



Limited Scope Review of Dallas County's Indigent Defense Systems

February 2024



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Honorable Brandon Creighton Conroe, State Senator
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Honorable Sherry Radack Houston, Chief Justice, First Court of Appeals
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Honorable Valerie Covey Georgetown, Williamson County Commissioner
Honorable Richard Evans Bandera, Bandera County Judge
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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.¹ In this limited scope review, TIDC examined specific items requested by Commissioner John Wiley Price. TIDC made three findings regarding methods for appointing attorneys to capital cases. First, in instances in which the state hasn't provided written notice that it is not seeking death, the courts do not always appoint either two attorneys or the public defender. Second, courts do not always make a finding of good cause on the record for appointing counsel other than the public defender in capital cases. Third, some appointments of private attorneys are made to individuals who are not on the First Administrative Judicial Region's approved capital appointment list.

TIDC thanks Dallas County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical assistance to remedy these issues. TIDC will conduct a second follow-up review within two years.²

Background

On April 17, 2023, Dallas County Commissioner John Wiley Price sent TIDC a letter requesting that TIDC conduct a monitoring review to make recommendations for more efficient procedures (*See* Appendix B) and answer the five questions listed below. This is the first time that TIDC has been asked to examine issues related to whether a public defender office is receiving priority appointments in capital cases.

1. Is the Dallas County Public Defender's Office receiving priority appointment for capital murder proceedings in compliance with Texas Code of Criminal Procedure article 26.04, subsections (a) and (f)?
2. Is the Dallas County Public Defender's Office receiving priority appointment for appeals in compliance with Texas Code of Criminal Procedure article 26.04, subsections (a) and (f)?
3. Should the Dallas County Public Defender's Office receive priority appointments under Texas Code of Criminal Procedure article 26.04(a) and (f), for pre-trial magistration?
4. Are the Courts making findings of good cause, in compliance with Texas Code of Criminal Procedure article 26.04, subsection (f), when they appoint attorneys outside of the Dallas County Public Defender's Office?
5. Does the current merger of the first-degree felony and capital murder appointment wheels into a single appointment wheel comply with the law, particularly Texas Code of Criminal Procedure articles 26.04 and 26.052?

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

Additionally, in November 2021, TIDC issued a fiscal monitoring report for Dallas County. This review made a finding regarding the accuracy of appointment data related to capital murder cases. As part of this limited scope review, TIDC seeks to verify that capital murder appointment data is reasonably accurate.

Current Review

Staff members Wesley Shackelford, Debra Stewart, and Joel Lieurance conducted the review of Dallas County with a site visit between July 25 and 27, 2023. TIDC observed magistrate warnings and met with district judges, statutory county judges, associate judges, court coordinators, and public defender staff. TIDC analyzed data from Dallas County's pretrial case management system, District Clerk's Office, and County Auditor's Office, as well as data submitted as part of TIDC's Indigent Defense Expense Report. TIDC also received the First Administrative Judicial Region's approved capital appointment lists for 2019 through 2023.

Accuracy of Data Reported to TIDC

In 2021, TIDC issued a fiscal monitoring report covering Dallas County's financial reports to TIDC for FY2019 and FY2020. The report found issues with how capital case data was reported to TIDC. In this review, TIDC examined FY2021 and FY2022 data maintained by Dallas County and found they reasonably represented capital case data reported to TIDC.

Appointment Procedures

Defendants are brought before a magistrate at the Article 15.17 hearing, where they may request appointed counsel. In Dallas County, defendants who request counsel now complete a detailed financial affidavit of indigence. Formerly, affidavits contained only two questions, one regarding a defendant's income and another regarding a defendant's assets. When this previous affidavit was used, Dallas County did not provide assistance, and most defendants noted they received \$0 income and own \$0 assets. Presently, Dallas County staff gather detailed information from defendants through financial interviews. The answers are much more varied.

Dallas County is now able to identify affidavits of indigence and arresting charges in its case management system. The system automatically assigns non-capital cases to each court, and each court appoints counsel for defendants found to be indigent. For non-capital cases, the case management system rotates appointment wheels and provides the next attorney to be appointed. The court can either appoint the recommended attorney or override the system to appoint another attorney. Appointments to the public defender's office are always overrides in the system.

