



# **Policy Monitoring Review of Ector County's Indigent Defense Systems**

**August 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 (FDA) through policy reviews.<sup>1</sup> TIDC observed court, interviewed officials, and reviewed FY2022 data from Ector County. TIDC made six findings of noncompliance.

- a. Inconsistent methods for assisting defendants in applying for counsel.
- b. Untimely transmission of counsel requests to the appointing court.
- c. Untimely rulings on requests for counsel in felony cases.
- d. Untimely rulings on requests for counsel in misdemeanor cases.
- e. Waivers of defendants' right to counsel while requests for counsel were pending.
- f. Requests for counsel at the Article 15.17 hearing not reported in Judicial Council Monthly Court Activity Reports.

TIDC thanks Ector 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 follow-up review regarding its finding within two years.<sup>2</sup>

## **Background**

TIDC selected Ector County for a policy monitoring review through its annual county selection process, which seeks to cycle through counties around the State. This review covers all six FDA core requirements listed below:

**REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

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

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

TIDC staff members William R. "Bill" Cox, Natasha George, and Joel Lieurance made an on-site visit to the County between August 28 and August 31, 2023, to conduct the review. TIDC examined FY2022 data, including felony, misdemeanor, and juvenile case files; the local indigent defense plans; appointment lists; and records of attorney continuing legal education (CLE) hours. TIDC interviewed judges, Ector County and municipal staff, and local criminal defense attorneys. TIDC observed Article 15.17

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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).

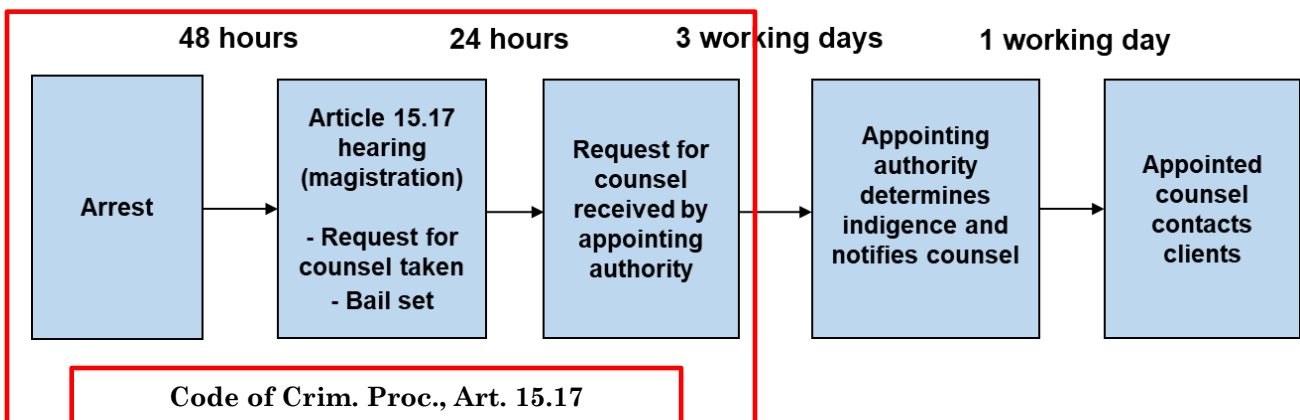
hearings, as well as felony, misdemeanor, and juvenile dockets. TIDC also conducted a survey of criminal defense attorneys as part of this report’s quality supplement.

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

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



#### *Local Practices for Conducting Magistrate Warnings*

In Ector County, defendants who are in jail are promptly brought before a magistrate. The magistrate makes probable cause determinations, sets bail, and explains that defendants have the right to counsel. Judges make notations as to whether a defendant requests counsel, but that notation is not part of the magistrate warning form (*see* Appendix B), which is the practice most counties follow.<sup>7</sup> When felony defendants request counsel, they complete and sign a very short affidavit of indigence

<sup>3</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>4</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>5</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>6</sup> 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>.

<sup>7</sup> TEX. CODE CRIM. PROC. ART. 15.17(e), requires a record to be made of the magistrate informing the person of the right to counsel, the magistrate asking the person if they want to request appointment of counsel, and whether the person requested appointment of counsel.

in the magistration courtroom. Misdemeanor defendants are required to complete a more detailed affidavit after magistration. Misdemeanor defendants complete these affidavits while back in their cells and give them to jail staff after completion. Jail staff forward all affidavits to the District Clerk’s Office, who in turn forwards them to district and county court coordinators.

