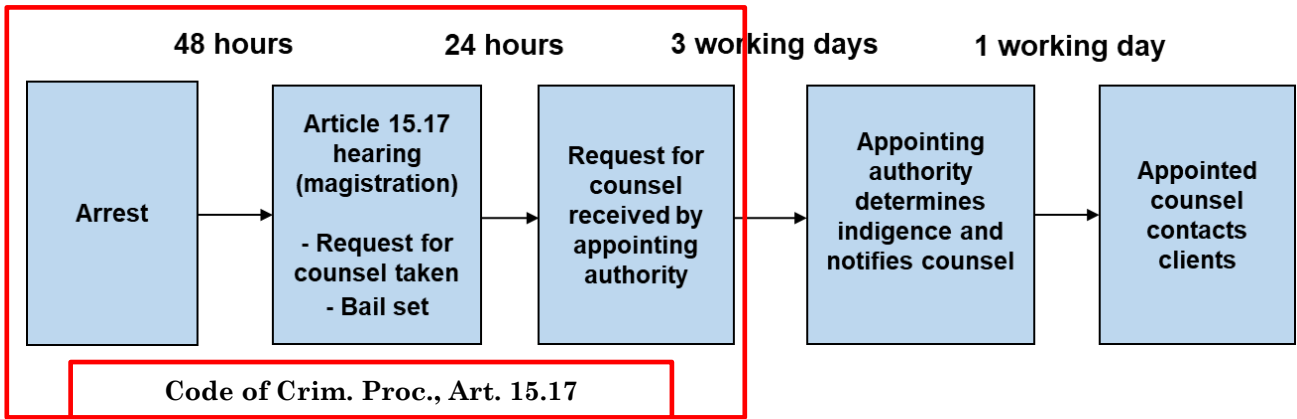
³ TEX. CODE CRIM. PROC. art. 15.17(a).

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

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

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

Figure 2a: Timeline for Appointment of Counsel in Adult Criminal Cases



Timeliness of Warnings

A county is presumed to be in substantial compliance with the prompt Article 15.17 hearing requirement if at least 98% of Article 15.17 hearings sampled reflected the hearing was conducted within 48 hours of arrest.⁷ To determine the timeliness of Article 15.17 warnings in Kinney County, TIDC calculated the number of calendar days between arrest and the Article 15.17 hearing for Article 15.17 hearings conducted in Kinney County, both prior to and during OLS.⁸ For defendants receiving magistrate warnings in Kinney County during OLS, Article 15.17 hearings for all sample defendants occurred within one day of arrest, indicating that procedures are in place in Kinney County to promptly bring defendants before a magistrate.

⁷ 1 TEX. ADMIN. CODE § 174.28. If the hearing occurred within two days of arrest, the monitor presumed warnings were timely.

⁸ For the time period prior to OLS, TIDC could not obtain a sufficient number of data points to analyze hearing timeliness. In this period, TIDC could only calculate the number of days from arrest to Article 15.17 hearings for 2 defendants, although TIDC found magistrate warning forms for 11 defendants arrested from April 1 to July 16, 2021.

Table 2: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
KINNEY COUNTY MAGISTRATION, JULY 17-SEPT. 30		
Article 15.17 hearing occurs 2 days after arrest: ⁹	174	—
0 days	154	88.5%
1 day	20	11.5%
2 days	0	0%
Timely Hearings	174	100%
More than 2 days	0	0%

Completion and Transmission of Financial Forms to the Appointing Authority

At the Article 15.17 hearing, the magistrate must ensure the arrestee has reasonable assistance in completing the necessary forms for requesting counsel.¹⁰ Within 24 hours of a defendant requesting counsel, the magistrate must transmit the request and financial paperwork to the person authorized to appoint counsel.¹¹ For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.¹²

Transmitting and Assisting with Forms

TIDC obtained magistrate warning records from Kinney County’s Justice Court. Based on interviews, TIDC learned magistrates were not giving defendants the affidavit of indigence when they requested counsel at the Article 15.17 hearing. Instead, the judge recorded that a request was made on the magistrate warning form and sent the request to the county clerk’s office. The justice-of-the-peace expected the requests would be forwarded to the county judge so that he could assist with the completion of affidavits of indigence. The County Clerk did not route requests from the county clerk to the county judge. According to interviews, the Kinney County Judge changed this process. Kinney County must ensure that, whenever a request for counsel is made at the Article 15.17 hearing, the magistrate must provide the arrestee with reasonable assistance in completing financial paperwork. The magistrate must send the request and financial paperwork to the appointing authority within 24 hours of the request being made.