I. Public Defender Priority Appointments in Capital Cases

If a defendant is charged with a capital offense, Article 26.052 of the Code of Criminal Procedure requires the court to either appoint the public defender office³ or a lead private attorney approved by the regional selection committee.⁴ If private counsel is appointed, the court must appoint two attorneys unless the state gives notice in writing that it will not seek the death penalty.⁵

Article 26.04(f) of the Code of Criminal Procedure requires the court to give priority to appointing public defender offices when defendants have been found indigent.⁶ Article 26.04(f) provides four exceptions, one of which involves the court

³ TEX. CODE CRIM. PROC. ART. 26.052(b) states:

If a county is served by a public defender's office, trial counsel and counsel for direct appeal or to apply for a writ of certiorari may be appointed as provided by the guidelines established by the public defender's office. In all other cases in which the death penalty is sought, counsel shall be appointed as provided by this article.

⁴ TEX. CODE CRIM. PROC. ART. 26.052(d)(1)-(2) states:

- (1) The committee shall adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought.
- (2) The standards must require that a trial attorney appointed as lead counsel to a capital case:
 - (A) be a member of the State Bar of Texas;
 - (B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
 - (C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;
 - (D) have at least five years of criminal law experience;
 - (E) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies;
 - (F) have trial experience in:
 - (i) the use of and challenges to mental health or forensic expert witnesses; and
 - (ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and
 - (G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

⁵ TEX. CODE CRIM. PROC. ART. 26.052(e) states:

The presiding judge of the district court in which a capital felony case is filed shall appoint two attorneys, at least one of whom must be qualified under this chapter, to represent an indigent defendant as soon as practicable after charges are filed, unless the state gives notice in writing that the state will not seek the death penalty.

⁶ TEX. CODE CRIM. PROC. ART. 26.04(f) states:

(f) In a county with a public defender's office, the court or the courts' designee shall give priority in appointing that office to represent the defendant in the criminal proceeding, including a proceeding in a capital murder case. However, the court is not required to appoint the public defender's office if:

making a finding of good cause for appointing other counsel. In capital cases, this finding must be on the record.

TIDC interviewed administrators for the Dallas County courts regarding procedures for making capital appointments. Capital cases are assigned to individual courts through a random assignment system in which each district court is represented by a ping pong ball. When a capital case is charged, a ball is selected, and that court is assigned the capital case. The ball is removed from further selections until each court has received a capital case.

Counsel is appointed for capital cases by individual courts, and the selection operates outside of the wheel system. Each court has a copy of the approved capital attorney list for the First Administrative Judicial Region. Article 26.052 allows the court to appoint an attorney from this approved list or to appoint the public defender office. Generally, courts only appoint one attorney, but will appoint an additional attorney if the prosecution announces an intent to seek death, or if defense counsel requests a second chair. Dallas County's case management system uses a combined first-degree felony and capital case list, but this list should be irrelevant for capital cases, so long as all appointments go to either attorneys approved for the regional capital list or the public defender.

TIDC interviewed attorneys in the Capital Division of the Public Defender's Office. The Capital Division has two attorneys and several support staff, including two in-house investigators. The Division also uses other felony public defender attorneys to sit as second chair. TIDC inquired about the Division's ability to handle additional capital cases, and staff stated they have capacity for more cases.

The Dallas County District Courts provided TIDC with a list of capital case defendants who received an appointed attorney during FY2021-2022 (October 2020 - September 2022). From this list, TIDC identified cases involving 111 defendants in which private assigned counsel was appointed.⁷ The sample contained several cases with a standard form denoting why a court is appointing counsel other than the public defender (*see* Appendix A). The form includes a checkbox to note the court is appointing counsel approved by the First Administrative Judicial Region's for capital cases. However, the courts used the standard form, with the required good cause finding, for

-
- (1) the court makes a finding of good cause for appointing other counsel, provided that in a capital murder case, the court makes a finding of good cause on the record for appointing that counsel;
 - (2) the appointment would be contrary to the office's written plan under Article 26.044;
 - (3) the office is prohibited from accepting the appointment under Article 26.044(j); or
 - (4) a managed assigned counsel program also exists in the county and an attorney will be appointed under that program.