The use of different affidavits can cause confusion regarding whether a defendant has requested counsel and whether the appropriate affidavit has been completed. This is particularly true with defendants arrested for both felony and misdemeanor offenses. We encourage Ector County to adopt: 1) a different magistrate warning form that denotes whether counsel was requested and 2) a single affidavit of indigence that would apply to both felony and misdemeanor cases.<sup>8</sup>

**1.a. Timeliness of Warnings**

An arrested person must be brought before a magistrate within 48 hours of arrest.<sup>9</sup> TIDC presumes a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>10</sup> To determine the timeliness of Article 15.17 warnings in the County, TIDC staff examined 187 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing. Article 15.17 hearings occurred within two days of arrest for all sample cases, indicating the County is providing warnings in a timely manner (see Table 1).

**Table 1: Timeliness of Article 15.17 Hearings**

|   | <b>Sample Size</b> | <b>Percent</b> |
|---|--------------------|----------------|
| Article 15.17 hearing occurs x days after arrest: | 187                |                |
| 0 days  | 64                 |                |
| 1 day   | 113                |                |
| 2 days  | 10                 |                |
| <b>Timely Hearings</b>                            | <b>187</b>         | <b>100%</b>    |
| More than 2 days                                  | 0                  | 0%             |

**1.b. Ability of Arrested Persons to Request Counsel**

At the Article 15.17 hearing, the magistrate must inform an arrested person of the right to counsel, ask whether the person wants to request counsel, and record whether the person requests counsel.<sup>11</sup> From TIDC’s case file review, 78% of sample

<sup>8</sup> TIDC provides model magistration forms and affidavits of indigence at: <https://www.tidc.texas.gov/improvement/model-forms/>.

<sup>9</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>10</sup> 1 TEX. ADMIN. CODE § 174.28(c)(1). Article 15.17(a) requires magistrate warnings occur within 48 hours of arrest. To simplify time measurement, TIDC assumes warnings are timely if they occur within 2 days of arrest. TIDC excluded cases in which it could not determine the timeliness of magistrate warnings.

<sup>11</sup> TEX. CODE CRIM. PROC. ART. 15.17(a), (e).

felony cases and 34% of sample misdemeanor cases included a request for counsel made at the Article 15.17 hearing.<sup>12</sup>

Summary magistrate warning data must be reported to the Office of Court Administration (OCA) monthly by justice courts and municipal courts. In FY2022 (October 2021 - September 2022), the City of Odessa Municipal Court reported conducting 4,847 magistrate warnings for Class B misdemeanor offenses and above. However, the Court did not report any requests for counsel. TIDC observed counsel requests at the municipal court and covers this issue further in its discussion of Requirement 6, making a finding about reporting this data variable.

**Table 2: Article 15.17 Data Reported to OCA**

|                              | <b>Misd. Requests</b> | <b>Misd. Warnings</b> | <b>% Misd. Requests</b> | <b>Felony Requests</b> | <b>Felony Warnings</b> | <b>% Felony Requests</b> |
|------------------------------|-----------------------|-----------------------|-------------------------|------------------------|------------------------|--------------------------|
| Ector County Justice Cts.    | 105                   | 739                   | 14%                     | 308                    | 1,077                  | 29%                      |
| City of Odessa Municipal Ct. | 0                     | 2,562                 | 0%                      | 0                      | 2,285                  | 0%                       |

***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel at the time of the hearing.<sup>13</sup> Ector County’s process satisfies this process for felony defendants requesting counsel, who complete and sign affidavits of indigence in the magistration courtroom. When misdemeanor defendants request counsel, they are given an affidavit of indigence, and are told to complete it back in their cells. Based on TIDC’s case samples, many of these requests are never ruled upon by the courts.

An informal process is in place for jail staff to assist with affidavits of indigence. However, there are no formal procedures to track if completed affidavits are received from people who requested an appointed attorney. The County must provide a consistent method to ensure reasonable assistance in completing affidavits of indigence is provided at the time of the Article 15.17 hearing. A consistent method may include a checklist noting: (1) the date a person requested counsel at the 15.17 hearing; (2) whether the person completed the affidavit at that time; and (3) whether the forms were successfully sent to the courts.

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a person requesting counsel, the magistrate must transmit the request to the entity authorized to appoint counsel.<sup>14</sup> TIDC was not able to measure

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<sup>12</sup> This sample data should be taken with caution as TIDC was unable to obtain magistrate warning data for all sample cases.

<sup>13</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>14</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

how long it took for completed affidavits to reach the courts. Jail staff send completed affidavits electronically to the District Clerk, who then forwards them to coordinators. District and county court coordinators who are designated to receive requests noted that they regularly receive them from the jail. However, the fact that several counsel requests were not ruled upon indicates that not all requests are completed and sent to the courts within 24 hours. The root issue is likely related to prompt completion of affidavits rather than the transmission method, but we could not make a definite determination.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

**Conduct prompt and accurate magistration proceedings**

**FINDING 1 AND RECOMMENDATION:** At the Article 15.17 hearing, a magistrate must ensure arrested persons have reasonable assistance in completing the necessary forms for requesting counsel. The County must provide a method to ensure reasonable assistance in completing affidavits of indigence is provided at the time of the Article 15.17 hearing.

