



Second Follow-up Review of Smith County's Indigent Defense Systems

October 2023

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Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.¹ In this second follow-up review of Smith County's indigent defense processes, TIDC observed dockets, interviewed officials, and examined FY2022 case file records. TIDC found that courts no longer delay appointments of counsel until a defendant obtains attorney quotes. However, findings related to timely appointments in felony and misdemeanor cases remain pending. In misdemeanor cases, some defendants waived counsel while their counsel requests were pending. In fiscal matters, Smith County addressed a previous finding requiring reductions in attorney vouchers to include reasons for reductions. The other fiscal finding requiring supporting documentation for mental health expenses remains pending.

TIDC thanks Smith County officials and staff for their assistance in completing this review. TIDC stands ready to provide technical and financial assistance to remedy these issues. TIDC will conduct a third follow-up review regarding its findings within two years.²

Background

TIDC issued a limited scope monitoring report of Smith County's indigent defense practices in May 2014. The purpose of the review was to: (1) determine whether the County's felony defense contracts met TIDC's Contract Defender Rules; (2) review the procedures for tracking data reported to TIDC; and (3) assess actual operations of the contract defender system, including the procedures for the determination of indigence and appointment of contract counsel. TIDC was not able to obtain sample magistrate warning forms, and so was not able to analyze the timeliness of counsel appointments. The report found that magistrates did not always mark whether defendants requested counsel. Counsel requests were not always reported on Judicial Council Monthly Court Activity Reports. Contract defense attorneys did not always submit monthly vouchers, however they were still paid for services. This restricted the ability to collect accurate information required to be reported to TIDC.

TIDC conducted a follow-up review in 2018. Because the 2014 review found issues with magistrate warnings, TIDC extended the follow-up review to misdemeanor cases. This review found that magistrates asked all defendants if they wanted to request appointment of counsel and reported the data on Judicial Council Monthly Court Activity Reports. Contract defense attorneys submitted monthly vouchers, allowing for accurate data reports to TIDC. TIDC analyzed the timeliness of counsel appointments, and in both felony and misdemeanor cases, the samples fell below TIDC's 90% timeliness threshold. In misdemeanor cases, sample defendants waived counsel prior to

¹ TEX. GOV'T CODE § 79.037(a)-(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

the court ruling on a defendant’s counsel request. Overall, this review found some past findings had been addressed, while there were gaps in ruling on counsel requests made at the Article 15.17 hearing.

Table 1: History of Monitoring Findings for Smith County

FDA Core Requirement	Description and Initial Year of Finding	Status after 2023 Review	
		Satisfied	Pending
1. Magistrate Warnings	Magistrates must document whether an arrestee requests counsel, even if the arrestee expects to make bail. (2014)	✓ (2018)	
1. Magistrate Warnings	As part of the Texas Judicial Council Monthly Court Activity Reports, justices of the peace must report the number of persons requesting counsel at the Article 15.17 hearing. (2014)	✓ (2018)	
2. Indigence Determinations	The courts require defendants to gather proof of income and obtain quotes from private attorneys. The time frames for this information extend beyond time frames set in Article 1.051. (2018)	✓ (2023)	
4. Prompt Appointment of Counsel	In felony cases, counsel must be appointed within three working days of a request being made (plus 24 hours allowed in transmitting the request to the appointing authority). (2018)		✓
4. Prompt Appointment of Counsel	In misdemeanor cases, counsel must be appointed within three working days of a request being made (plus 24 hours allowed in transmitting the request to the appointing authority). (2018)		✓
4. Prompt Appointment of Counsel (waivers of counsel)	Requests for counsel must be ruled upon prior to a waiver of counsel and a defendant’s uncounseled communication with the prosecutor. (2018)		✓
6. Standard Payment Process	Attorney fee vouchers must be approved by the court prior to payment. (2014)	✓ (2018)	
6. Standard Payment Process	Reduced fee vouchers must include written findings for the reduction. (2018)	✓ (2023)	
7. Data Reporting	All cases where an attorney’s appointed representation has been completed are to be reported annually to TIDC. (2014)	✓ (2018)	
7. Data Reporting	The County must put in place procedures to ensure accurate reporting of contract case totals to TIDC. (2014)	✓ (2018)	
7. Data Reporting	The County must put in place procedures to ensure only defense expenses and not general court expenses related to mental health are reported to TIDC. (2018)		✓

