



Brazoria County Courthouse
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PATRICK BULANEK
DISTRICT JUDGE
461ST Judicial District

Angleton 979-864-1205

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August 24, 2022

Via Electronic Mail: jlieurance@tidc.texas.gov

Joel Lieurance
Senior Policy Monitor
Texas Indigent Defense Commission
209 West 14th Street, Room 202
Austin, Texas 78701

**RE: Brazoria County's Response to Texas Indigent Defense Commission
Monitoring Review of Brazoria County Indigent Defense Systems,
June 2022**

Dear Mr. Lieurance,

On June 14, 2022, the Texas Indigent Defense Commission ("TIDC") issued a "Monitoring Review of Brazoria County's Indigent Defense System." On August 8, 2022, TIDC provided Brazoria County an extension to provide its response by October 14, 2022. Please find below Brazoria County's response to the report's findings and recommendations.

FINDING AND RECOMMENDATION 1: "Article 15.17(e) of the Code of Criminal Procedure requires magistrates to ask and record whether each defendant requests counsel. Brazoria County magistrates must ask and record whether each defendant requests counsel."

RESPONSE: The Brazoria County magistrates have implemented procedures to ensure that each defendant is (1) clearly informed of his or her right to the appointment of counsel if he or she cannot afford counsel, (2) asked whether he or she wants to request appointment of counsel, and (3) informed of the procedures for requesting the appointment of counsel. The magistrates have reviewed additional guidance from the Texas Justice Court Training Center on language to use in communications with defendants regarding the appointment of counsel. In addition, the magistrates have modified the "Statutory Warnings" form completed during each magistration. The form, which each defendant reviews and signs, clearly explains the procedure for requesting appointment of

counsel and records whether the defendant has requested the appointment of counsel.

FINDING AND RECOMMENDATION 2: “If a defendant requests counsel, under Article 15.17(a), the magistrate must ensure reasonable assistance is provided in completing the forms necessary for requesting counsel.”

RESPONSE: The Brazoria County magistrates have implemented procedures to ensure each defendant who requests appointment of counsel receives an application and is permitted to complete the application at the time of magistration. The Brazoria County Sheriff’s Office has assigned Detention Center staff to provide reasonable assistance to any defendant in completing the application for appointment of counsel at the time of magistration.

FINDING AND RECOMMENDATION 3: “Under Article 15.17(a), requests for counsel must be transmitted to the appointing authority within 24 hours. For those defendants able to request counsel at the Article 15.17 hearing, TIDC did not observe any process for transmitting those requests to the appointing authority within 24 hours.”

RESPONSE: The Brazoria County magistrates, in coordination with the Brazoria County Sheriff’s Office, have implemented a procedure where Detention Center staff providing reasonable assistance to defendants completing applications for court-appointed counsel at the time of magistration will transmit the completed applications to the Brazoria County Indigent Defense Office at the conclusion of magistration.

FINDING AND RECOMMENDATION 4: “Indigence determinations must comply with Article 26.04(m) and *Abdnor v. State*. Indigence determinations may not consider the income of persons who are not legally bound to pay for the defendant’s legal expenses.”

RESPONSE: The Brazoria County Courts have confirmed with the Brazoria County Indigent Defense Office that the Indigent Defense Office currently does not consider another person’s income other than spousal income that is available to the defendant. The Indigent Defense Office does not request, collect, print, record, or house any financial documents. In addition, the Brazoria County Courts do not require defendants to return to court with supporting financial documentation before appointing counsel.

FINDING AND RECOMMENDATION 5: “In misdemeanor cases, courts do not appoint counsel for defendants who they found to be partially indigent but who report they are unable to pay the \$100 fee, indicating they are also unable to retain counsel. If the

courts find a defendant is unable to retain counsel, the courts must appoint counsel for the defendant.”

RESPONSE: The Brazoria County Courts will amend the Brazoria County Indigent Defense Plan to remove any requirement that a court cost be paid prior to the appointment of counsel. The removal of this requirement will also remedy any potential delay in the appointment of counsel for adult misdemeanor cases (See Finding and Recommendation 9). The Brazoria County Courts may later collect any assessed costs a defendant has the financial resources to repay as permitted by Texas Code of Criminal Procedure article 26.05(g).

FINDING AND RECOMMENDATION 6: “In misdemeanor cases, an attorney-for-the-day is periodically used. When the attorney-for-the-day is used, the courts must ensure the attorney continues to represent the defendant until the case is disposed or the court finds good cause on the record for the attorney to withdraw from the case.”

RESPONSE: Some Brazoria County Courts periodically request private attorneys serve as “attorney-for-the-day” in adult misdemeanor dockets. An attorney-for-the-day is not appointed to represent any defendant, makes no appearance on behalf of any defendant, and does not establish an attorney-client relationship with any defendant.

If requested to attend a docket, the role of the attorney-for-the-day is to inform defendants who have chosen not to retain or request the appointment of counsel of rights related to their case, including their right to request court appointed counsel. In the event a defendant requests counsel after being informed by an attorney-for-the-day of their right do so, the defendant is permitted to complete an application for the appointment of counsel in accordance with Code of Criminal Procedure articles 1.051 and 26.04. In the event the defendant chooses to not request the appointment of counsel after being informed of his or her right to do so, the Court advises and permits the defendant to make a voluntary and intelligent waiver in accordance with Article 1.051(g).

