



Follow-Up Policy Monitoring Review of Galveston County's Indigent Defense Systems

October 2022



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Mission: Protecting the right to counsel, improving public defense.

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Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act through policy reviews.¹ These reviews are conducted to promote local compliance with the requirements of the Fair Defense Act and to provide technical to improve county assistance indigent defense processes. TIDC observed court hearings, interviewed officials, and reviewed FY2021 data from Galveston County. TIDC found three pending findings after the October 2022 review:

- a. Sample appointments of counsel in felony cases did not meet TIDC's 90% timeliness threshold.
- b. Sample appointments of counsel in misdemeanor cases did not meet TIDC's 90% timeliness threshold.
- c. Misdemeanor defendants with pending counsel requests entered uncounseled pleas.

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

Background

In June 2017, TIDC issued a limited scope review of Galveston County's felony and misdemeanor appointment procedures. The report found that counsel was not appointed timely in either felony or misdemeanor cases. In misdemeanor cases, some defendants with pending counsel requests entered uncounseled pleas. Additionally, in misdemeanor cases, jail docket attorneys did not always represent defendants beyond the week of their assignment, and defendants not wishing to enter a plea were left without means to resolve their cases. The review also addressed data reporting matters.

Current Review

TIDC's policy monitoring rules require follow-up reviews of counties where the report included noncompliance findings. Staff members William R. "Bill" Cox, Joel Lieurance, and Nicolas Sawyer conducted a follow-up review with an on-site visit to Galveston County between March 28 and March 30, 2022. The purpose of the visit was to evaluate whether the findings from the 2017 review had been satisfied. TIDC examined the local indigent defense plan and felony and misdemeanor case files for cases that were filed between April 1 and September 31, 2021 and maintained by the

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

district and county clerks. This review focused on the FDA core requirements two and four:³

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

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

TIDC is concurrently conducting a fiscal review in which it will address fiscal and data reporting matters covered by the initial review.

Table 1: History of Monitoring Findings

FDA Core Requirement	Description and Initial Year of Finding	Status after October 2022 Review	
		Satisfied	Pending
4. Prompt Appointment (felony)	Timeliness in sample felony cases did not meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2017)		✓
4. Prompt Appointment (misdemeanor)	Timeliness in sample misdemeanor cases did not meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2017)		✓
4. Prompt Appointment (misdemeanor)	Misdemeanor defendants with pending counsel requests entered uncounseled pleas. (2017)		✓
4. Prompt Appointment (misdemeanor)	Jail docket attorneys did not always represent misdemeanor clients beyond the term of the hearing. (2017)	✓ (2022)	
4. Prompt Appointment (misdemeanor)	Defendants who make bail after being represented by a jail docket attorney do not need to re-qualify as indigent. (2017)	✓ (2022)	

³ 1 TEX. ADMIN. CODE § 174.28.

Program Assessment

Description of Local Counsel Appointment Procedures

After arrest in Galveston County, the Personal Bond Office interviews defendants, gathering information related to ability to post bond and eligibility for court-appointed counsel.⁴

Defendants then go before a magistrate 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 each defendant whether they would like to request counsel. If a defendant requests counsel but had not previously completed the affidavit of indigence, the defendant is directed to complete the affidavit at the hearing. The defendant's request and financial information are then transferred to the County or District Court assigned to their case, which rules on the application for appointed counsel.

Galveston County provides two private defense attorneys for early representation on bail matters. The two attorneys provide Article 15.17 representation to felony defendants who were arrested on-view. They also represent detained felony and misdemeanor defendants at a bail review docket that occurs 12 hours after the Article 15.17 hearing.