**FINDING 2 AND RECOMMENDATION:** Article 15.17(a) requires requests for counsel and associated paperwork be sent to the appointing authority within 24 hours of the request being made. The County must provide a consistent and reliable process to ensure requests are sent to the appointing authority within 24 hours of the request.

**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 procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence:

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.

The local presumptions for determining indigence are set in each county's indigent defense plans.



### ***2.a. Indigence Standard in Adult Criminal Cases***

For adult criminal cases in Ector County, the adult indigent defense plan lists multiple tests to qualify as indigent.<sup>15</sup> First, a public benefits test allows for automatic qualification. If not eligible for public benefits, a defendant qualifies as indigent if the defendant has limited, non-exempt assets, and meets any of the following three conditions:

- net household income less than 150% of the Federal Poverty Guidelines;
- difference of less than \$500 in the defendant’s net household income and reasonable expenses; or
- defendant resides in a correctional institution or public mental health facility.

A defendant may still qualify as indigent if unable to retain counsel without substantial hardship. The posting of bail may not be considered in determining indigence.

### ***2.b. Indigence Standard in Juvenile Cases***

For juvenile delinquency cases in Ector County, the juvenile indigent defense plan lists similar tests to qualify as indigent, but the test concerns the financial capabilities of the person responsible for the youth.<sup>16</sup> First, there is a public benefits test that allows for an automatic qualification. If not eligible for public benefits, a youth qualifies as indigent if the responsible person has limited non-exempt assets and meets any of the following three conditions:

- net household income less than 25% of the Federal Poverty Guidelines;<sup>17</sup>
- difference of less than \$300 in the defendant’s net household income and reasonable expenses; or
- the responsible person resides in a correctional institution or public mental health facility.

A youth may still qualify as indigent if the responsible person is unable to retain counsel without substantial hardship.

### ***2.c. Local Practices***

Based on case file examination, the courts appeared to follow the local standard of indigence. TIDC finds that Ector County is in substantial compliance with Requirement 2 for both adult and juvenile cases.

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<sup>15</sup> The adult indigent defense plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=309>.

<sup>16</sup> The juvenile indigent defense plan is available at <https://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=543&ShowPending=1>.

<sup>17</sup> Although counties retain authority to set indigency standards, it should be noted that this is the lowest indigency standard the TIDC monitor has observed. Indigency is statutorily defined as “a person who is not financially able to employ counsel,” and juveniles from a household that earn more than 25% of the Federal Poverty Guidelines will not be financially able to employ counsel.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determination of Indigence**

Requirement satisfied. No findings.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

Under Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.<sup>18</sup> Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters.<sup>19</sup>

**3.a. Felony and Misdemeanor Cases**

For both the felony and misdemeanor appointment lists, attorneys must obtain at least ten criminal CLE hours annually. The courts noted they had difficulties attracting attorneys wishing to accept appointments in criminal cases.

**Table 3a: Qualifications for Ector County Adult Appointment Lists**

| <b>List</b>                                     | <b>CLE Hours</b> | <b># Years Experience</b>   | <b># Jury Trials or # App. Briefs</b>  |
|---|------------------|---|--|
| Misdemeanor                                     | 10 criminal      | 6 mos.  | n/a  |
| SJF / 3 <sup>rd</sup> Degree Felony             | 10 criminal      | 6 mos.  | 1 <sup>st</sup> or 2 <sup>nd</sup> chair in 3 criminal jury verdicts   |
| 1 <sup>st</sup> / 2 <sup>nd</sup> Degree Felony | 10 criminal      | 4 for 2 <sup>nd</sup> degree felonies;<br>5 for 1 <sup>st</sup> degree felonies | Lead counsel in 4 felony jury verdicts for 2 <sup>nd</sup> degree felonies;<br>8 felony jury verdicts for 1 <sup>st</sup> degree felonies  |
| Capital Felony                                  | n/a              | n/a   | 1 <sup>st</sup> or 2 <sup>nd</sup> chair approved by the Administrative Region's Selection Committee   |
| Appeals   | 10 criminal      | n/a   | Board certified in criminal law; or personally authored and filed at least 5 briefs or post-conviction writs of habeas corpus; or worked as appellate court briefing clerk for at least 2 years. |

<sup>18</sup> 1 TEX. ADMIN. CODE §§ 174.1–4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

<sup>19</sup> TEX. CODE CRIM. PROC. ART. 26.04(d).

