



# **Second Follow-up Policy Monitoring Review of Kleberg County's Indigent Defense Systems**

**March 2023**



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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.<sup>1</sup> In this second follow-up review, TIDC interviewed local staff and reviewed FY2021 case file records. TIDC found that previous report findings dealing with magistrates recording whether defendants requested counsel and reporting this data in Judicial Council Monthly Court Activity Reports remain pending.

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

## Background

In January 2016, TIDC issued a limited scope report of Kleberg County's indigent defense practices. The limited scope report covered the ability of arrestees to request and obtain appointed counsel. At the time of the review, arrestees were brought before a magistrate shortly after arrest. Magistrates asked arrestees if they wanted to request counsel, but if an arrestee requested counsel, the request was recorded on a form separate from the magistrate warning form. There was not a method to transmit requests for counsel from the jail to the courts. TIDC was unable to obtain magistrate records, and as a result, TIDC could not make an analysis of the timeliness of attorney appointments.

In response, Kleberg County applied to TIDC for a compliance grant which TIDC funded. The grant provided for an indigent defense coordinator tasked with ensuring counsel requests were transmitted from the jail to the courts.

In January 2020, TIDC issued a follow-up report that analyzed whether recommendations from the 2016 report had been addressed. This report found that requests for counsel and affidavits were being transmitted to the appointing authority and appointments were timely, except if defendants made bail shortly after arrest.

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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).

**Table 1: History of Monitoring Findings**

FDA Core Requirement	Description and Initial Year of Finding	Status after 2023 Review	
		Satisfied	Pending
1. Magistrate Warnings	The magistrate warning form must be updated to include a space to request counsel. (2016)	✓ (2020)	
1. Magistrate Warnings	Kleberg County must maintain records documenting whether arrestees requested counsel. (2016)	✓ (2020)	✓ (2023) <sup>3</sup>
1. Magistrate Warnings	Arrestees who make bail shortly after arrest must be given reasonable assistance with affidavits of indigence. (2020)	✓ (2023)	
4. Prompt Appointment	Kleberg County must maintain records documenting the timeliness of indigence determinations. (2016)	✓ (2020)	
4. Prompt Appointment	The timeliness of indigence determinations in sample felony cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2020)	✓ (2023)	
4. Prompt Appointment	The timeliness of indigence determinations in sample misdemeanor cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2020)	✓ (2023)	
4. Prompt Appointment	Local procedures did not ensure requests for counsel were ruled upon prior to waivers of counsel. (2020)	✓ (2023)	
4. Prompt Appointment	Waivers of counsel must use language that closely tracks Article 1.051(g). (2016)	✓ (2020)	
6. Data Reporting	Justices of the peace and municipal courts must submit Judicial Council Monthly Activity Reports documenting the number of magistrate warnings and the number of persons requesting counsel. (2016)		✓

## Current Review

TIDC’s policy monitoring rules require follow-up reviews where the report included noncompliance findings.<sup>4</sup> Staff members Joel Lieurance and Kristin Meeks conducted a second follow-up review of Kleberg County, with site visits on September 15-16, 2022, and on October 24-25, 2022. TIDC examined whether Kleberg County successfully addressed the findings and recommendations from the January report.

<sup>3</sup> In the 2020 report, TIDC found magistrates documented whether defendants requested counsel at the Article 15.17 hearing. In the current report, TIDC again found this documentation was not always present.

<sup>4</sup> 1 TEX. ADMIN. CODE § 174.28(d)(3).

TIDC examined misdemeanor and felony case files and met with the indigent defense coordinator.

## **Program Assessment**

### ***Description of Local Counsel Appointment Procedures***

After arrest in Kleberg County, defendants go before a magistrate for the Article 15.17 hearing. At the hearing, a magistrate determines whether there is probable cause to detain the individual, sets bail, and asks defendants whether they would like to request counsel. Under Article 15.17 of the Code of Criminal Procedure, magistrates must record whether the defendant requested counsel, but some do not always record this.

Kleberg County now has an indigent defense coordinator, who attempts to ensure that all defendants who request counsel complete and submit affidavits of indigence. She forwards felony requests to the district court and misdemeanor requests to the county court-at-law. These courts promptly rule on all requests they receive.