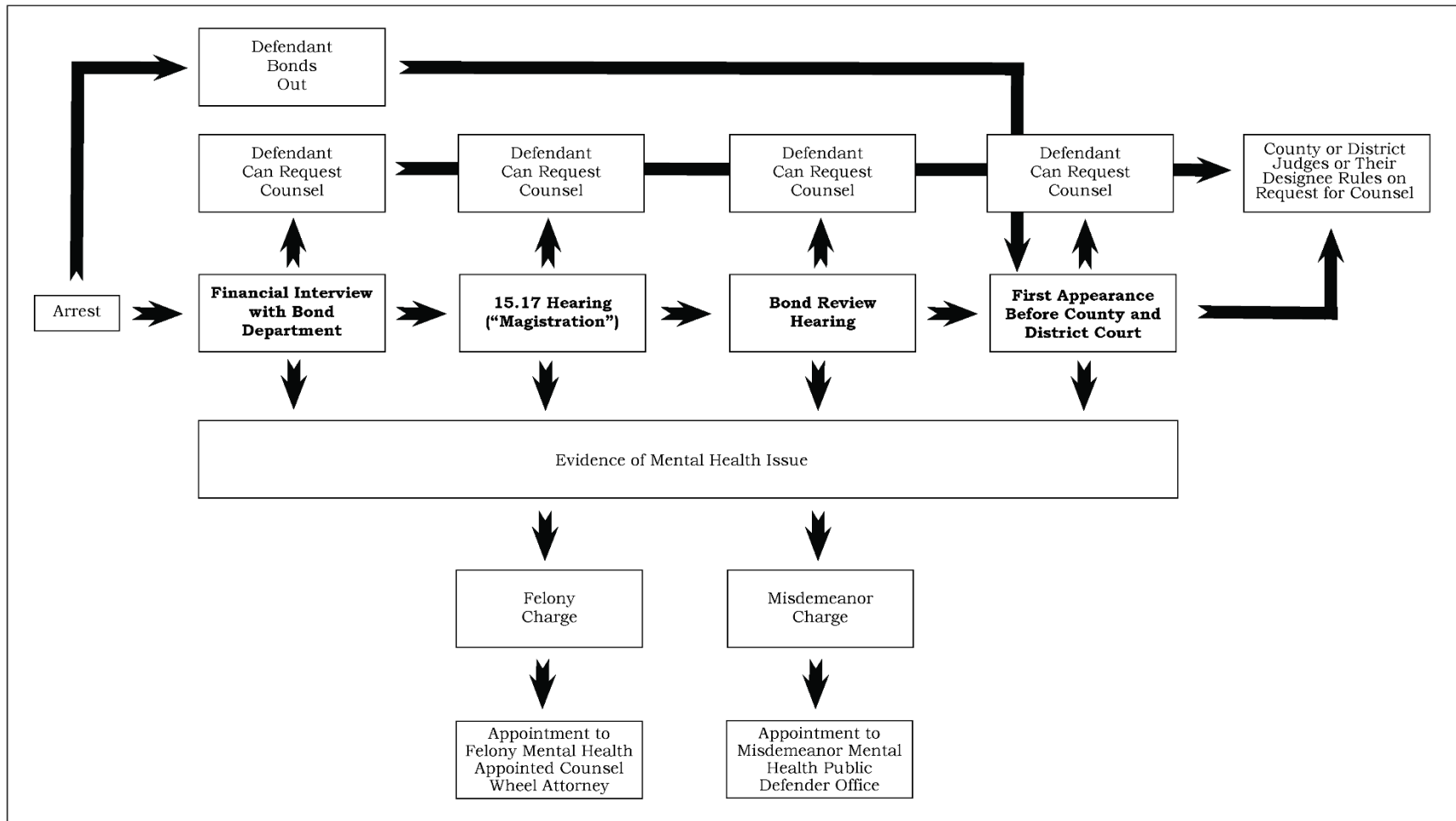
If Galveston County identifies a defendant with mental health issues, the defendant is transferred to the mental health court. Specialized wheel attorneys are appointed to felony defendants, while the Mental Health Public Defender's Office is appointed to misdemeanors. During the period reviewed (April 2021 – September 2021), there were delays in promptly ensuring access to mental health attorneys. Galveston staff indicated that prompt mental health identification now allows specialized attorneys to be appointed within 24 hours from the time of arrest.

Misdemeanor defendants who do not make bail are set for a jail docket. Two attorneys are appointed to represent defendants, securing release by entering pleas of guilt or no-contest in the case or arguing for dismissal from the prosecutor. If a defendant does not enter a plea or receive a dismissal, the case will be moved to the trial docket. This topic is discussed further in Requirement 4, regarding continuity of counsel by jail docket attorneys.

Defendants who post bail must appear at their trial court. Each court has its own procedures for explaining the right to appointed counsel and for ruling on counsel requests, which are discussed in detail with Requirement 2.

⁴ The Personal Bond Office maintains oversight over a monthly population averaging between 400 and 500 defendants who have been released on personal bonds. Approximately 95% of these defendants remain in compliance with the terms of their release. For more information, see <https://www.galvestoncountytexas.gov/county-offices/personal-bond-collections>.