**3.b. Juvenile Cases**

The juvenile courts require all attorneys to obtain at least six juvenile CLE hours annually.

**Table 3b: Qualifications for Ector County Juvenile Appointment Lists**

| <b>List</b>  | <b>CLE Hours</b> | <b># Years Experience</b> | <b># Jury Trials or # App. Briefs</b>   |
|--|------------------|---------------------------|---|
| CINS or Delinquent Conduct (commitment to TJJD not an option)  | 6 juvenile       | 1                         | Observed or participated in at least 1 stipulated adjudication, 1 contested adjudication, 1 disposition, 1 detention hearing, and participated in 1 criminal or juvenile trial. |
| Delinquent Conduct (commitment to TJJD authorized)   | 6 juvenile       | 2                         | Participated in at least 2 criminal or juvenile cases, of which at least 1 was tried to jury verdict.   |
| Determinate Sentence or Proceedings for Discretionary Transfer to Criminal Court have been initiated | 6 juvenile       | 5                         | Participated in at least 5 criminal or juvenile cases, of which at least 2 were tried to jury verdict. Tried at least 2 criminal or juvenile cases as lead counsel.             |

**Assessment**

TIDC reviewed appointment lists and CLE records. TIDC found that the County has procedures for managing appointment lists and ensuring that all attorneys on the lists meet their annual CLE requirement.

Under Article 26.04(j)(4) of the Code of Criminal Procedure and the local indigent defense plans, attorneys representing adult criminal defendants and youths charged with crimes must annually submit the percent of their practice time devoted to indigent defense. The juvenile program has not historically tracked whether attorneys submitted their practice time reports, but juvenile probation staff indicated they will do so in the future.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3**

**Establish Minimum Attorney Qualifications**

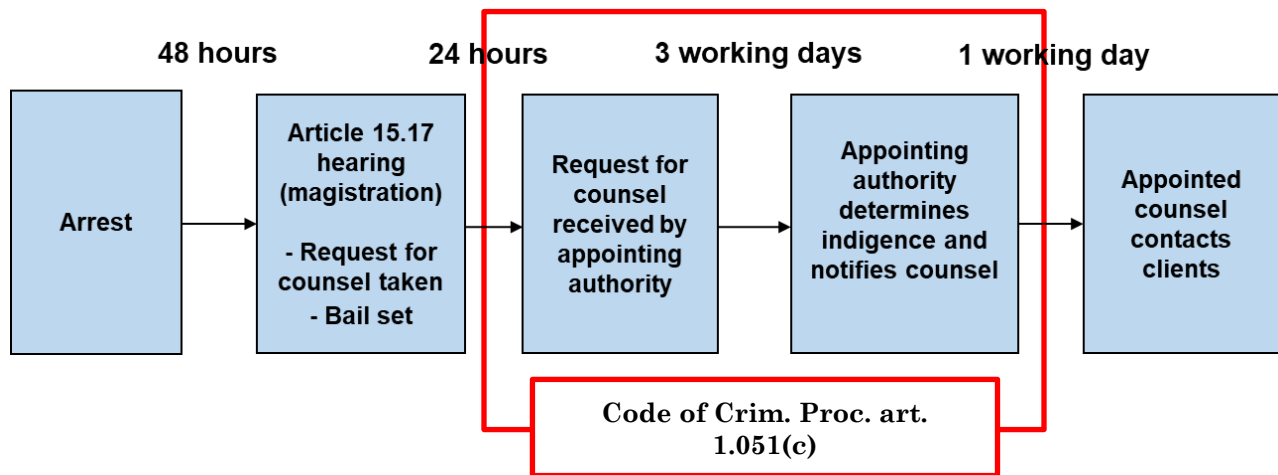
Requirement satisfied. No findings.

## REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

### *Adult Cases*

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 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 against him or her.<sup>20</sup> 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. TIDC examined cases filed in FY2022 (October 2021 to September 2022).

#### ***4.a. Timeliness of Appointment in Felony Cases***

TIDC examined 108 sample felony cases filed in FY2022. The courts made timely appointments of counsel in 50 of 86 cases in which counsel was requested (**58% timely**). This falls below TIDC's 90% threshold for presuming a jurisdiction's practices ensure timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

<sup>20</sup> In Ector County, the Justices of the Peace magistrate defendants arrested by the Sheriff's Department and the Texas Department of Public Safety, while Odessa Municipal Court Judges magistrate those arrested by the Odessa Police Department and University of Texas Permian Basin Police Department.