⁹ TIDC excluded 6 of the 180 cases examined because of data reliability issues.

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

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

¹² TEX. CODE CRIM. PROC. art. 15.18 (a-1).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate Article 15.17 proceedings.

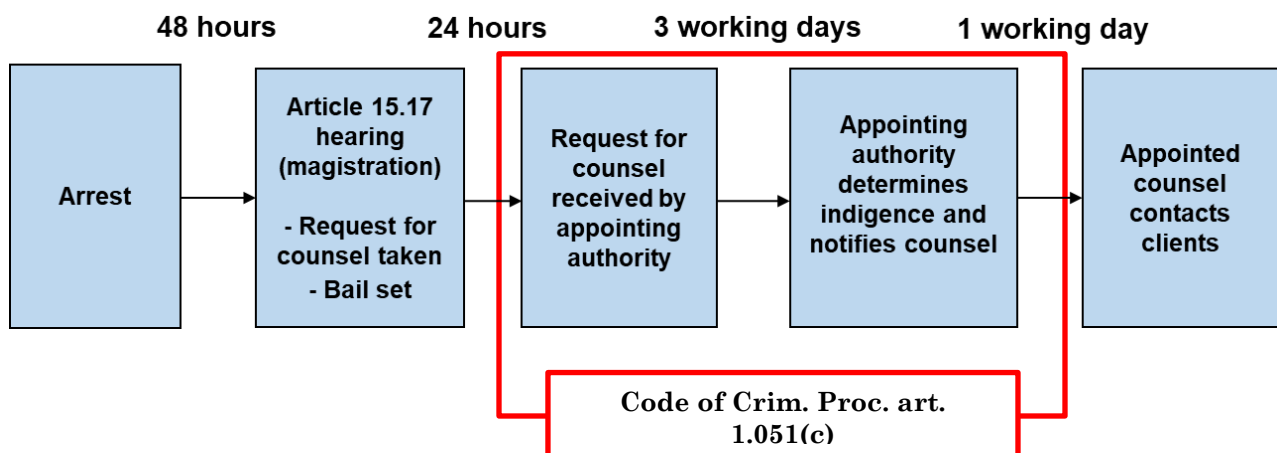
FINDING 1 AND RECOMMENDATION: Article 15.17(a) requires that magistrates ensure reasonable assistance in completing the forms necessary for requesting counsel at the time of the hearing. This review found arrestees were not provided with the forms, nor with assistance completing them at the time of the Article 15.17 hearing. Kinney County must ensure that, whenever a request for counsel is made at the Article 15.17 hearing, magistrates provide arrestees with the form and reasonable assistance in completing financial paperwork.

FINDING 2 AND RECOMMENDATION: Article 15.17(a) requires that magistrates transmit the request and accompanying forms to the courts within 24 hours of the request being made. TIDC found procedures were not in place to ensure requests were transmitted to the appointing authority within 24 hours of the request being made. Kinney County must ensure that whenever a request for counsel is made at the Article 15.17 hearing, the request and financial paperwork are sent to the courts within 24 hours of the request being made.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request. To assess the timeliness of Kinney County's current appointment procedures in misdemeanor cases, TIDC examined requests for counsel made between April 1, 2021, and September 30, 2021.

Figure 2b: Timeline for Appointment of Counsel in Adult Criminal Cases



Kinney County Non-OLS Misdemeanor Cases

For defendants receiving magistrate warnings in Kinney County between April 1 and September 30 (non-OLS), the Kinney County Judge did not rule on any counsel requests within statutory timelines (**0% timely**). Kinney County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases for non-OLS cases.