Current Appointment of Counsel Process for Misdemeanor and Felony Defendants in Galveston County



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

Under Article 26.04 of the Code of Criminal Procedure, courts 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 standards for determining indigence are set in each county's indigent defense plans. The ultimate test is whether the defendant is financially able to employ counsel.⁵ Under Galveston County's indigent defense plan, some defendants may not meet the local presumptive standard set in the plan, but still not have the financial ability to employ counsel.⁶ These defendants can qualify as indigent due to substantial hardship.

For adult criminal cases in Galveston County, defendants are presumed indigent if they have a household income at or below 125% of the Federal Poverty Guidelines and non-exempt assets less than \$2,500.⁷ Defendants can also be considered indigent if they meet any of the following factors: (1) at the time of the request, they have been determined to be eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing; (2) they are serving a sentence in a correctional facility or are residing in a mental health facility; or (3) they are unable to retain counsel without substantial hardship to the defendant or defendant's dependents.

Partial Indigence

In Galveston County, defendants may be found to be partially indigent if they make between 125% and 175% of the Federal Poverty Guidelines and have non-exempt assets less than \$2,500. The Galveston County Indigent Defense Plan states that "[a] defendant determined to be partially indigent shall be eligible for appointment of counsel only upon payment of the counsel of an appointment fee of

⁵ TEX. CODE CRIM. PROC. ART. 1.051(b).

⁶ The Galveston District and County Court Indigent Defense Plan is available at <https://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=291&ShowPending=1>.

⁷ *Id.*

\$100 if charged with one or more misdemeanors or \$200 if charges with one or more felonies.”

In Galveston County, when courts find a defendant is partially indigent, a court can assess the attorney fees that the defendant is able to pay or require up-front payment. TIDC’s file review included four felony cases in which defendants were found to be partially indigent. One defendant was ordered to pay the \$200 prior to receiving appointed counsel, but was unable to do so, delaying the appointment of counsel beyond Article 1.051 timelines. Galveston staff indicated partial indigence is rare in misdemeanor cases; however, when it is used, the \$100 must be paid before the appointment of counsel.⁸ If a defendant is unable to pay the up-front fee, it is an indication the defendant is also unable to employ counsel.⁹

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

Determination of Indigence

Requirement satisfied. No findings.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

Article 1.051(c) of the Code of Criminal Procedure requires courts in counties with a population of 250,000 or more to rule on a request for counsel within one working day of receiving the request.

Timeliness of Appointments in Felony Cases

TIDC examined 113 sample felony cases filed between April 1 and September 31, 2021. Counsel was timely appointed in 68 of 93 cases where counsel was requested (73% timely). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. All sample requests were ruled upon, with many appointments of counsel made just beyond Article 1.051’s time frames.¹⁰

⁸ TIDC’s case file sample did not include any misdemeanor cases in which partial indigence was found.

⁹ The defendant eventually received appointed counsel two-and-a-half months later. Galveston County’s indigent defense plan states

A defendant who does not meet any of the financial standards above shall nevertheless be determined indigent if the defendant is otherwise unable to retain private counsel without substantial hardship to the defendant or the defendant’s dependents, taking into account the nature of the criminal charge, the anticipated complexity of the defense, the estimated cost of obtaining competent private legal representation for the matter charged, and the amount needed for the support of the defendant and the defendant’s dependents.

¹⁰ TIDC did not find distinct factors contributing to late felony appointments, but one late felony appointment occurred after a defendant was found partially indigent and counsel was not promptly appointed because the defendant failed to pay the up-front \$200 fee.

The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

Table 2: Times to Appointment in Felony Cases

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	93	
Request for counsel ruled upon in 'x' workdays		
0 workdays	20	
1 workday + 24 hours allowed to transmit a request	48	
Timely Rulings on Requests	68	73%
2 – 5 workdays + 24 hours allowed to transmit a request	18	
More than 5 workdays + 24 hours allowed to transmit a request	7	
No ruling on request	0	
Total Untimely / No Rulings on Requests	25	27%

Timeliness of Appointments in Misdemeanor Cases

TIDC examined 224 sample misdemeanor cases filed between April 1 and September 31, 2021. Counsel was timely appointed in 76 of 119 cases in which counsel was requested (64% 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. TIDC identified five factors causing appointments to be untimely.