After cases are filed, defendants appear at the trial court. Those without counsel are able to make in-court requests and receive rulings on the requests that same day.

### **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>5</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>6</sup> If the magistrate has authority to appoint counsel, the magistrate must appoint counsel according to the timelines set in Article 1.051.<sup>7</sup> If the magistrate does not have authority to appoint counsel, the magistrate must transmit requests for counsel to the appointing authority within 24 hours.<sup>8</sup> If a person is arrested on an out-of-county warrant, the

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

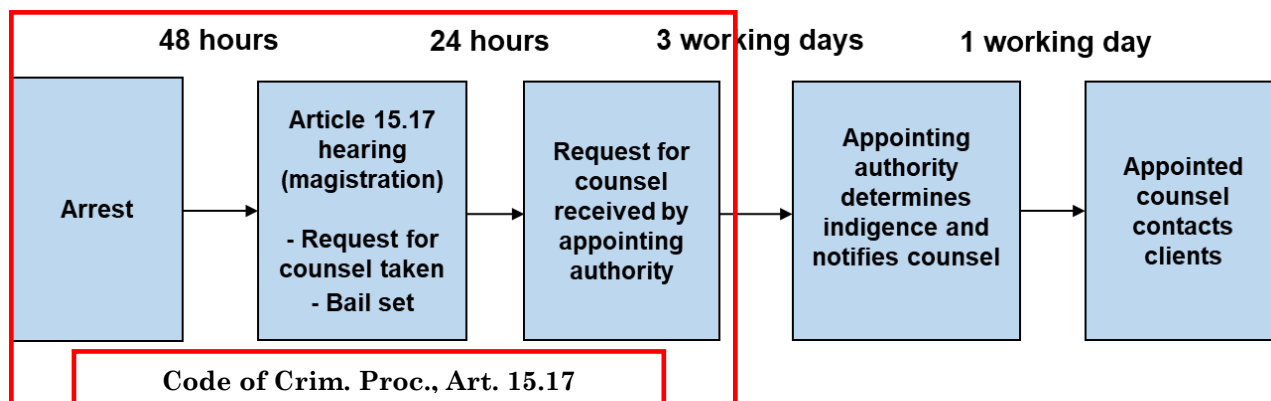
<sup>6</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>7</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>8</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

magistrate must perform the same duties as if the person were arrested on an in-county warrant.<sup>9</sup>

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



### ***The Ability of Arrestees to Request Counsel***

At the Article 15.17 hearing, the magistrate must inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused’s request for counsel.<sup>10</sup> The magistrate must make a record of each step of this exchange.<sup>11</sup>

In 2016, TIDC found that the magistrate warning form did not contain a space to record whether a defendant requested counsel. In response to this report, the County adopted a form with a space to record whether defendants requested counsel. In 2020, TIDC found magistrates were marking whether defendants requested counsel at the Article 15.17 hearing.

In the current review, TIDC found sample forms in which magistrates did not mark whether defendants had requested counsel. When this happens, the indigent defense coordinator inquires whether defendants wish to request counsel, and if so, provides affidavits of indigence. However, sometimes defendants make bail before she is able to contact them. As required by Article 15.17(e), magistrates from Kleberg County must ask and record whether each defendant requests counsel.

### ***Reasonable Assistance in Completion of Financial Forms***

At the Article 15.17 hearing, the magistrate must ensure the arrestee has reasonable assistance in completing the necessary forms for requesting counsel.<sup>12</sup> In 2020, TIDC found that defendants who made bail shortly after arrest did not receive

<sup>9</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>10</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>11</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>12</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

this assistance. In the current review, TIDC found that when counsel requests are marked on the Article 15.17 form, affidavits of indigence are promptly completed and forwarded to the appointing authority, even when defendants make bail quickly.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings.**