Table 3: Times to Appointment in Non-OLS Misdemeanor Cases

KINNEY COUNTY MAGISTRATION, APRIL 1 - SEPT. 30	Sample Size	Number from sample	Percent
Number of arrests examined	11		
Total cases with a counsel request ¹³		4	
Appointment / denial of indigence occurred in:			
0 work days		0	
1 – 3 work days + 24-hour transfer		0	
Total timely appointments / denials		0	0%
More than 3 work days + 24-hour transfer		0	
No ruling on request		4	
Total untimely appointments / denials		4	100%

OLS Misdemeanor Cases Going Through Kinney County Magistrates

For defendants receiving magistrate warnings locally in Kinney County in connection with OLS, Kinney County ruled upon 51 of 178 counsel requests within statutory timelines (**29.0% timely**). Kinney County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases for OLS cases.

¹³ Additional requests may have been made, but TIDC did not obtain magistrate warning forms for all sample cases.

Table 4: Times to Appointment in OLS Misdemeanor Cases Going Through Kinney County Magistration

KINNEY COUNTY MAGISTRATION, JULY 17-SEPT. 30			
Number of arrests examined	180		
Total cases with a counsel request ¹⁴		176	
Appointment / denial of indigence occurred in:			
0 work days		51	
1 – 3 work days + 24-hour transfer		0	
Total timely appointments / denials		51	29.0%
More than 3 work days + 24-hour transfer		46	
No ruling on request		79	
Total untimely appointments / denials		125	71.3%

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure requires that waivers of counsel be 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 give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If a defendant enters an uncounseled plea, the defendant must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).¹⁵

In the period prior to July 17 (when OLS cases began), TIDC found two sample cases in which non-OLS misdemeanor defendants requested counsel at the Article 15.17 hearing and later entered uncounseled pleas without their requests being ruled upon. The absence of a ruling on a pending request raises the possibility of several statutory

¹⁴ Additional requests may have been made, but TIDC did not obtain magistrate warning forms for all sample cases. TIDC excluded two requests in which timeliness of appointment could not be determined.

¹⁵ 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)

violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Kinney County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Prompt Appointment

FINDING and RECOMMENDATION 3: 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. TIDC’s case file examination revealed this time frame was not met. Kinney County must implement practices that satisfy Article 1.051(c)(1)’s appointment timeline in misdemeanor cases.

FINDING and RECOMMENDATION 4: 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)). Two sample cases (filed before OLS began on July 19) involved defendants who requested counsel but later entered uncounseled pleas without having the requests ruled upon. Kinney 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).

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE.

Justice courts must report the number of Article 15.17 hearings and the number of counsel requests to OCA as part of their Judicial Council Monthly Court Activity Reports.¹⁶ TIDC uses these reports, as well as court observations and case file records, to review whether magistrates inform arrestees of their right to counsel and if arrestees are able to invoke that right. The Kinney County Justice Court received a larger number of counsel requests than it reported to OCA.

From April through September 2021, Kinney County reported 187 magistrate warnings and 17 requests for counsel. Reviewing magistrate warnings forms conducted by the Justice Court, TIDC found 131 counsel requests. The difference in totals between reported requests and examined requests are an indication that the Justice Court has not reported all counsel requests in monthly Judicial Council Monthly Court Activity Reports to OCA. The Kinney County Justice Court must report the number of persons requesting counsel to OCA to ensure complete and accurate Texas judicial data.

¹⁶ 1 TEX. ADMIN. CODE § 171.7.

Table 5: Difference in Counsel Requests Reported to OCA and Requests Found in Magistrate Warning Form Review (April 2021 – September 2021)

Court	Art. 15.17 Misd. Requests	Misd. Warnings	Misd. Request Rate
Reported by Justice Court	17	187	9.1%
Found in Justice Court records	131	191	68.6%

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

Texas Judicial Council Monthly Court Activity Reports

FINDING and RECOMMENDATION 5: Title 1, Rule 171.7 of the Texas Administrative Code requires justice courts to report to OCA the number of persons who request counsel at Article 15.17 hearings. Totals reported to OCA did not match totals found in TIDC’s examination of magistrate warning forms. The Kinney County Justice Court must report the number of persons requesting counsel to OCA to ensure complete and accurate Texas judicial data.