Current Review

TIDC's policy monitoring rules require follow-up reviews where the report included noncompliance findings.³ Staff members Joel Lieurance and Debra Stewart conducted the second follow-up review of Smith County with site visits between April 3 and April 6, 2023, and between May 25 and May 26, 2023. TIDC observed felony and misdemeanor dockets and an Article 15.17 hearing. TIDC examined felony and misdemeanor case files and met with local officials and staff. This follow-up review encompasses the policy monitoring core requirements listed below:

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

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

REQUIREMENT 6: PAYMENT SYSTEMS

REQUIREMENT 7: STATUTORY DATA REPORTING

Program Assessment

Description of Local Counsel Appointment Procedures

After arrest, defendants are booked into the Smith County Jail. Trial courts are automatically identified upon booking at the County Jail. Within 48 hours of arrest, defendants go before a magistrate at the County Jail for the Article 15.17 hearing. At this hearing, a magistrate determines whether there is probable cause to detain the individual, sets bail, and asks whether the defendant would like to request counsel. If a defendant requests counsel, jail staff provide and collect affidavits of indigence. If a defendant refuses to complete the form, the refusal is noted. Jail staff then send counsel requests and associated paperwork to the trial court.

Interviews with court staff confirmed that trial courts receive counsel requests from the jail. However, there were gaps in ruling on requests. Some felony courts noted they did not receive all counsel requests, and some requests were received several days after being made. In misdemeanor cases, a primary gap involved defendants who made bail shortly after arrest.

Appointment rates vary greatly between felony and misdemeanor cases. In felony cases, about 75% of defendants receive appointed counsel. Each district court has three contract defenders who handle almost all appointed felony cases. In misdemeanor cases, about 10% of defendants receive appointed counsel. Misdemeanor appointments use a rotation method among attorneys on the approved list.

³ 1 TEX. ADMIN. CODE § 174.28(d)(3).

Table 2: Smith County Historical Appointment Rates

Year	Texas 2022	2022	2021	2020	2019
Population Estimate	29,741,214	237,813	232,675	232,675	230,086
Felony Cases Disposed	281,347	2,365	1,698	1,823	2,225
Felony Cases Paid	223,839	1,717	1,359	1,427	1,638
% Felony Cases with Appointed Counsel	80%	73%	80%	78%	74%
Misdemeanor Cases Disposed	375,151	3,424	2,561	2,906	4,094
Misdemeanor Cases Paid	180,466	315	321	357	503
% Misdemeanor Cases with Appointed Counsel	48%	9%	13%	12%	12%

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

Article 26.04(l) of the Code of Criminal Procedure requires the courts to adopt procedures and financial standards for determining indigence. For adult criminal cases in Smith County, a person is presumed indigent if any of the following conditions are met:⁴

1. At the time of requesting appointed counsel, the accused is eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing.
2. The accused's net household income does not exceed 125% of the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register.
3. The accused is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.

If a defendant does not meet these conditions, the defendant may still be found indigent if unable to retain private counsel without substantial hardship. Posting of bail or ability to post bail may not be considered in determining whether a person is indigent.

In 2018, TIDC found that some courts required defendants to obtain quotes from attorneys prior to receiving appointed counsel. This requirement delayed the appointment of counsel beyond statutory timelines. In the current review, TIDC found the courts had stopped the practice, addressing this finding.

⁴ The District Courts' plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=395>. The County Courts' plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=512>.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

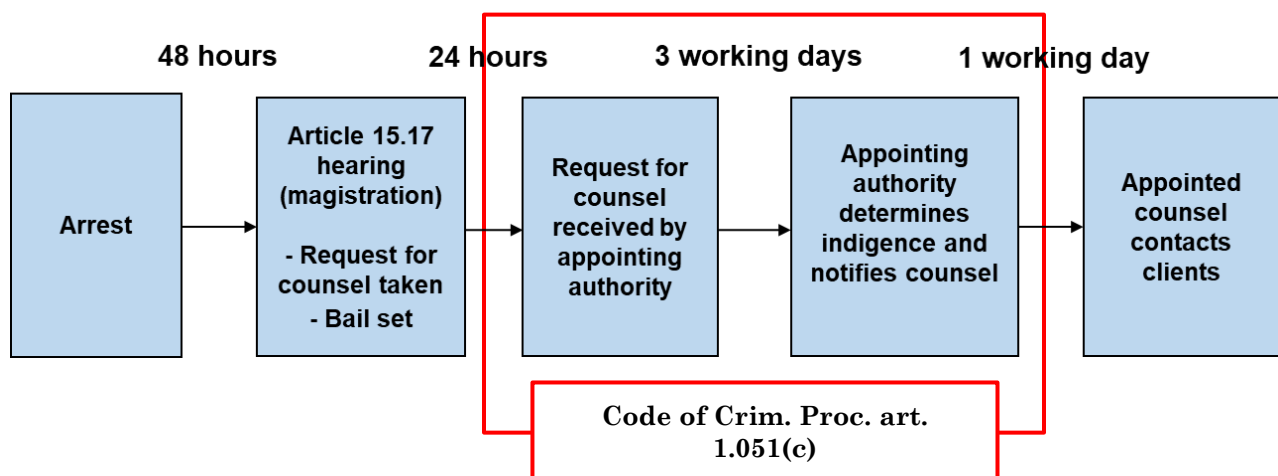
Determine indigence according to standards directed by the indigent defense plan.

