



Policy Monitoring Follow-up Review – Childress County

July 2017



Texas Indigent Defense Commission
 209 W. 14th Street, Room 202 (Price Daniel Building)
 Austin, Texas 78701
 Direct: 512.463.8015 Fax: 512.463.5724
 Main line: 512.936.6994 Toll free in Texas: 866.499.0656
 On the web: <http://www.courts.state.tx.us/tidc>

Chair:

Honorable Sharon Keller Chair – Presiding Judge, Court of Criminal Appeals

Ex Officio Members:

Honorable Nathan L. Hecht Austin, Chief Justice, Supreme Court of Texas
 Honorable Sharon Keller Austin, Presiding Judge, Court of Criminal Appeals
 Honorable Brandon Creighton Conroe, State Senator
 Honorable Andrew Murr Kerrville, State Representative
 Honorable Sherry Radack Houston, Chief Justice, First Court of Appeals
 Honorable Linda Rodriguez Hays County
 Honorable John Whitmire Houston, State Senator
 Honorable Joseph Moody El Paso, State Representative

Members Appointed by the Governor:

Honorable Missy Medary Corpus Christi, Presiding Judge, 5th Administrative Judicial Region of Texas
 Honorable Jon Burrows Temple, Bell County Judge
 Mr. Don Hase Arlington, Attorney, Ball & Hase
 Mr. Alex Bunin Houston, Chief Defender, Harris County Public Defender’s Office
 Honorable Richard Evans Bandera, Bandera County Judge

Staff:

Jim Bethke	Executive Director	512-936-6994	Jbethke@tidc.texas.gov
Brandon Bellows	Policy Analyst	512-936-6996	Bellows@tidc.texas.gov
Edwin Colfax	Grant Program Manager	512-463-2573	Colfax@tidc.texas.gov
Marissa Kubinski	Executive Assistant	512-936-6994	Mkubinski@tidc.texas.gov
Joel Lieurance	Senior Policy Analyst	512-936-7560	Lieurance@tidc.texas.gov
Wesley Shackelford	Deputy Director/Special Counsel	512-936-6997	Wshackelford@tidc.texas.gov
Debra Stewart	Fiscal Monitor	512-936-7561	Dstewart@tidc.texas.gov
Doriana Torres	Grant Specialist	512-463-8015	DTorres@tidc.texas.gov
Sharon Whitfield	Budget & Accounting Analyst	512-936-6998	Swhitfield@tidc.texas.gov

MISSION

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

Contents

Background	4
Current Review	4
Requirements from Arrest to the Article 15.17 Hearing	5
Requirements for the Article 15.17 Hearing	6
Requirements to Appoint Counsel Timely	6
Statutory Requirements for Waivers of Counsel.....	7
Conclusion	8
Status of Recommendation from the March 2015 Review	9
Additional Recommendation from the July 2017 Review	9

Background

In March 2015, Texas Indigent Defense Commission (Commission) staff made a limited scope review of the Childress County's indigent defense practices. The initial policy monitoring report made one recommendation to assist Childress County in meeting the core requirements of the Fair Defense Act. The recommendation concerned the ability of arrestees to request counsel at the Article 15.17 hearing.

At the time of the 2015 review, the monitor found that arrestees were unable to request counsel at the Article 15.17 hearing. The magistrate warning form used at this hearing lacked a place to record whether the arrestee requested counsel at the hearing. Article 15.17(e) specifically requires the magistrate ask each arrestee whether he/she would like to request appointed counsel and to record whether the arrestee requested the appointment of counsel. In response to the 2015 report, Childress County adopted a magistrate warning form which contains a space to indicate whether the arrestee requested appointed counsel.

Current Review

On June 7, 2017, Commission staff members Joel Lieurance and Brandon Bellows (collectively, "the monitor") visited Childress County to conduct a follow-up of the Commission's March 2015 review. The monitor's review sought to determine whether Childress County successfully addressed the recommendation from the Commission's March 2015 report. For this report, the monitor examined misdemeanor case files and data reported to the Commission as part of the annual Indigent Defense Expense Report (IDER). The monitor's findings from the current review are detailed below, and the county must respond to this report's recommendations.