⁷ The Public Defender was appointed to 16 capital defendants from the list the Dallas County District Courts provided. Public defender appointments were excluded from the analysis that follows.

only about 45% of sample defendants.⁸ There was no other finding of good cause entered on the record in any of the remaining 55% of sample defendants' cases.

As to the frequency of appointing private attorneys from the regional first chair capital list, the courts appointed from this list for just under 70% of sample defendants. TIDC's analysis follows.⁹ In a few instances, courts used the standard form to appoint counsel other than the public defender, then marked they were appointing from the regional list, but their selected attorney was not actually approved for the regional list.

Table: Defendants with Counsel Approved for Regional Appointment List

	#	%
Capital defendants with private assigned counsel	111	
Single attorney appointed who was approved by Local Selection Committee to be first chair in death penalty cases	68	61.3%
Two private attorneys appointed, at least 1 of whom was approved by the Local Selection Committee	7	6.3%
Total defendants with counsel approved for first chair by Local Selection Committee	75	67.6%
Appointed attorney not approved by the Local Selection Committee	31	27.9%
Single attorney appointed, but only approved for Local Selection Committee's second chair list	5	4.5%
No counsel approved for first chair by Local Selection Committee	36	32.4%

As noted previously, the Capital Division of the Public Defender Office stated it is capable of handling more appointments, and it desires more cases. Given that the Capital Division is underutilized compared to private counsel,¹⁰ Dallas County should modify its appointment process to ensure the Division is given priority when appointing counsel.

⁸ TIDC observed the finding of good cause to appoint counsel other than the public defender for 49 of 111 sample defendants (44.1% of the sample).

⁹ Several sample defendants were represented by attorneys who later withdrew. After the withdrawal, new counsel would be appointed or retained. For purposes of this analysis, TIDC used the first appointment that most closely corresponded to the FY2021 - FY2022 time period.

¹⁰ The Capital Division received about a tenth of sample defendants for FY2021 - FY2022 and about a quarter of total capital cases paid as reported by Dallas County in its annual Indigent Defense Expense Reports.

FINDINGS AND RECOMMENDATIONS

Finding 1 and Recommendation: The Dallas County District Courts do not always appoint two attorneys in capital cases. In accordance with Article 26.052(e), the courts must either appoint two attorneys or the public defender in capital cases, unless the state gives notice in writing that it will not seek the death penalty.

Finding 2 and Recommendation: The Dallas County District Courts do not always make a finding of good cause on the record for appointing private counsel in capital cases. If private counsel is appointed, the courts must make a finding of good cause on the record. Dallas County has a standard form for this good cause finding.

Finding 3 and Recommendation: When appointing private counsel in capital cases, the Dallas County District Courts do not always appoint from the list approved by the First Administrative Judicial Region. If private counsel is appointed, the courts must appoint an attorney approved for first chair by the First Region's Local Selection Committee.

II. Public Defender Priority Appointments in Appeals Cases

As previously noted, Article 26.04(f) of the Code of Criminal Procedure requires the court to give priority to appointing public defender offices when defendants have been found indigent. Article 26.04(f) provides four exceptions, one of which involves the court making a finding of good cause for appointing other counsel. In appeals cases, the finding of good cause does not have to be on the record.

In Dallas County, if an indigent defendant files a notice of appeal, the case management system recommends an attorney from the approved appeals lists. The system rotates names on the list, including both private and public defender attorneys. As a result, the appeals attorneys in the public defender office do not receive any more cases than a private attorney, unless there is an override to appoint public defender attorneys over private attorneys. However, private attorneys handle other types of cases, not just appointed appeals.

TIDC interviewed the Appellate Division of the public defender office. The Appellate Division has 4.5 attorneys and a legal assistant. TIDC inquired about the ability to handle additional appellate cases, and staff stated they have capacity for more cases.

TIDC obtained the list of attorney overrides for FY2021 and FY2022. From this list, there were 17 overrides appointing the appellate public defender over private attorneys, but no overrides appointing private attorneys over the public defender.¹¹ This

¹¹ The overrides total was based on total defendants with appeals overrides, not cases.

is a sign that the courts have confidence in the ability of the Appellate Division, but the attorney selection method does not appoint a sufficient number of cases to maximize its effectiveness. Given that the Appellate Division is underutilized,¹² the Dallas County Courts and the Appellate Division may wish to discuss other ways to allocate appointments.

