



# **Follow-up Review of Rusk County's Indigent Defense Systems**

**October 2024**



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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) monitors local compliance with the Fair Defense Act through policy reviews.<sup>1</sup> In this follow-up review, TIDC interviewed local officials and staff, observed felony and misdemeanor dockets, and examined FY2023 case file records. TIDC found that the two previous report findings dealing with methods for conducting Article 15.17 hearings have been addressed. However, TIDC also identified additional issues related to the timely appointment of counsel and the continuity of these appointments.

TIDC thanks Rusk 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 second follow-up review within two years.<sup>2</sup>

## **Background**

TIDC conducted an initial policy monitoring review in 2019. The report made two findings regarding magistrate warnings. The magistrate did not inform defendants of the right to appointed counsel and did not ask and record whether defendants requested appointed counsel. After informing officials of Article 15.17 requirements, courts and staff agreed to ensure defendants are able to request counsel at the Article 15.17 hearing.

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

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

**Table 1: History of Monitoring Findings for Rusk County**

FDA Core Requirement	Description and Initial Year of Finding and Recommendation	Status after 2024 Review	
		Satisfied	Pending
1. Prompt Magistration	The magistrate did not inform defendants of the right to appointed counsel. (2019)	✓ (2024)	
1. Prompt Magistration	The magistrate did not ask defendants if they wanted to request appointed counsel. (2019)	✓ (2024)	
2. Standard of Indigence	When the justice court appoints counsel, defendants must re-qualify as indigent at the trial court. (2024)		✓
2. Standard of Indigence	When the justice court appoints counsel, counsel is sometimes replaced without a finding of good cause. (2024)		✓
4. Prompt Appointment (felony cases)	The timeliness of felony counsel appointments did not meet TIDC’s administrative threshold (90% of sample cases receive timely rulings). (2024)		✓
4. Prompt Appointment (misd. cases)	The timeliness of misdemeanor counsel appointments did not meet TIDC’s administrative threshold (90% of sample cases receive timely rulings). (2024)		✓
4. Prompt Appointment (misd. cases)	The courts did not rule on all counsel requests prior to a waiver of counsel and a defendant’s uncounseled communication with the prosecutor. (2024)		✓

**Current Review**

TIDC’s policy monitoring rules require follow-up reviews when the report included noncompliance findings.<sup>3</sup> Staff members Ashley De La Garza and Joel Lieurance conducted the follow-up review of Rusk County with a site visit between May 15 and 17, 2024. TIDC observed felony and misdemeanor dockets as well as Article 15.17 hearings. TIDC examined felony and misdemeanor case files and met with local officials and staff. This review encompasses the policy monitoring core requirements listed below:<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 4: APPOINT COUNSEL PROMPTLY

<sup>3</sup> 1 TEX. ADMIN. CODE § 174.28(d)(3).

<sup>4</sup> A full monitoring review will cover all six core requirements. This review does not cover:

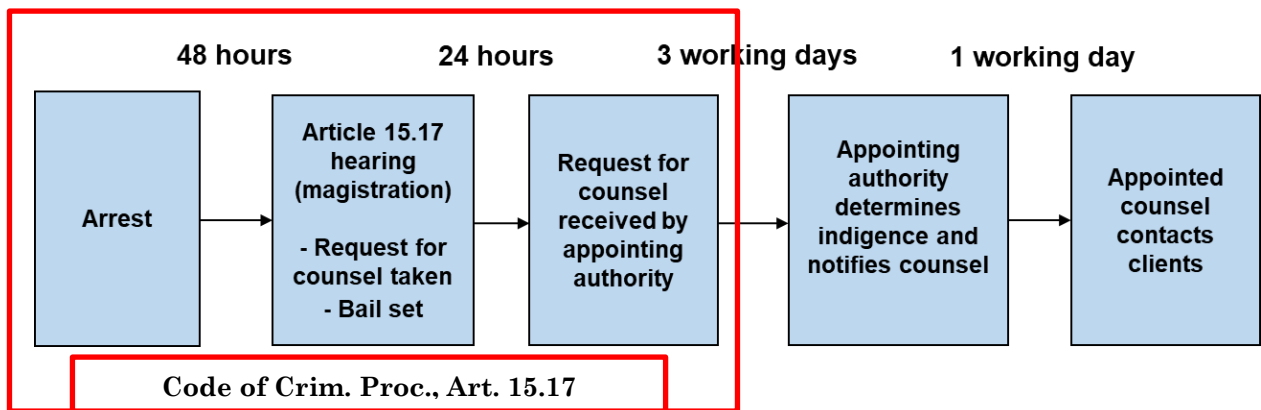
- REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS;
- REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS; or
- REQUIREMENT 6: STATUTORY DATA REPORTING.