For the current review, the monitor examined 44 misdemeanor cases filed in FY2016 (October 2015 – September 2016). Three defendants from the sample retained counsel, and 41 defendants went pro se. Four defendants in the file review sample requested counsel at the initial appearance.¹ The court did not rule on any of the four counsel requests, and three of the defendants later entered uncounseled pleas. Each of the defendants entering uncounseled pleas signed a form waiving the right to counsel.

From the case file review, the monitor did not find any documentation of events occurring at the Article 15.17 hearing, and made a separate request for these forms. The monitor later learned that there was no documentation of events occurring at the Article 15.17 hearing for the requested files because **no formal Article 15.17**

¹ Requests for counsel at the initial appearance docket were documented on the newly adopted magistrate warning form.

hearings were conducted for these cases. A discussion of statutory requirements from arrest until appointment of counsel follows.

Requirements from Arrest to the Article 15.17 Hearing

Article 14.06 of the Code of Criminal Procedure requires persons to be promptly brought before a magistrate after arrest. The magistrate must then perform the duties described in Article 15.17 of the Code of Criminal Procedure.² For misdemeanor offenses, if a magistrate has not determined whether probable cause exists to detain the arrestee within 24 hours of the arrest, the arrestee must be released on bond, in an amount not to exceed \$5,000.³ For felony offenses, if a magistrate has not determined whether probable cause exists to detain the arrestee within 48 hours of the arrest, the arrestee must be released on bond, in an amount not to exceed \$10,000.⁴ In both misdemeanor and felony offenses, if the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.⁵

² Tex. Code Crim. Proc. art. 14.06(a) states:

(a) Except as otherwise provided by this article, in each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested **shall take the person arrested** or have him taken without unnecessary delay, **but not later than 48 hours after the person is arrested, before the magistrate who may have ordered the arrest, before some magistrate of the county where the arrest was made without an order**, or, to provide more expeditiously to the person arrested the warnings described by Article 15.17 of this Code, before a magistrate in any other county of this state. **The magistrate shall immediately perform the duties described in Article 15.17 of this Code.**

³ Tex. Code Crim. Proc. art. 17.033(a) states:

(a) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed \$5,000, **not later than the 24th hour after the person's arrest** if the person was arrested for a misdemeanor and **a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.**

⁴ Tex. Code Crim. Proc. art. 17.033(b) states:

(b) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed \$10,000, not later than the 48th hour after the person's arrest if the person was arrested for a felony and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

⁵ Tex. Code Crim. Proc. art. 17.033(a) – (b).

Because magistrate warning forms were unavailable for the 2016 sample cases, the monitor cannot state that findings of probable cause were made within 24 hours of arrest in misdemeanor cases. Misdemeanor arrestees who do not receive a probable cause hearing within 24 hours of arrest must be released on bond, and, if the person is unable to obtain the bond, the arrestee must be released on personal bond per Article 17.033.

Requirements for the Article 15.17 Hearing

The Article 15.17 hearing may be conducted either in person or through a videoconference system.⁶ If the person is deaf or does not speak and understand the English language, the magistrate must conduct the hearing in accordance with Articles 38.30 and 38.31.⁷ At the hearing, the magistrate must inform the accused of the charge against him and of any affidavit filed therewith.⁸ The magistrate must inform the arrestee of various rights, including: the right to retain counsel; the right to remain silent; the right to have an attorney present during any interview with peace officers or attorneys representing the state; the right to terminate the interview at any time; and the right to have an examining trial.⁹ **The magistrate must also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel and the procedures for requesting appointment of counsel.**¹⁰ **The magistrate must then record whether counsel was requested¹¹ and ensure reasonable assistance is provided to the person in completing the forms necessary for appointment of counsel.**¹²

Policy Monitoring Recommendation 1: For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel, record whether counsel was requested, and provide reasonable assistance in filling out the necessary forms to those persons requesting counsel.

Requirements to Appoint Counsel Timely

If counsel was requested at the Article 15.17 hearing, the request and all paperwork must be transmitted to the appointing authority within 24 hours of the

⁶ Tex. Code Crim. Proc. art. 15.17(a).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Tex. Code Crim. Proc. art. 15.17(e).