FINDINGS AND RECOMMENDATIONS

No Findings.

III. Priority Appointment for Representation at Article 15.17 Hearings

Dallas County is examining whether and how to provide counsel for defendants at the Article 15.17 hearing (magistration). The current jail facilities pose a challenge to Article 15.17 representation. Article 15.17 hearings are held in a jail courtroom whose dimensions are about 35 feet by 35 feet. Court staff include the magistrate, two bailiffs, and an interpreter. There are about 25 chairs for defendants.

The Dallas County Commissioners Court has approved the concept for defense attorneys and prosecutors to be present at the Article 15.17 hearing. There are questions as to whether public defenders or private counsel should provide defense representation. Currently, public defenders represent defendants at 48-hour bail bond hearings and at Article 16.22 hearings to assist with mental health personal bonds. A question could arise about whether the priority appointment procedures in Article 26.04(f) require the Public Defender to provide Article 15.17 representation. Dallas County may wish to create a workgroup of relevant stakeholders to discuss the matter further.

A few jurisdictions in Texas provide counsel for defendants at Article 15.17 hearings, notably Bexar, Harris, Montgomery, and Potter Counties. In Bexar, Harris, and Potter Counties, public defender attorneys represent defendants at the Article 15.17 hearing. These attorneys' primary job focus is representing defendants at this first appearance. They meet with clients prior to the hearing, so they can argue points such as a defendant's ties to the community and other factors showing why the defendant will likely show up to court. In Montgomery County, private counsel is appointed for these hearings, but based on TIDC's observations, those attorneys do not meet with clients prior to the hearing.

TIDC sponsored a research paper to determine the effects of counsel at the Article 15.17 hearing in Hays and Potter Counties. This paper has not yet been published. The research attempts to determine if counsel at the Article 15.17 affects bail bond amounts, bail bond conditions, and whether the representation improves defendants

¹² For FY2021 - FY2022, the Appellate Division received about a fifth of total appeals cases paid as reported by Dallas County in its annual Indigent Defense Expense Reports.

understanding of the hearing and the charges against them. TIDC will share this paper after it is released.

FINDINGS AND RECOMMENDATIONS

No Findings.

IV. Possible Areas for Efficiency Gains

Centralization of Court Appointments and Budgets

TIDC heard concerns from courts about how individual court budgets affected their decisions. Judges noted individual court budgets affected their choice of counsel and the monthly case appointment totals to each attorney. Many urban counties do not rely on individual courts to appoint counsel but have a centralized pretrial services or indigent defense department that is designated to appoint counsel for all courts. They use budgets based on activity type or court type, and this budget is spread across all courts.¹³ This centralization can create economies of scale and allows judges and court staff to devote their time to court matters other than selecting and appointing counsel.

Access to Case Management System Details

When TIDC interviewed the Capital Division of the public defender office, staff did not seem to have access to details noting whether defendants had been charged with a capital case at magistration. Instead, staff attempted to maintain their own lists of capital cases. If the public defender office were granted access to magistrate warning charge data, the office's data tracking could be improved.

Conclusion

TIDC thanks Dallas 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.¹⁴ TIDC staff stand ready to provide technical assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

¹³ As an example, See El Paso County FY2024 Adopted Budget, Book 1 (available at <https://www.epcounty.com/budget/documents/00 - Book 1 2 Combined ONLINE NEW.pdf>). Budgets covering the administration of justice begin on page 59. Each court has a budget that covers employee expenses. Appointment of counsel expenses are not attributed to individual courts, but rather for all courts as a block. On pages 69 - 70, they are listed as legal fees under Council of Judges Administration.

¹⁴ 1 TEX. ADMIN. CODE § 174.28(c)(2).

Summary of Findings and Recommendations

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

Findings and Recommendations

Finding 1 and Recommendation: The Dallas County District Courts do not always appoint two attorneys in capital cases. In accordance with Article 26.052(e), the courts must either appoint two attorneys or the public defender in capital cases, unless the state gives notice in writing that it will not seek the death penalty.