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

|   | Sample Size | Number from sample | Percent    |
|---|-------------|--------------------|------------|
| Number of case files examined                         | 108         |                    |            |
| Total cases with a counsel request                    |             | 86                 |            |
| <b>Appointment / denial of indigence occurred in:</b> |             |                    |            |
| 0 workdays  |             | 17                 |            |
| 1 – 3 workdays + 24 hour transfer                     |             | 33                 |            |
| <b>Total timely appointments / denials</b>            |             | <b>50</b>          | <b>58%</b> |
| 4 – 7 workdays + 24 hour transfer                     |             | 9                  |            |
| More than 7 work days + 24 hour transfer              |             | 22                 |            |
| No ruling on request                                  |             | 5                  |            |
| Total untimely appointments / denials                 |             | 36                 | 42%        |

**4.b. Timeliness of Appointments in Misdemeanor Cases**

TIDC examined 220 sample misdemeanor cases filed in FY2022. The courts made timely appointments of counsel in 39 of 87 cases in which counsel was requested (**45% timely**). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline in misdemeanor cases. Many of the late appointments may relate to problems with promptly sending requests to the courts.

**Table 5: Times to Appointment in Misdemeanor Cases**

|   | Sample Size | Number from sample | Percent    |
|---|-------------|--------------------|------------|
| Number of case files examined                         | 220         |                    |            |
| Total cases with a counsel request                    |             | 87                 |            |
| <b>Appointment / denial of indigence occurred in:</b> |             |                    |            |
| 0 workdays  |             | 34                 |            |
| 1 – 3 workdays + 24-hour transfer                     |             | 5                  |            |
| <b>Total timely appointments / denials</b>            |             | <b>39</b>          | <b>45%</b> |
| 4 – 7 workdays + 24-hour transfer                     |             | 3                  |            |
| More than 7 workdays + 24-hour transfer               |             | 20                 |            |
| No ruling on request                                  |             | 25                 |            |
| Total untimely appointments / denials                 |             | 48                 | 55%        |

**4.c. 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 that substantially conforms to the language of Article 1.051(g).

TIDC's case file examination contained 25 samples in which the court did not rule on requests for counsel. In 15 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)). Ector 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).

#### ***4.d. Juvenile Cases***

Counsel must be appointed for youths alleged to have engaged in delinquent conduct when the youth is brought to a detention hearing and when the youth is served with a copy of the petition alleging misconduct.<sup>21</sup> Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. When a petition is filed, Subsection 51.101(c) of the Family Code, directs the court to determine whether a youth's family is indigent upon the filing of the petition. Subsection 51.101(d) requires the court to appoint counsel, for those found to be indigent, within five working days of service of the petition on the juvenile.<sup>22</sup>

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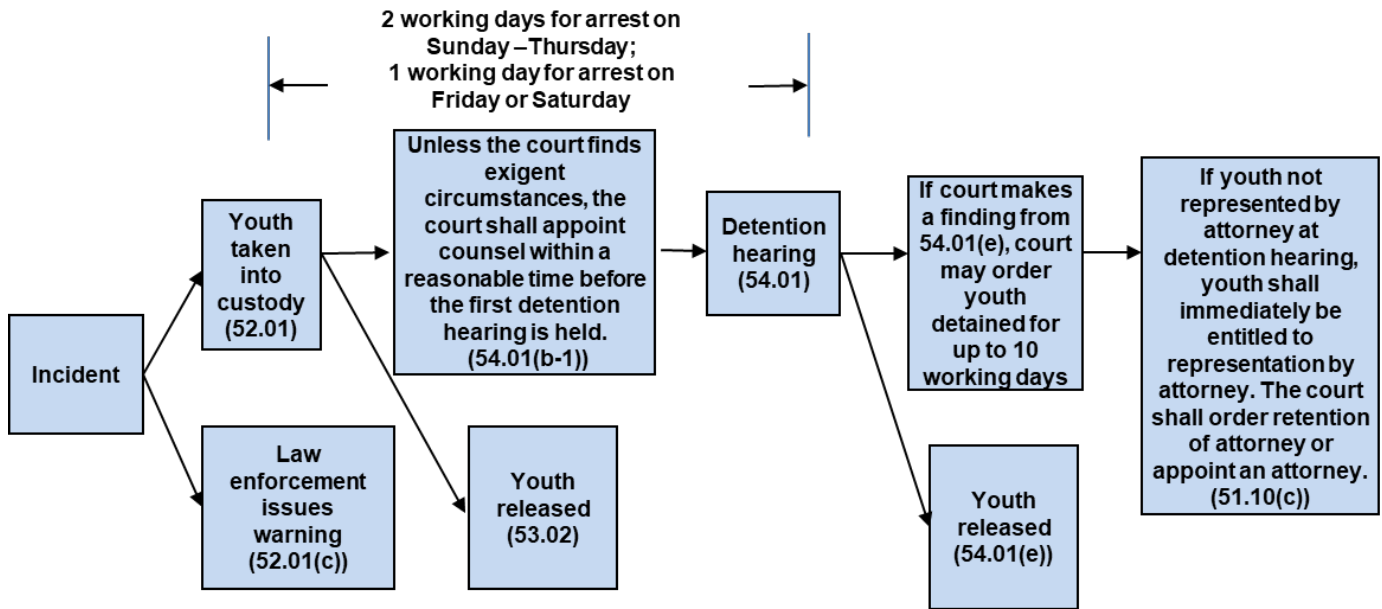
<sup>21</sup> TEX. FAM. CODE § 51.10(f).