¹² Tex. Code Crim. Proc. art. 15.17(a).

request being made.¹³ **Upon receipt of the counsel request, the court (appointing authority) has three working days to determine indigence, and appoint counsel for those determined to be indigent.**¹⁴ The court cannot delay the appointment of counsel because the defendant makes bail.¹⁵

Article 1.051(b) of the Code of Criminal Procedure defines indigence as “not financially able to employ counsel.” The financial standard of indigence for the jurisdiction, which presumes whether a defendant can afford to employ counsel, is set in the county’s indigent defense plan.¹⁶

Statutory Requirements for Waivers of Counsel

If a defendant comes to court without counsel, the court may not direct or encourage an unrepresented defendant to communicate with the prosecutor until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel, and the defendant has been given a reasonable opportunity to request appointed counsel.¹⁷ If a defendant has requested counsel, the prosecutor cannot communicate with a defendant until the request for counsel is denied, and the defendant waives the right to retain counsel.¹⁸ If a defendant wishes to enter an uncounseled plea, the defendant must sign a written waiver of counsel that substantially conforms to Article 1.051(g).¹⁹ Under Article 1.051(f), waivers obtained in violation of Article 1.051(f-1) or (f-2) are presumed invalid.

¹³ *Id.*

¹⁴ Tex. Code Crim. Proc. art. 1.051(c).

¹⁵ Tex. Code Crim. Proc. art. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 991 (2008).

¹⁶ At the time of this report, the indigent defense plan states:

An accused is presumed indigent if any of the following conditions or factors are present:

1. At the time of requesting appointed counsel, the accused or accused’s dependents are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
2. The accused’s net household income does not exceed 100% of the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register; or
3. The accused is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.

¹⁷ Tex. Code Crim. Proc. art. 1.051(f-2).

¹⁸ Tex. Code Crim. Proc. art. 1.051(f-1).

¹⁹ Tex. Code Crim. Proc. art. 1.051(g) states:

If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation. If the court determines that the waiver is

In the current review, the monitor found records showing four requests for counsel made by defendants. None of the requests were ruled upon, and three of the defendants entered uncounseled pleas. Sample cases with an uncounseled plea contained a form waiving counsel. Under Article 1.051(f-1), all four requests were to have been ruled upon prior to the defendant speaking with the prosecutor.²⁰ Since they were not ruled upon, Article 1.051(f) presumes the accompanying waiver of counsel forms in these cases to be invalid.

Policy Monitoring Recommendation 2: Childress County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(2) of the Code of Criminal Procedure prohibits an attorney representing the state from communicating with a defendant who has requested the appointment of counsel unless the court has denied the request and subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or waives the opportunity to retain private counsel.

Conclusion

The monitor appreciated the professionalism and assistance provided by Childress County officials and staff. Childress County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the County's transition and process improvements regarding the report's recommendations. If officials in Childress County desire technical assistance training, please contact our office so we can make such arrangements.

voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:

"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)."

²⁰ Since one of the cases was dismissed, it is possible that one of the defendants did not speak with the prosecutor.

Status of Recommendation from the March 2015 Review

Policy Monitoring Recommendation 1:²¹ For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel, record whether counsel was requested, and provide reasonable assistance in filling out the necessary forms to those persons requesting counsel. The county must update its magistration form to comply with Article 15.17(e) and with its indigent defense plan. The new form must state whether the individual is requesting counsel. *Issue still pending. Magistrate warnings are not currently being conducted as formal hearings. The magistrate warning form has been updated to include a space to mark requests for counsel.*

Additional Recommendation from the July 2017 Review

Policy Monitoring Recommendation 2: Childress County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. Article 1.051(f-1)(2) of the Code of Criminal Procedure prohibits an attorney representing the state from communicating with a defendant who has requested the appointment of counsel unless the court has denied the request and subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or waives the opportunity to retain private counsel.

²¹ This recommendation has been revised from the 2015 report. In the 2015 report, the recommendation stated:

For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel. The County must update its magistration form to comply with Article 15.17(e) and with its indigent defense plan. The new form must state whether the individual is requesting counsel.