Table 3: Times to Appointment in Misdemeanor Cases¹¹

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	119	
Request for counsel ruled upon in 'x' workdays		
0 workdays	45	
1 workday + 24 hours allowed to transmit a request	31	
Timely Rulings on Requests	76	64%
2 – 5 workdays + 24 hours allowed to transmit a request	5	
More than 5 workdays + 24 hours allowed to transmit a request	22	
No ruling on request	16	
Total Untimely / No Rulings on Requests	43	36%

¹¹ For those instances in which misdemeanor defendants have an accompanying felony case, TIDC used the earlier of the two appointment dates if the same attorney was used in both cases.

Factors Affecting Timeliness in Misdemeanor Cases

TIDC found five factors contributing to late misdemeanor appointments:

- Counsel was not appointed in a timely manner for cases in which defendants made bail shortly after the Article 15.17 hearing.¹²
- Some defendants did not make bail. These defendants were frequently represented by a jail docket attorney; however, not all cases had an order appointing counsel.
- Some defendants refused the initial Pretrial Bond Interview, and if they later completed the financial affidavit at the Article 15.17 hearing, the requests were not always ruled upon.
- Some defendants were found not competent to complete the financial interview by a magistrate. These requests were not always ruled upon.
- Defendants requesting counsel at first appearance in the trial court were sometimes required to bring additional documentation, delaying the appointment of counsel beyond Article 1.051 timelines.

Proper Documentation of Counsel Appointments

In misdemeanor cases, defendants represented by a jail docket attorney often have no order appointing an attorney to represent them. TIDC considered the representation to be a timely appointment if there was evidence of representation within one working day (plus 24 hours allowed to transmit the request to the courts) of the counsel request.

Under Article 26.04(b)(5) of the Code of Criminal Procedure, local procedures must

(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics;

Without an order appointing counsel, naming the attorney providing representation, it may not be possible for courts to adequately oversee attorney performance.

¹² *Rothgery v. Gillespie County*, 554 U.S. 991 (2008), held that the sixth amendment right to counsel attaches when a defendant appears before a magistrate and learns of the charges against him and his liberty is subject to restriction (*i.e.*, the Article 15.17 hearing which was held to be the initiation of adversarial judicial proceedings). Article 1.051(j) of the Code of Criminal Procedure then sets the timing of counsel appointments for persons who make bond: ...if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first. Since the *Rothgery* decision, the meaning of the language from Article 1.051(j) cannot be construed to allow for a ruling on a request for counsel to be delayed because the defendant makes bond.

Galveston County may benefit from ensuring that all appointments of counsel have an order appointing the attorney for the case.

Appointments Are Not Made if Initial Affidavit Not Completed

Defendants can request counsel and complete financial affidavits at multiple points. However, the case file review showed appointments of counsel to misdemeanor defendants were not made if a defendant refused the initial interview with the Pretrial Bond Office. Some defendants who refused this initial interview later requested counsel at the Article 15.17 hearing and completed an affidavit at that time. These defendants did not always receive a ruling on their requests.

Defendants Who Are Not Competent to Complete the Financial Affidavit

In other instances, magistrates found misdemeanor defendants were not competent to complete the financial interview, and the defendants did not receive an order appointing counsel. The corresponding financial affidavits noted that defendants refused the financial interview. Several of these defendants later entered guilty pleas with a jail docket attorney, but there was no order appointing counsel for the defendant.

Galveston staff interviews indicated new mental health identification procedures will now move these cases to the mental health court, which then appoints the Mental Health Public Defender's Office. The Mental Health Public Defender's Office did not begin operations until the end of our case review period, and so these new procedures were not observed.

Additional Required Financial Paperwork

TIDC found examples in sample case files where the court required defendants to produce additional financial documents to prove income prior to ruling on a request for counsel.¹³ As a result, these indigence determinations exceeded the timeframes set by Article 1.051 of the Code of Criminal Procedure and delayed the appointment of counsel. Galveston County must ensure its process for determining indigency does not lead to a delay in appointment beyond the timelines in Article 1.051.

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel allowing 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

¹³ Practices include requiring defendants who requested counsel to bring payment stub records, tax returns, or bank statements to the next court setting so that the request can be ruled upon.

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, he or she must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).¹⁴

TIDC found three sample cases in which misdemeanor defendants requested counsel at the Article 15.17 hearing and later entered uncounseled pleas without their requests being ruled upon. In all three instances, defendants made bail shortly after requesting counsel. The absence of a ruling on a pending request raises the possibility of statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Galveston 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).