<sup>22</sup> If the person responsible for the youth fails to retain counsel, under Section 51.10(b) of the Family Code, the youth's right to representation by an attorney shall not be waived in

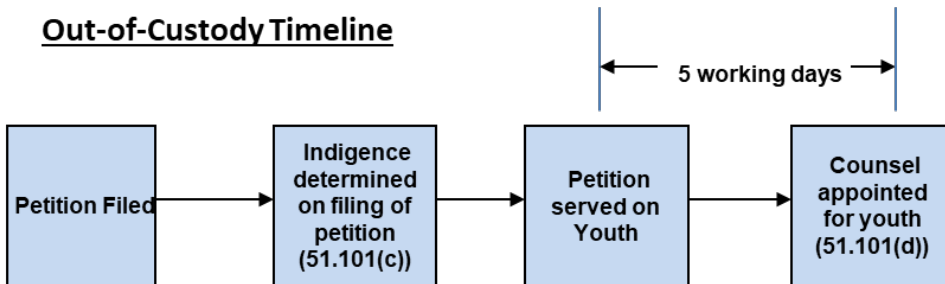
- (1) a hearing to consider transfer to criminal court as required by Section 54.02;
- (2) an adjudication hearing as required by Section 54.03;
- (3) a disposition hearing as required by Section 54.04;
- (4) a hearing prior to commitment to the Texas Juvenile Justice Department as a modified disposition in accordance with Section 54.05(f); or
- (5) hearings required by Chapter 55.

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**

**In-Custody Timeline**



**Out-of-Custody Timeline**



*Juvenile Detention Hearings*

To assess the timeliness of the County’s appointment procedures in juvenile cases, TIDC staff examined 72 cases filed in FY2022 (October 2021 – September 2022). Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing unless appointment is not feasible due to exigent circumstances.<sup>23</sup> Of the 72 sample cases, 48 involved detention hearings. Counsel was present for the initial detention hearing in all 48 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

*Appointment After Service of the Petition*

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth. Of 72 sample cases, 47 involved service of the petition on the

<sup>23</sup> TEX. FAM. CODE §54.01(b-1) states:

Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

youth. Counsel was timely appointed for 43 of these cases (**91% timely**), which exceeds TIDC’s 90% threshold.

**Table 6: Times to Appointment in Juvenile Cases**

|   | Sample Size | Number from Sample | Percent     |
|---|-------------|--------------------|-------------|
| Total juvenile cases examined   | 72          |                    |             |
| <b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>                    |             |                    |             |
| Case files with detention hearings  |             | 48                 |             |
| <b>Cases with attorney present at initial hearing</b>                               |             | <b>48</b>          | <b>100%</b> |
| <b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE YOUTH SERVED WITH A PETITION</b>        |             |                    |             |
| Case files in which youth served with a petition                                    | 47          |                    |             |
| Counsel appointed within 5 working days of service                                  |             | 40                 |             |
| Indigence denied or counsel retained within 5 working days of service <sup>24</sup> |             | 3                  |             |
| <b>Total cases with timely presence of counsel</b>                                  |             | <b>43</b>          | <b>91%</b>  |
| Cases where counsel not present in a timely fashion                                 |             | 4                  | <b>9%</b>   |

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4**

**Appoint Counsel Promptly**

**FINDING 3 (FELONY CASES) AND RECOMMENDATION:** Ector County’s felony appointment process did not meet TIDC’s threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), district courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline.

**FINDING 4 (MISDEMEANOR CASES) AND RECOMMENDATION:** Ector County’s misdemeanor appointment process did not meet TIDC’s threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), statutory county courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline.

**FINDING 5 (MISDEMEANOR CASES) AND RECOMMENDATION:** 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.

<sup>24</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.



## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner.