## 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 accused of his or her right to counsel; inform the accused of the procedures for requesting counsel; and ensure the accused has reasonable assistance in completing the necessary forms for requesting assistance of counsel.<sup>6</sup> If the magistrate has authority to appoint counsel, the magistrate must rule on the request within three working days.<sup>7</sup> If the magistrate does not have authority to appoint counsel, the magistrate must transmit the counsel request and associated financial paperwork to the appointing authority within 24 hours.<sup>8</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>9</sup>

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



After arrest in Rusk County, defendants go before a magistrate for the Article 15.17 hearing. The Justice of the Peace for Precinct 5 conducts almost all hearings, where she determines whether there is probable cause to detain the individual, sets bail, and asks defendants whether they would like to request counsel. If a defendant requests counsel, the request is marked on the magistrate warning form.

TIDC's 2019 review found that magistrates did not inform defendants of the right to appointed counsel or ask if counsel was requested. However, that has now changed.

<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) and TEX. CODE CRIM. PROC. ART. 1.051(c)(1).

<sup>8</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>9</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>.

Based on TIDC observations and data reported to the Office of Court Administration, defendants are now informed of their right to appointed counsel and regularly request counsel.

**Table 2: Court Activity Reports for Rusk County (Oct. 2022 – Sept. 2023)**

Court	Misd. Requests	Misd. Warnings	Misd. Req. Rate	Felony Requests	Felony Warnings	Fel. Req. Rate
JP1	0	0	--	0	0	--
JP2	0	0	--	0	0	--
JP3	0	0	--	0	0	--
JP4	0	0	--	0	0	--
JP5	399	781	51%	496	868	57%

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings.**

**2019 Finding 1 and Recommendation:** Article 15.17(a) requires the magistrate to inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused’s request for counsel. The magistrate must make a record of each step of this exchange. The Rusk County magistrate was not providing arrestees with an opportunity to request counsel. Rusk County magistrates must inform arrestees of their right to counsel, ask whether they want to request counsel, and receive requests. *Successfully Addressed.*

**2019 Finding 2 and Recommendation:** Article 15.17(e) requires a record to be made of the magistrate asking whether the person wants to request appointment of counsel and whether the person requested appointment of counsel. The Rusk County magistrate was not marking whether arrestees requested counsel. Rusk County magistrates must mark whether arrestees are requesting counsel.

*Successfully Addressed.*

**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 financial standards and procedures for determining indigence when ruling upon a request for counsel.<sup>10</sup> Article 26.04(m) lists the factors courts may consider in

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<sup>10</sup> TEX. CODE CRIM. PROC. ART. 26.04(L): “Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.”

determining indigence.<sup>11</sup> The local standards for determining indigence are set in each county's indigent defense plans.

TIDC interviewed officials and examined felony and misdemeanor case files as part of this review. From TIDC's file review, defendants were appointed counsel after the Article 15.17 hearing, but attorneys were not necessarily allowed to stay on the case after the filing of indictment or information. Sometimes, the finding of indigence remained intact, but the trial court appointed new counsel. At other times, counsel would be appointed after the Article 15.17 hearing, but the finding of indigence would not stand, and the defendant would enter an uncounseled plea. In one sample case, appointed defense counsel sent a letter requesting permission to continue representing the defendant.

Pursuant to Article 26.04(p) of the Code of Criminal Procedure, a defendant is presumed to remain indigent throughout the pendency of the case unless the court finds that the defendant has experienced a material change in financial circumstances.<sup>12</sup> However, absent a finding of material change in financial circumstances, the defendant is presumed to remain indigent. From TIDC's case file review, findings of a material change in financial circumstances were not regularly made. Indigence determinations in Rusk County must continue unless the court finds there is a material change in the defendant's financial circumstances.