Continuity of Representation by Jail Docket Attorneys

The initial 2017 policy review found issues with the use of misdemeanor jail docket attorneys. At the time, jail docket attorneys only represented defendants for the duration of the hearing. If a defendant did not enter a plea on a given day, the defendant could be represented by a different attorney at a later jail docket. Alternatively, if a defendant made bail after appearing at a jail docket, the defendant would need to requalify as indigent in the trial court.

In the current review, TIDC's interviews indicated that once a defendant is represented by a jail docket attorney, the attorney stays with the case, unless the defendant consents to a change in representation. If the defendant makes bail, the defendant does not need to re-qualify as indigent. TIDC could not confirm this with record review, as many jail docket appointments do not involve an appointment order that is part of the clerk's case file. Based on interviews, TIDC finds that our previous findings covering continuity of counsel and re-determinations of indigence have been addressed.

¹⁴ The waiver language of Article 1.051(g) states:

“I have been advised this _____ day of _____, 2____, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)”

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

2017 FINDING 1 AND RECOMMENDATION (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission'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.***

2017 FINDING 2 AND RECOMMENDATION (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission'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.***

2022 Additional Language for Finding 2: TIDC identified five factors that are causing appointments to be untimely. Galveston County must ensure that these sub-groups of defendants receive timely appointment of counsel.

1. Counsel was not appointed in a timely manner for cases in which defendants made bail shortly after the Article 15.17 hearing.
2. Some defendants did not make bail. These defendants were frequently represented by a jail docket attorney, but not all cases had an order appointing counsel.
3. Some defendants requested counsel but refused the initial Pretrial Bond Interview. If they later completed the financial affidavit at the Article 15.17 hearing, the requests were not always ruled upon.
4. Some defendants were found not competent to complete the financial affidavit by a magistrate. These requests were not always ruled upon.
5. Defendants requesting counsel at the trial court sometimes were required to bring additional documentation, and this delayed the appointment of counsel beyond Article 1.051 timelines.

2017 FINDING 3 AND RECOMMENDATION (misdemeanor cases): The County does not have processes in place to ensure all misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon a request for counsel prior to a defendant's waiver of the right to retain counsel. ***Issue Pending.***

2017 FINDING 4 AND RECOMMENDATION (felony and misdemeanor cases): Article 26.04(j)(2) requires that once counsel has been appointed, counsel continue with a case through disposition unless permitted or ordered by the court to withdraw after a finding of good cause has been entered on the record. Jail docket attorneys do not typically continue with a case through disposition but are regularly replaced after their scheduled docket(s) have been completed. Appointed counsel must continue representing the defendant through case disposition unless permitted or ordered to withdraw after a finding of good cause has been entered on the record. *Successfully Addressed.*

2017 FINDING 5 AND RECOMMENDATION (misdemeanor cases): Under Article 26.04(p), once a defendant has been determined to be indigent, the defendant is presumed to remain indigent unless a material change in the defendant's financial circumstances occurs. Under current practice, defendants found to be indigent at the jail docket must re-qualify as indigent at later bonded dockets. The courts must put in place a system to ensure that all persons found to be indigent are presumed to remain indigent unless a material change in the defendant's financial circumstances occurs. *Successfully Addressed.*

Conclusion

TIDC thanks Galveston 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.¹⁵ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Findings and Recommendations from the 2022 Review

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

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

2022 FINDING 1 AND RECOMMENDATION (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission'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.

¹⁵ 1 TEX. ADMIN. CODE § 174.28(c)(2).

2022 FINDING 2 AND RECOMMENDATION (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission'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.

TIDC identified five factors that are causing appointments to be untimely. Galveston County must ensure that these sub-groups of defendants receive timely appointment of counsel.

1. Counsel was not appointed in a timely manner for cases in which defendants made bail shortly after the Article 15.17 hearing.
2. Some defendants did not make bail. These defendants were frequently represented by a jail docket attorney, but not all cases had an order appointing counsel.
3. Some defendants requested counsel but refused the initial Pretrial Bond Interview. If they later completed the financial affidavit at the Article 15.17 hearing, the requests were not always ruled upon.
4. Some defendants were found not competent to complete the financial interview by a magistrate. These requests were not always ruled upon.
5. Defendants requesting counsel at the trial court sometimes were required to bring additional documentation, and this delayed the appointment of counsel beyond Article 1.051 timelines.

2022 FINDING 3 AND RECOMMENDATION (misdemeanor cases): The County does not have processes in place to ensure all misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon a request for counsel prior to a defendant's waiver of the right to retain counsel.