Finding and Recommendation 1: The courts require defendants to produce income documentation and to obtain quotes from private attorneys. However, the time frames for gathering this information extend beyond those set in the indigent defense plans and in Article 1.051 of the Code of Criminal Procedure. The courts may require defendants to produce documentation indicating whether the defendant’s financial resources meet the local standard of indigence, but this documentation cannot delay a determination of indigence. *Successfully addressed.*

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.

Figure: 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. 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 sample are timely.⁵

⁵ 1 TEX. ADMIN. CODE § 174.28.

Timeliness of Appointments in Felony Cases

In Smith County, each felony court makes its own counsel appointments. TIDC examined 129 felony cases filed in FY2022 (October 2021 – September 2022) to determine the timeliness of felony appointments. TIDC found 90 sample felony requests in which it could determine timeliness.⁶ The courts appointed counsel timely in 54% of those cases. This falls below TIDC’s threshold (90% timely) for presuming a jurisdiction’s procedures ensure timely appointment of counsel. Smith County must implement practices that satisfy the three working day appointment timeline in felony cases.

Some felony coordinators noted they either did not receive all requests or did not receive them in a timely manner, while jail staff reported they have procedures to promptly send all requests and paperwork to the courts. TIDC did not analyze how quickly requests were sent from the jail to the courts. Under Article 15.17, financial paperwork must be transmitted to the courts within 24 hours of a defendant requesting counsel before a magistrate. The courts then have three working days to rule on the request.

Table 3: Times from Request to Appointment in Felony Cases

	Number from Sample	Percent of Sample
Total records examined	129	
Requests for counsel used in analysis	90	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	41	
1 to 3 workdays + 24 hours allowed to transmit a request	8	
Timely Rulings on Requests	49	54%
Between 4 and 7 workdays	5	
More than 7 workdays	28	
No ruling on request	8	
Untimely / No Rulings on Requests	41	46%

Timeliness of Appointments in Misdemeanor Cases

In Smith County, each misdemeanor court makes its own counsel appointments. TIDC examined 232 cases filed in FY2022 (October 2021 – September 2022) to determine the timeliness of misdemeanor appointments. TIDC identified 67 misdemeanor requests in which it could determine timeliness.⁷ The courts appointed

⁶ From this sample, there were 9 cases in which counsel was appointed at an uncertain date, and these cases were excluded from the timeliness analysis.

⁷ TIDC excluded 5 cases in which it could not ascertain whether an indigence determination was timely.

counsel timely in 16% of those cases. This falls below TIDC’s threshold (90% timely) for presuming a jurisdiction’s procedures ensure timely appointment of counsel. Many untimely appointments occurred when defendants made bail shortly after arrest. Smith County must implement practices that satisfy the three working day appointment timeline in misdemeanor cases.

Table 4: Times to Appointment in Misdemeanor Cases

	Number from Sample	Percent of Sample
Total records examined	232	
Requests for counsel used in analysis	67	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	7	
1 to 3 workdays + 24 hours allowed to transmit a request	4	
Timely Rulings on Requests	11	16%
Between 4 and 7 workdays	6	
More than 7 workdays	11	
No ruling on request	39	
Untimely / No Rulings on Requests	56	84%

Waivers of Counsel

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, the language of which must substantially conform to the language of Article 1.051(g).

Ruling on Requests Prior to Waivers

TIDC’s case sample contained 39 misdemeanor cases in which defendants requested counsel at the Article 15.17 hearing, and the court did not rule on the requests. In 27 of these cases, the defendant entered an uncounseled plea without the request having been 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)). Smith 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.