Finding 2 and Recommendation: The Dallas County District Courts do not always make a finding of good cause on the record for appointing private counsel in capital cases. If private counsel is appointed, the courts must make a finding of good cause on the record. Dallas County has a standard form for this good cause finding.

Finding 3 and Recommendation: When appointing private counsel in capital cases, the Dallas County District Courts do not always appoint from the list approved by the First Administrative Judicial Region. If private counsel is appointed, the courts must appoint an attorney approved for first chair by the First Region's Local Selection Committee.

Appendix A - Sample Form to Appoint Private Counsel in Capital Case

Cause No. F-2276305-R

THE STATE OF TEXAS

§

Judicial DISTRICT

VS.

§

COURT #265



§

DALLAS COUNTY, TEXAS

Order Appointing Counsel to a Defendant Charged with Capital Murder

The above-named Defendant has been charged with capital murder and has requested counsel be appointed. The Court has determined the criteria for appointing counsel has been met. Accordingly, the Court, having good cause to appoint counsel other than the public defender's office, makes a finding of good cause for appointing counsel named herein. The Court has determined the following:

Counsel has the requisite experience and background for the degree of seriousness of the offense, therefore, the Court finds good cause to appoint this attorney.

The Court is familiar with the work ethic and work standard of this attorney, therefore, the Court finds good cause to appoint this attorney.

The Court believes that the facts and circumstances of this offense and/or the special needs of the Defendant support appointing the attorney named herein, therefore, the Court finds good cause to appoint this attorney.

The Court finds that the attorney meets specified objective qualifications for representation in that they are approved by the First Administrative Judicial Region to receive appointments in Capital Murder cases, therefore, the Court finds good cause to appoint this attorney.

For all of the reasons indicated above, the Court hereby appoints

Paul Johnson to represent the Defendant for

the trial of this cause.

The Court orders the Clerk of the Court to send a copy of this order to counsel appointed herein.

Signed on this the 19 day of September, 2022.



JUDGE PRESIDING

Appendix B - Commissioner Price Letter Requesting Review

OFFICE OF COMMISSIONER
DISTRICT NO. 3

April 17, 2023

Texas Indigent Defense Commission
Geoff Burkhart, Executive Director
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JOHN WILEY PRICE

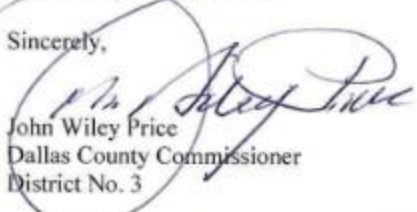
Dear Mr. Burkhart,

This letter serves as a request for monitoring of several facets of the attorney appointment process for indigent defendants in Dallas County. Dallas County has an interest in assuring high-quality, cost-effective representation for indigent defendants. I am therefore requesting technical assistance in the following areas to ensure that our appointment process complies with the Texas Code of Criminal Procedure and any other applicable laws. We also seek recommendations for making our process more efficient.

- Is the Dallas County Public Defender's Office receiving priority appointment for capital murder proceedings in compliance with Texas Code of Criminal Procedure article 26.04, subsections (a) and (f)?
- Is the Dallas County Public Defender's Office receiving priority appointment for appeals in compliance with Texas Code of Criminal Procedure article 26.04, subsections (a) and (f)?
- Should the Dallas County Public Defender's Office receive priority appointment under Texas Code of Criminal Procedure article 26.04, subsections (a) and (f), for pre-trial magistration?
- Are the Courts making findings of good cause, in compliance with Texas Code of Criminal Procedure article 26.04, subsection (f), when they appoint attorneys outside of the Dallas County Public Defender's Office?
- Does the current merger of the first-degree felony and capital murder appointment wheels into a single appointment wheel comply with the law, particularly Texas Code of Criminal Procedure articles 26.04 and 26.052?

I would invite a team from your office to spend the necessary amount of time in Dallas County to conduct an audit of our appointment process, particularly in light of the aforementioned questions. We appreciate your assistance.

Sincerely,


John Wiley Price
Dallas County Commissioner
District No. 3

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