Additional Analysis of the Appointment Processing System

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request. Of 911 cases reviewed, TIDC found 73 OLS counsel requests that had not been ruled upon as of November 6, 2021. Of these, 70 were arrested between August 17 and August 20, 2021. As of November 6, 2021:

- 20 of 73 individuals had not been charged with an information
- 47 of 73 bonded out after an average of 53 days pretrial incarceration
- 26 of 73 were still incarcerated (average of 81 days in detention)

These 73 individuals make up 8% of all 911 magistrate warnings during this period.¹⁷ Of the remaining individuals, the majority received timely magistrate warnings and were provided counsel. After TIDC identified the individuals without counsel, TIDC staff emailed the Kinney County Judge on December 6, 2021, to ask whether counsel should be appointed in these cases. On December 14, 2021, the Kinney County Judge’s administrative assistant forwarded a signed order approving appointment of counsel, which was immediately forwarded to LPDO. LPDO confirmed receipt and began processing their appointments.

¹⁷ The 911 magistrate warnings include Kinney County defendants going through local magistrations and Kinney County defendants going through Centralized Magistrations in Del Rio.

Conclusion

TIDC appreciates the professionalism and assistance provided by Kinney County and state officials. Kinney County officials appear willing to make necessary changes to improve the indigent defense system. TIDC stands ready to provide technical assistance in addressing issues raised in the report. As mandated by statute, TIDC will continue to monitor the County's progress on meeting the requirements of the Fair Defense Act.

Summary of Findings and Recommendations

Kinney County must respond in writing with how they will address these findings and recommendations.

FINDING 1 AND RECOMMENDATION: Article 15.17(a) requires that magistrates ensure reasonable assistance in completing the forms necessary for requesting counsel at the time of the hearing. This review found arrestees were not provided with the forms, nor with assistance completing them at the time of the Article 15.17 hearing. Kinney County must ensure that, whenever a request for counsel is made at the Article 15.17 hearing, magistrates provide arrestees with the form and reasonable assistance in completing financial paperwork.

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FINDING and RECOMMENDATION 4: 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)). Two sample cases (filed before OLS began on July 19) involved defendants who requested counsel but later entered uncounseled pleas without having the requests ruled upon. Kinney 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 and RECOMMENDATION 5: Title 1, Rule 171.7 of the Texas Administrative Code requires justice courts to report to OCA the number of persons who request counsel at Article 15.17 hearings. Totals reported to OCA did not match totals found in TIDC's examination of magistrate warning forms. The Kinney County Justice Court must

report the number of persons requesting counsel to OCA to ensure complete and accurate Texas judicial data.

Appendix – Request to Conduct Fiscal and Policy Reviews



HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE



NICOLE COLLIER
CHAIR

TEXAS HOUSE OF REPRESENTATIVES

KEITH BELL
VICE CHAIR

October 13, 2021

Texas Indigent Defense Commission
c/o Mr. Geoff Burkhart, Executive Director
209 W. 14th Street, Suite 202
Austin, TX, 78701

Dear Mr. Burkhart,

In light of the Criminal Jurisprudence Committee hearing on Monday, October 4, 2021, please accept this letter as a request for the Texas Indigent Defense Commission (TIDC) to conduct policy and fiscal monitoring of Kinney County's Indigent Defense system.

In particular, could TIDC please review the attorney appointment process for misdemeanor appointment cases?

Thank you for your prompt attention to this request. If you have any questions, please feel free to contact the office.

Kindest regards,

A handwritten signature in blue ink that reads "Nicole Collier".

Nicole Collier

MEMBERS: JEFF CASON • DAVID COOK • JASMINE CROCKETT • GINA HINOJOSA • ANN JOHNSON • ANDREW S. MURR • CODY VASUT
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CHIEF COMMITTEE CLERK: TIFFANY WHITE