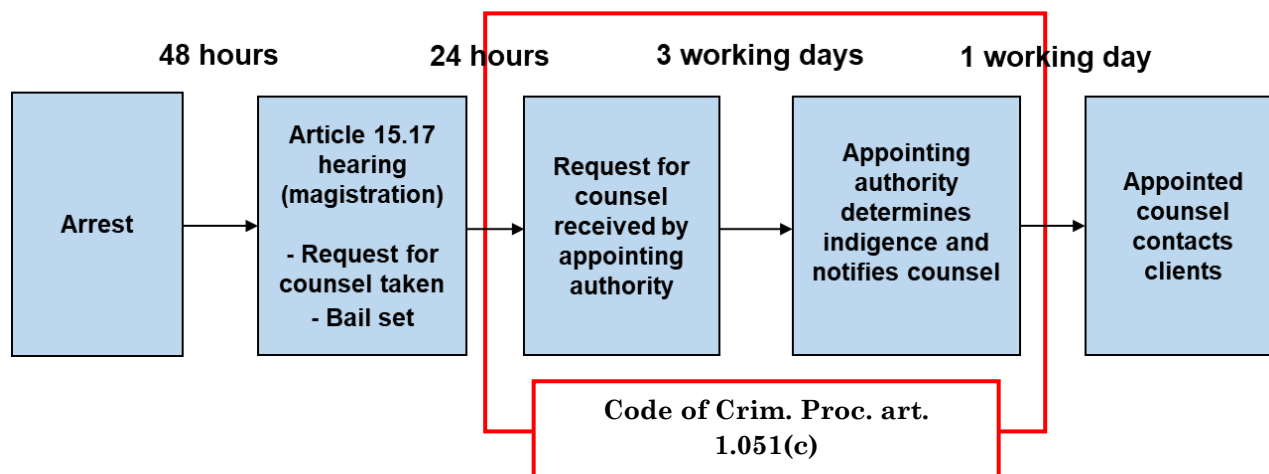
**FINDING 1 AND RECOMMENDATION:** Article 15.17(e) requires magistrates to ask and record whether defendants request counsel. Kleberg County magistrates must ask and record whether each defendant requests counsel. *New Finding.*

**FINDING 2 AND RECOMMENDATION:** Arrestees who make bail shortly after the Article 15.17 hearing often fail to complete affidavits of indigence. Kleberg County must ensure reasonable assistance in completing financial affidavits of indigence. *Successfully Addressed in the 2023 review.*

#### REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request.

**Figure 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. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant’s first opportunity to request counsel is at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or



denial of indigence. Under TIDC’s monitoring rules, a county is presumed to be following the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor’s sample are timely.<sup>13</sup>

***Timeliness of Appointments in Felony Cases***

TIDC staff examined 58 sample felony cases filed in the second half of FY2021 (April 2021 – September 2021). From this sample, TIDC found 41 counsel requests. Counsel was appointed in a timely manner in 93% of cases with a request for counsel. This exceeds TIDC’s 90% timeliness threshold for presuming a jurisdiction’s procedures ensure timely appointment of counsel.

**Table 2: Times from Request to Appointment in Felony Cases**

	Number from Sample	Percent of Sample
Total records examined	58	
Requests for counsel	41	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	11	
1 to 3 workdays + 24 hours allowed to transmit a request	27	
<b>Timely Rulings on Requests</b>	<b>38</b>	<b>93%</b>
Between 4 and 7 workdays	2	
More than 7 workdays	1	
No ruling on request	0	
<b>Untimely / No Rulings on Requests</b>	<b>3</b>	<b>7%</b>

***Timeliness of Appointments in Misdemeanor Cases***

TIDC staff examined 62 sample misdemeanor cases filed in the second half of FY2021 (April 2021 – September 2021). From this sample, TIDC found 46 counsel requests.<sup>14</sup> Counsel was appointed in a timely manner in 98% of cases with a request for counsel. This exceeds TIDC’s 90% timeliness threshold for presuming a jurisdiction’s procedures ensure timely appointment of counsel.

<sup>13</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>14</sup> TIDC actually found 47 counsel requests but excluded one case from this analysis.