Continuity of representation must be maintained. An appointed attorney is required to continue representation through case disposition, unless "ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record," in accordance with Article 26.04(j)(2).<sup>13</sup> From TIDC's case file review, we examined new attorney appointments, but findings of good cause for replacing the initial attorney were not regularly made. Appointments of counsel in Rusk County must

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<sup>11</sup> TEX. CODE CRIM. PROC. ART. 26.04(M): "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."

<sup>12</sup> TEX. CODE CRIM. PROC. ART. 26.04(P): "A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or non-indigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination."

<sup>13</sup> TEX. CODE CRIM. PROC. ART. 26.04(J)(2): "(J) An attorney appointed under this article shall:  
(2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record;"



continue until either the case is disposed, or the court orders the attorney to withdraw after a finding of good cause is entered on the record.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

**Indigence Standards**

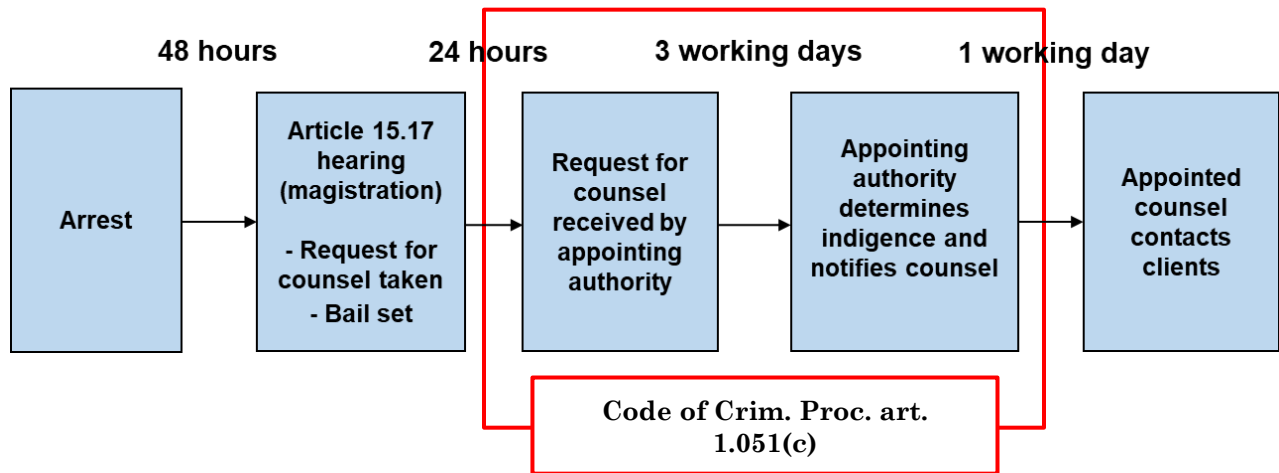
**2024 Finding 1 and Recommendation:** Defendants are often required to requalify as indigent after case filing. However, courts are not finding that a material change in financial circumstances has occurred. If a defendant is re-determined to not be indigent, the courts must make a finding of a material change in financial circumstances.

**2024 Finding 2 and Recommendation:** Attorneys appointed prior to case filing do not automatically remain on the case but may be removed or replaced without an order finding good cause for the removal or replacement. If an attorney does not continue with a case through disposition, the court must make a finding of good cause on the record for the attorney to be removed or replaced.

**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.<sup>14</sup>

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



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

<sup>14</sup> Under *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008), “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.” Since *Rothgery*, appointments of counsel can no longer be delayed because a defendant makes bail.

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 the first opportunity to request counsel at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial of indigence. Under TIDC’s monitoring rules, a county is presumed to promptly appoint counsel if at least 90% of indigence determinations in the monitor’s sample are timely.<sup>15</sup>

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

TIDC examined 86 felony cases filed in FY2023 (October 2022 – September 2023) to determine the timeliness of felony appointments. From this sample, TIDC found 63 cases with counsel requests. Counsel was appointed in a timely manner in 40% of those cases. This is less than TIDC’s threshold (90% timely) for presuming a jurisdiction’s procedures ensure timely appointment of counsel. Rusk County must implement practices that ensure timely appointment of counsel in felony cases.