In assigned counsel systems, TIDC presumes a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if the top 10% of attorneys receiving cases of a given case level receive no more than three times their respective share of appointments.<sup>25</sup> If a county can track appointments by list, this analysis is made according to each appointment list. A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

### ***Assessment***

TIDC's fiscal monitoring review found that the attorney detail report submitted by the auditor as part of the annual Indigent Defense Expenditure Report contained several inaccuracies. The fiscal review made findings about local procedures for capturing and reporting case-level data, which the auditor's office is addressing. TIDC relies on this report to make an analysis of appointment distributions. TIDC makes no analysis of appointment distributions in this report because of a lack of reliable data. TIDC will analyze the distribution of attorney appointments when we return on our follow-up review.

### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

#### **Attorney Selection Process**

TIDC makes no analysis of appointment distributions in this report because of a lack of reliable data. TIDC will revisit this issue in our follow-up review.

## **REQUIREMENT 6: 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 Commission. 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. The fiscal monitor reviewed the accuracy of these reports.

As mentioned in our Requirement 1 discussion, OCA collects summary magistrate warning data in its Texas Judicial Council Monthly Court Activity Reports. As part of these reporting requirements, justice courts and municipal courts must report

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<sup>25</sup> 1 TEX. ADMIN. CODE § 174.28(c)(5)(D).

the number of individuals requesting counsel at Article 15.17 hearings administered.<sup>26</sup> For FY22 (October 2021 - September 2022), the Odessa Municipal Court reported zero counsel requests of 4,847 reported Article 15.17 hearings. TIDC’s file review included counsel requests made during this period. As required by Title 1, Rule 171.8 of the Texas Administrative Code, the Odessa Municipal Court must report Article 15.17 requests in their Judicial Council Monthly Court Activity Reports.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

**Statutory Data Reporting**

**FINDING 6 (MUNICIPAL DATA REPORTS) AND RECOMMENDATION:** For FY22 (October 2021 - September 2022), the Odessa Municipal Court reported zero counsel requests of 4,847 reported Article 15.17 hearings. TIDC’s file review included counsel requests made during this period. As required by Title 1, Rule 171.8 of the Texas Administrative Code, the Odessa Municipal Court must report Article 15.17 requests in their Judicial Council Monthly Court Activity Reports.

**Conclusion**

TIDC thanks Ector 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>27</sup> TIDC staff stand ready to provide technical and financial assistance to ensure full compliance with the Fair Defense Act.

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<sup>26</sup> 1 Tex. Admin. Code § 171.7 – 8.

<sup>27</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

## **Summary of Findings and Recommendations**

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

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.**

**FINDING 1 AND RECOMMENDATION:** At the Article 15.17 hearing, a magistrate must ensure arrested persons have reasonable assistance in completing the necessary forms for requesting counsel. The County must provide a method to ensure reasonable assistance in completing affidavits of indigence is provided at the time of the Article 15.17 hearing.

**FINDING 2 AND RECOMMENDATION:** Article 15.17(a) requires requests for counsel and associated paperwork be sent to the appointing authority within 24 hours of the request being made. The County must provide a consistent and reliable process to ensure requests are sent to the appointing authority within 24 hours of the request.

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

**FINDING 3 (FELONY CASES) AND RECOMMENDATION:** Ector County's felony appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), district courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**FINDING 4 (MISDEMEANOR CASES) AND RECOMMENDATION:** Ector County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), statutory county courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**FINDING 5 (MISDEMEANOR CASES) AND RECOMMENDATION:** 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.

### **REQUIREMENT 6: STATUTORY DATA REPORTING**

**FINDING 6 (MUNICIPAL DATA REPORTS) AND RECOMMENDATION:** For FY22 (October 2021 - September 2022), the Odessa Municipal Court reported zero counsel requests of 4,847 reported Article 15.17 hearings. TIDC's file review included counsel requests made during this period. As required by Title 1, Rule 171.8 of the Texas Administrative Code, the Odessa Municipal Court must report Article 15.17 requests in their Judicial Council Monthly Court Activity Reports.

## Appendix A: Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>28</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>29</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>30</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>31</sup>
- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>32</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>33</sup>
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>34</sup>

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<sup>28</sup> TEX. CODE CRIM. PROC. ART. 14.06(a).

<sup>29</sup> TEX. CODE CRIM. PROC. ART. 17.033.

<sup>30</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>31</sup> *Id.* This box is not checked because assistance with affidavits of indigence is not provided at the time of the Article 15.17 hearing.

<sup>32</sup> TEX. CODE CRIM. PROC. ART. 15.17(e).

<sup>33</sup> *See, e.g.*, TEX. CODE CRIM. PROC. ART. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. ART. 1.051); TEX. CODE CRIM. PROC. ART. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>34</sup> TEX. CODE CRIM. PROC. ART. 15.17(a). This box is not checked because procedures for defendants to complete affidavits in their cells do not ensure all requests are transmitted to the trial courts within 24 hours of the request being made.