Code of Criminal Procedure article 26.04(j)’s requirement involving the withdrawal of counsel applies only to attorneys who are appointed under Article 26.04. Because attorneys-for-the-day in adult misdemeanor cases are not appointed to represent indigent defendants and establish no attorney-client relationship with any defendant, Article 26.04(j) does not apply.

FINDING AND RECOMMENDATION 7: “In misdemeanor cases, the attorney-for-the-day is not described in the indigent defense plan. If the courts intend to use the attorney-

for-the-day in adult criminal cases, the courts must describe its use in the local indigent defense plan.”

RESPONSE: Some Brazoria County Courts periodically request private attorneys serve as “attorney-for-the-day” in adult misdemeanor dockets. An attorney-for-the-day is not appointed to represent any defendant, makes no appearance on behalf of any defendant, and does not establish an attorney-client relationship with any defendant.

If requested to attend a docket, the role of the attorney-for-the-day is to inform defendants who have chosen not to retain or request the appointment of counsel of rights related to their case, including their right to request court appointed counsel. In the event a defendant requests counsel after being informed by an attorney-for-the-day of their right do so, the defendant is permitted to complete an application for the appointment of counsel in accordance with Code of Criminal Procedure articles 1.051 and 26.04. In the event the defendant chooses to not request the appointment of counsel after being informed of his or her right to do so, the Court advises and permits the defendant to make a voluntary and intelligent waiver in accordance with Article 1.051(g).

Article 26.04 requires the adoption of a local indigent defense plan with “written countywide procedures for timely and fairly appointing counsel for an indigent defendant arrested for, charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony.” In adult misdemeanor cases, attorneys who serve as “attorney-for-the-day” are not appointed as counsel for defendants, as those defendants (to that point) have chosen not to retain counsel or request the appointment of counsel. Because the role of an attorney-for-the-day is outside the scope of Article 26.04, modifying the local indigent defense plan would not comply with applicable law.

FINDING AND RECOMMENDATION 8: “Several attorneys acting as juvenile attorney-for-the-day were not approved for any juvenile appointment list. Article 26.04(a) requires the court to appoint attorneys from a public appointment list. The juvenile courts must only appoint attorneys who were approved for a juvenile appointment list.”

RESPONSE: The Brazoria County Courts will implement measures to increase the number of attorneys on the juvenile appointment list so that appointments may be made from the list. Currently, only six attorneys participate on the Brazoria County juvenile appointment list. To increase the number of attorneys on the juvenile appointment list, the Brazoria County Courts plan to take actions to encourage attorneys to apply for the juvenile appointment list, including recruitment efforts through the Brazoria County Bar Association.

FINDING AND RECOMMENDATION 9 (MISDEMEANOR CASES): “Brazoria County’s misdemeanor appointment process did not meet TIDC’s threshold for timely appointment of counsel (75% timely). Under Article 1.051(c)(2), the County must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)’s timeline.”

RESPONSE: The Brazoria County Courts will amend the Indigent Defense Plan to remove any requirement that a court cost be paid prior to the appointment of counsel, which, according to the TIDC Report, delayed the appointment process. In addition, no County Court at Law Judge currently requires defendants return with supporting financial documentation for the appointment of counsel.

FINDING AND RECOMMENDATION 10 (MISDEMEANOR CASES): “The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Brazoria County must ensure that its procedures for ruling on counsel requests meet the requirements on both Article 1.051(c) and 1.051(f-2).”

RESPONSE: Brazoria County has learned that some defendants have stated at magistration they wish to request the appointment of counsel, the defendants’ requests were recorded on the Magistrate Warning form, but the defendants ultimately chose not to complete and submit the applications. The procedures implemented by the Brazoria County magistrates in response to Finding and Recommendation 2 will ensure that an application is provided to the Brazoria County Indigent Defense Office for each defendant who requests an application, regardless of whether the defendant chooses to complete and submit the application after stating they wish to request appointment of counsel.

FINDING AND RECOMMENDATION 11 (JUVENILE CASES): “The courts must put in place a system for appointing counsel in juvenile cases that is fair, neutral, and nondiscriminatory. The juvenile attorney-for-the-day system, as it is currently used, does not provide a fair, neutral, and nondiscriminatory appointment system.”

RESPONSE: The Brazoria County Courts are exploring the creation of additional juvenile appointment list classifications to narrow the selection process. The current juvenile appointment lists are misdemeanor and felony, with the exception of appeals. The Brazoria County Courts are considering establishing juvenile felony appointment lists that mirror adult felony appointment lists, as well as specialized appointment lists. In addition, to

increase the number of attorneys on the juvenile appointment list, the Brazoria County Courts plan to take actions to encourage attorneys to apply for the juvenile appointment list, including recruitment efforts through the Brazoria County Bar Association.

FINDING AND RECOMMENDATION 12: “Under Title 1 Tex. Admin. Code § 171.7, justice courts must submit monthly reports documenting the number of magistrate warnings conducted and the number of those persons who request counsel. The justice courts must put in place methods to capture and report requests for counsel in their Judicial Council Monthly Court Activity Reports.”

RESPONSE: The Brazoria County magistrates have modified the “Statutory Warning” form completed during each magistration. The form, which is signed by each defendant, captures clearly whether the defendant has requested the appointment of counsel. From this document, the magistrates’ clerks will report the number of magistrate warnings conducted and number of those persons who request counsel in accordance with Administrative Code requirements.

Sincerely,



Patrick Bulanek
Judge
461st Judicial District, Brazoria County, Texas



Courtney T. Gilbert
Judge
County Court at Law No. 1 and Probate Court, Brazoria County, Texas