**Table 3: Times to Appointment in Misdemeanor Cases**

	Number from Sample	Percent of Sample
Total records examined	62	
Requests for counsel	46	
<b>Request for counsel ruled upon in 'x' workdays</b>		
0 workdays	33	
1 to 3 workdays + 24 hours allowed to transmit a request	12	
<b>Timely Rulings on Requests</b>	<b>45</b>	<b>98%</b>
Between 4 and 7 workdays	0	
More than 7 workdays	1	
No ruling on request	0	
<b>Untimely / No Rulings on Requests</b>	<b>1</b>	<b>2%</b>

***Waivers of Counsel in Misdemeanor Cases***

Article 1.051(f-2) requires the court to advise the defendant of the right to counsel and the procedure for requesting appointed counsel (and give the defendant a reasonable opportunity to request appointed counsel) before the court directs or encourages the defendant to communicate with the attorney representing the state.<sup>15</sup> In the current review, Kleberg County ruled upon all sample cases in which defendants requested counsel. TIDC finds that Kleberg County has put in place procedures to ensure counsel requests are ruled upon prior to any waiver of counsel.

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<sup>15</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

**Appoint Counsel Promptly.**

**FINDING 3 AND RECOMMENDATION:** TIDC’s sample review of felony cases did not meet the 90% timeliness threshold. Kleberg County must implement procedures to make prompt determinations of indigence. *Successfully Addressed in the 2023 review.*

**FINDING 4 AND RECOMMENDATION:** TIDC’s sample review of misdemeanor cases did not meet the 90% timeliness threshold. Kleberg County must implement procedures to make prompt determinations of indigence. *Successfully Addressed in the 2023 review.*

**FINDING 5 AND RECOMMENDATION:** Five sample misdemeanor defendants did not receive rulings on their counsel requests. The absence of a ruling on a pending counsel request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Kleberg 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). *Successfully Addressed in the 2023 review.*

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

Justices of the peace and municipal judges must report to the Office of Court Administration (as part of their Judicial Council Monthly Court Activity Reports) the number of individuals who receive Article 15.17 warnings and the number who request counsel at the hearings.<sup>16</sup> TIDC uses these reports as well as court observations and case file records to determine if magistrates inform arrestees of their right to counsel and if arrestees are able to invoke that right.

One court has not submitted monthly court activity reports since TIDC’s reviews began in 2016. Justices of the peace and municipal courts must report the number of persons receiving magistrate warnings and the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports.

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<sup>16</sup> 1 TEX. ADMIN. CODE § 171.7 – 8.

**Table 4: Texas Judicial Council Monthly Court Activity Reports**  
 FY 2021 (October 2020 – September 2021)

	Monthly Reports Submitted	Misdemeanor Requests	Misdemeanor Warnings	Felony Requests	Felony Warnings
Kingsville	12	95	151	85	194
JP1	12	2	119	0	156
JP2	12	94	100	58	60
JP3	12	69	125	115	165
JP4	0	No reports	No reports	No reports	No reports
<b>Total</b>		<b>260</b>	<b>495</b>	<b>258</b>	<b>575</b>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6**

**Data Reporting**

**FINDING 6 AND RECOMMENDATION:** Monthly court data reports to OCA were not accurate. Justices of the peace and municipal courts must report the number of persons receiving magistrate warnings and the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports. *Issue Pending.*

**Conclusion**

TIDC thanks Kleberg County officials and staff for their assistance in completing this review. TIDC will conduct a third follow-up review regarding its noncompliance findings within two years.<sup>17</sup> TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

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<sup>17</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

## **Findings and Recommendations from the March 2023 Review**

Kleberg County must provide a written response to each of the report's findings within 60 days after the report is received by the County. TIDC stands ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

### **Core Requirement 1. Conduct Prompt and Accurate Article 15.17 proceedings.**

**2023 FINDING 1 AND RECOMMENDATION:** Article 15.17(e) requires magistrates to ask and record whether defendants request counsel. Kleberg County magistrates must ask and record whether each defendant requests counsel. *New Finding.*

### **Core Requirement 6. Report Data Required by Statute.**

**2023 FINDING 2 AND RECOMMENDATION:** Monthly court data reports to OCA were not accurate. Justices of the peace and municipal courts must report the number of persons receiving magistrate warnings and the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports. *Issue Pending.*