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

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.<sup>35</sup>
- ☒ State the financial standard(s) to determine whether a defendant is indigent.<sup>36</sup>
- ☒ List factors the court will consider when determining whether a defendant is indigent.<sup>37</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.<sup>38</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>39</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>40</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- ☒ Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.<sup>41</sup>
- ☒ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>42</sup>

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<sup>35</sup> TEX. CODE CRIM. PROC. ART. 26.04(l)–(r).

<sup>36</sup> TEX. CODE CRIM. PROC. ART. 26.04(l).

<sup>37</sup> TEX. CODE CRIM. PROC. ART. 26.04(m).

<sup>38</sup> TEX. CODE CRIM. PROC. ART. 26.04(d).

<sup>39</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>40</sup> TEX. CODE CRIM. PROC. ART. 26.04(j)(4).

<sup>41</sup> TEX. FAM. CODE § 54.01(b-1). TEX. FAM. CODE § 51.10(c).

<sup>42</sup> TEX. FAM. CODE § 51.101(d).

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>43</sup>
- Persons out of custody: Counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>44</sup>
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>45</sup>

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>46</sup>
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>47</sup>

**NOT APPLICABLE.**

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<sup>43</sup> TEX. CODE CRIM. PROC. ART. 1.051(c). This box is not checked because several detained defendants did not receive timely appointments.

<sup>44</sup> TEX. CODE CRIM. PROC. ART. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, [the Article 15.17 hearing] marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”). This box is not checked because several defendants who made bail did not receive timely appointments.

<sup>45</sup> TEX. CODE CRIM. PROC. ART. 1.051(f-2). This box is not checked because 15 sample misdemeanor defendants requested counsel but entered uncounseled pleas before the requests were ruled upon.

<sup>46</sup> TEX. CODE CRIM. PROC. ART. 26.04(a). TIDC was unable to obtain reliable data to analyze the appointment distributions. TIDC will analyze appointment distributions on our follow-up review.

<sup>47</sup> TEX. CODE CRIM. PROC. ART. 26.044.

- Alternative appointment method:<sup>48</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

**NOT APPLICABLE.**

### **REQUIREMENT 6: STATUTORY DATA REPORTING**

- The county auditor shall prepare and send to OCA an annual report of legal services provided in the county to indigent defendants during the fiscal year and an analysis of the amount expended:<sup>49</sup>
  - In each district, statutory county, and appellate court;
  - In cases for which a private attorney is appointed for an indigent defendant;
  - In cases for which a public defender is appointed for an indigent defendant;
  - In cases for which counsel is appointed for an indigent juvenile; and
  - For investigation expenses, expert witness expenses, or other litigation expenses.

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<sup>48</sup> TEX. CODE CRIM. PROC. ART. 26.04(g)–(h).

<sup>49</sup> TEX. GOV'T CODE § 79.036(a-1). 1 Tex. Admin. Code § 171.7 – 8. This box is not checked because the Odessa Municipal Court did not report counsel requests in their Judicial Council Monthly Court Activity Reports.

## Appendix B - Sample Magistrate Warning Form

STATE OF TEXAS

VS.

\_\_\_\_\_

MAGISTRATE FOR

ECTOR

COUNTY, TEXAS

This is to certify that on \_\_\_\_\_ at \_\_\_\_\_ A.M./P.M. the above named individual appeared before me in Odessa, Ector County, Texas, at which time I informed him/her of his/her rights, as stated below, in a clear language as required by Article 15.17 of the Texas Code of Criminal Procedure.

1. You are charged by affidavit of probable cause and/or complaint with \_\_\_\_\_.
2. You have the right to hire a lawyer to represent you.
3. You have the right to have a lawyer appointed to represent you if you cannot afford to hire a lawyer.
4. You have the right to have a lawyer present prior to and during any questioning by peace officers or attorneys representing the state.
5. You have the right to say nothing during questioning by peace officers or attorneys representing the state.
6. You have the right to not make any statement and any statement you make may be used against you in Court.
7. You have the right to end any questioning at any time and say nothing further.
8. You have the right to an examining trial (felonies only).
9. If you are not a citizen of the United States of America, you have the right to have the consulate of your home country notified of your arrest.

Bail is set at: \$ \_\_\_\_\_

**I acknowledge that I was given the above warning and that I understand my rights as explained to me in the warning:**

\_\_\_\_\_

Signature of Defendant

Accused refused to sign acknowledgment of warning

Remarks:

\_\_\_\_\_

Witness and/or Interpreter



\_\_\_\_\_

Magistrate

Municipal Judge, City of Odessa

Place of warning: Ector County Law  
Enforcement Center