Finding and Recommendation 2 (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 sample of attorney appointments in felony cases 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. *Issue Pending.*

Finding and Recommendation 3 (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 sample of attorney appointments in misdemeanor cases 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 appointment timeline in misdemeanor cases. *Issue Pending.*

Finding and Recommendation 4 (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 a defendant's waiver of counsel. *Issue Pending.*

REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS

Under Article 26.05(c), to receive payment for an indigent case, a defense attorney must submit a voucher to the judge presiding in the case. The voucher documents the services rendered and lists a requested amount of payment. The judge may sign off on the voucher and approve payment or may approve a different amount. Under Article 26.05(c) of the Code of Criminal Procedure, if the requested amount is not approved, the judge must make written findings. No payment may be made to the attorney without a signed order approving payment.

During the 2018 review, TIDC found vouchers that had been reduced without written findings for the reduction. In the current review, TIDC's review of vouchers did not reveal any vouchers that were reduced without a listed reason. Smith County has addressed this finding.

FINDINGS AND RECOMMENDATIONS

Promulgate Standard Attorney Fee Schedule and Payment Process

Finding and Recommendation 5: One sample fee voucher was reduced without a written finding. Article 26.05(c) requires the court to make written findings if it approves an amount different than requested. The Smith County courts must make written findings for approving amounts different than requested. *Successfully addressed.*

REQUIREMENT 7: REPORT DATA REQUIRED BY STATUTE

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 TIDC. This data must include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Financial data reports must include attorney-level information.⁸

In the 2018 review, TIDC found that some mental health evaluations had been reported on the annual Indigent Defense Expense Report (IDER) as indigent defense expenses. These expenses appeared to more accurately be categorized as general court expenses. TIDC allows mental health evaluation expenses, provided there is clear documentation establishing they were incurred solely for the defense. TIDC's instructions for reporting mental health evaluation expenses state:

Generally speaking, experts requested and hired by the defense to conduct a psychological evaluation are considered eligible indigent defense expenditures and should be included in the Expert Witness sections of the IDER. Not all psychological evaluations of a defendant who is indigent are eligible, however. For example, competency evaluations ordered by the court are not eligible defense costs.

To determine whether fees for mental health experts are eligible indigent defense expenditure to include on the IDER, auditors should determine whether the expert was working for the defense under derivative attorney-client privilege to assist in the criminal defense of indigent defendants. If the expert fees in question were initiated through an ex parte motion by the defense, the resulting reports would be privileged information provided to the defense attorney and these costs should be included on the IDER. By contrast, psychological evaluations ordered by the court, and which yield expert reports made available directly to the court or to all parties would not be counted as eligible indigent defense expenditures. While an order granting an ex parte defense motion

⁸ TEX. GOV'T CODE § 79.036(a-1).

requesting funds for a mental health defense expert is generally sufficient to establish eligibility as an indigent defense expenditure, evaluations of competency to stand trial are not eligible indigent defense expenditures regardless of the origin of the referral for the competency evaluation.⁹

In the current review, TIDC examined expenses reported on the FY2022 IDER. TIDC specifically examined 15 vouchers, categorized as psychological evaluations. Of these 15 vouchers, ten were billed to the courts and five to defense attorneys. None of the 15 vouchers included an ex parte motion or other documentation that would indicate the cost was to assist the defense under derivative attorney-client privilege. Without this documentation, it is unclear if either the ten vouchers charged to the courts or the five to defense attorneys are allowable expenses to be reported on the IDER. Smith County must maintain supporting documentation showing the psychological evaluations are exclusively for the defense.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

Statutory Data Reporting

Finding and Recommendation 6: Smith County included general court expenditures in the IDER. The general court expenditures were for mental health competency evaluations, which are ineligible expenses. Smith County must maintain supporting documentation, showing the mental health expenses are exclusively for the defense. *Issue Pending.*

Conclusion

TIDC thanks Smith 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.¹⁰ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

⁹ Indigent Defense Expenditure Report Manual Fiscal Year 2022, Texas Indigent Defense Commission (2022).

¹⁰ 1 TEX. ADMIN. CODE § 174.28(c)(2).

Summary of Findings and Recommendations

Smith County must respond to each finding that has not been successfully addressed with a detailed action plan describing how it will resolve each issue.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

2023 Finding and Recommendation 1 (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 sample of attorney appointments in felony cases 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. *Issue Pending.*

2023 Finding and Recommendation 2 (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 sample of attorney appointments in misdemeanor cases 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 appointment timeline in misdemeanor cases. *Issue Pending.*

2023 Finding and Recommendation 3 (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 a defendant's waiver of counsel. *Issue Pending.*

REQUIREMENT 7: STATUTORY DATA REPORTING

2023 Finding and Recommendation 4: Smith County included general court expenditures in the IDER. The general court expenditures were for mental health competency evaluations, which are ineligible expenses. Smith County must maintain supporting documentation, showing the mental health expenses are exclusively for the defense. *Issue Pending.*