If counsel is requested at the Article 15.17 hearing, the Justice of the Peace for Precinct 5 has been given authority to appoint counsel for both felony and misdemeanor cases. This court does not document denials. If the justice court does not appoint counsel, the trial courts do not appoint counsel until the first court appearance after case filing. To implement procedures that ensure timely appointment of counsel, the courts may wish to meet and discuss methods for ensuring that all counsel requests are ruled upon within three working days of the defendant’s request.

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

	Number from Sample	Percent of Sample
Total records examined	86	
Requests for counsel	63	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	15	
1 to 3 workdays + 24 hours to transmit a request	10	
<b>Timely Rulings on Requests</b>	<b>25</b>	<b>40%</b>
Between 4 and 7 workdays	4	
More than 7 workdays	29	
No ruling on request	5	
<b>Untimely / No Rulings on Requests</b>	<b>38</b>	<b>60%</b>

<sup>15</sup> 1 TEX. ADMIN. CODE § 174.28.

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

TIDC examined 100 misdemeanor cases filed in FY2023 (October 2022 – September 2023) to determine the timeliness of misdemeanor appointments. From this sample, TIDC found 55 cases with requests for counsel. Counsel was appointed in a timely manner in 40% of those cases. This does not meet TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. Rusk County must implement practices that ensure timely appointment of counsel in misdemeanor cases. The same factors affecting the timeliness of felony appointments affect the timeliness of misdemeanor appointments.

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

	Number from Sample	Percent of Sample
Total records examined	100	
Requests for counsel	55	
<b>Request for counsel ruled upon in ‘x’ workdays</b>		
0 workdays	20	
1 to 3 workdays + 24 hours to transmit a request	2	
<b>Timely Rulings on Requests</b>	<b>22</b>	<b>40%</b>
Between 4 and 7 workdays	2	
More than 7 workdays	15	
No ruling on request	16	
<b>Untimely / No Rulings on Requests</b>	<b>33</b>	<b>60%</b>

### ***Additional Observations on 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, the defendant must sign a written waiver, which must conform to the language of Article 1.051(g).<sup>16</sup>

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<sup>16</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

TIDC's interviews and court observations showed that defendants were encouraged to speak with the prosecutor prior to being informed of the procedures for requesting counsel or being given an opportunity to retain counsel. Article 1.051(f-2) requires that both of these events occur prior to a waiver of counsel. Only defendants who mark that they want to speak with the prosecutor on the misdemeanor check-in form, and whose previous requests have been ruled upon, should be directed to speak with the prosecutor.

TIDC's misdemeanor case file examination contained sixteen samples in which the court did not rule on requests for counsel. In six of these sample cases, a misdemeanor defendant requested counsel at the Article 15.17 hearing and later entered an uncounseled plea without the request being ruled upon. 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)). Rusk 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

##### **Appoint Counsel Promptly.**

**2024 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 felony case sample fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**2024 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 misdemeanor case sample fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in misdemeanor cases.

**2024 Finding 5 and Recommendation (misdemeanor cases):** The County does not have processes in place to ensure all 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 a request for counsel prior to a defendant's waiver of the right to retain counsel.

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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)".

## Conclusion

TIDC thanks Rusk 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>17</sup> TIDC stands ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

## Summary of Findings and Recommendations

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

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

**2024 Finding 1 and Recommendation:** Defendants are often required to requalify as indigent after case filing. However, courts are not finding that a material change in financial circumstances has occurred. If a defendant is re-determined to not be indigent, the courts must make a finding of a material change in financial circumstances.

**2024 Finding 2 and Recommendation:** Attorneys appointed prior to case filing do not automatically remain on the case but may be removed or replaced without an order finding good cause for the removal or replacement. If an attorney does not continue with a case through disposition, the court must make a finding of good cause on the record for the attorney to be removed or replaced.

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

**2024 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 felony case sample fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**2024 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 misdemeanor case sample fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in misdemeanor cases.

**2024 Finding 5 and Recommendation: (misdemeanor cases):** The County does not have processes in place to ensure all 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 a request for counsel prior to a defendant's waiver of the right to retain counsel.

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<sup>17</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).