



# **Limited Scope Review of Midland County's Indigent Defense Systems**

**April 2018**



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Mr. Alex Bunin Houston, Chief Public Defender, Harris County  
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Honorable Richard Evans Bandera, Bandera County Judge  
Mr. Don Hase Arlington, Attorney, Ball & Hase  
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Doriana Torres Grant Specialist  
Sharon Whitfield Budget & Accounting Analyst

**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.

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## **Background of Limited Scope Policy Monitoring Review**

The Texas Indigent Defense Commission (“Commission”) monitors local jurisdictions’ compliance with the Fair Defense Act (“FDA”) through on-site reviews.<sup>1</sup> These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed. Additionally, the review process aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

The Texas Indigent Defense Commission (formerly the Task Force on Indigent Defense) issued its initial monitoring report of Midland County in July 2007. This initial review found that arrestees did not have the ability to request counsel at the Article 15.17 hearing. To address this finding, Midland County put in place procedures in which magistrates asked all defendants whether they wanted to request counsel at the Article 15.17 hearing. However, this change did not result in misdemeanor defendants having the ability to readily obtain counsel. Two follow-up reviews were required before a seamless process was created to promptly transmit requests for counsel to the appointing authority, where they could be ruled upon. Commission staff closed the review in January 2010, after receiving data indicating that counsel requests made at the Article 15.17 hearing were regularly being ruled upon.

In September 2017, the Commission received a complaint from an individual regarding the ability of a misdemeanor defendant to request counsel in court at the arraignment docket. Staff forwarded this complaint to Midland County Court at Law #2 and requested the court describe how the procedures for requesting counsel are explained to defendants. The court promptly replied to our request by stating:

*Regardless, all defendants are informed of their right to appointed counsel at their initial arraignment setting. In fact, each defendant is given such opportunity prior to arraignment either in detention and/or through the clerk’s office. In any event, the right to appointed counsel is explained.*

The court declared defendants are informed of their right to appointed counsel but did not describe how the procedures for requesting counsel were explained in the court of dispositive jurisdiction.

Because of the extensive past monitoring history and the nature of the complaint, the Commission’s Board passed a motion at its December 7, 2017 meeting, directing staff to conduct a limited scope monitoring review of Midland County. The purpose of the review was to examine local procedures for accepting and ruling upon misdemeanor requests for counsel.

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<sup>1</sup> TEX. GOV’T CODE § 79.037(a)–(b).

Commission staff, Scott Ehlers and Joel Lieurance, conducted an on-site review from February 27 – March 1, 2018. Throughout this report, Commission staff will be referenced as “monitor.” The monitor examined 84 misdemeanor case files from the county clerk’s office and observed a misdemeanor arraignment docket on March 1, 2018.<sup>2</sup> The monitor’s report follows with accompanying findings and recommendations.

## **Program Assessment**

### **Requirement: Appoint counsel promptly.**

In adult criminal cases, the court (appointing authority) has three working days from the receipt of a counsel request to determine indigence and appoint counsel for those determined to be indigent.<sup>3</sup> The court cannot delay the appointment of counsel because the defendant makes bail.<sup>4</sup>

The standard of indigence in Midland County is set in its indigent defense plan. If a defendant meets the standard, he/she is presumed indigent and eligible for appointed counsel. The plan presumes a defendant is indigent if:

- (1) his/her income is less than 150 percent of the Federal Poverty Guidelines and the value of his/her non-exempt assets do not exceed the defendant’s debts by \$2500;
- (2) the defendant would be eligible for public assistance programs, including food stamps, Medicaid, Temporary Assistance to Needy Families, Supplemental Social Security Income, or public housing; or
- (3) is serving a sentence in a correctional facility or is residing in a mental health facility and the defendant’s non-exempt assets do not exceed the defendant’s debts by \$2500.<sup>5</sup>

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<sup>2</sup> The period of review covered cases filed in FY2017 (October 2016 – September 2017).

<sup>3</sup> TEX. CODE CRIM. PROC. ART. 1.051(c). The three-working-days time frame applies to counties with a population under 250,000. Counties with a population over 250,000 have one working day.

<sup>4</sup> TEX. CODE CRIM. PROC. ART. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 991 (2008).

<sup>5</sup> The indigent defense plan states:

#### **C. Deemed Eligibility for Court Appointed Counsel**

##### **1. Income**

*A defendant shall be deemed indigent and eligible for appointed counsel, if such defendant's income, less debts and living expenses does not exceed 150% of the poverty guidelines as established and revised annually by the United States Department of Health and Human Services and published in the Federal Register, and if the defendant's non-exempt assets and property do not exceed the defendant's debts by the lesser of:*

- a. \$2,500;*
- b. \$5,000 in the case of a defendant whose household includes a person who is age 60 or over, disabled or institutionalized; or*
- c. double the estimated cost of obtaining competent private legal representation on the offense with which the defendant is charged.*

##### **2. Public Assistance**

*A defendant is deemed indigent if, at the time of requesting appointed counsel, the defendant or the defendant's dependents have been determined to be eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income or public housing.*

##### **3. Incarceration**

## Local Practices for Taking Requests for Counsel

### Procedures for Handling Arrestees Prior to a Case Filing

Prior to an arraignment docket, Midland County processes misdemeanor arrestees in different ways. Some arrestees receive a citation with a notice to appear at a court docket and are never booked into the county jail.<sup>6</sup> Other defendants are booked into the county jail but make bail before seeing a magistrate.<sup>7</sup> Most defendants appear before a magistrate for the Article 15.17 hearing (within a day of being booked into the Midland County Jail). At this hearing, the magistrate is required by Article 15.17(e) of the Code of Criminal Procedure to ask and record whether each arrestee wants to request the appointment of counsel.

According to statistics reported to the Office of Court Administration, about 43% of misdemeanor arrestees who appear before justices of the peace at the Midland County Jail request counsel at the hearing.<sup>8</sup> Defendants who do not appear before a magistrate at the county jail have their first opportunity to request counsel when they appear at the court of dispositive jurisdiction after a case has been filed with the county clerk.

### Initial Arraignment Docket for Misdemeanor Defendants

The monitor observed an initial misdemeanor arraignment docket on March 1, 2018, presided over by Judge Marvin Moore. The docket was divided into two parts: one for jailed defendants and one for bonded defendants.

#### Jailed Defendants

The judge handled matters for detained defendants via a videoconference connection with the jail. Two defendants were represented by counsel present at the jail. Both entered guilty pleas. Four defendants entered not guilty or no contest pleas so they could sign temporary waivers of counsel to speak with the prosecutor. Two other

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*A defendant is deemed indigent if, at the time of requesting appointed counsel, the defendant has no non-exempt assets or property in excess of the amount specified in paragraph C above and is (1) currently serving a sentence in a correctional institution; (2) currently residing in a public mental health facility or (3) the subject of a proceeding in which admission or commitment to a public mental health facility is being sought.*

#### **D. Substantial Hardship Eligibility**

*A defendant who does not meet any of the financial standards above may 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 charges, 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.*

<sup>6</sup> Midland County appears to exercise cite and release practices for certain misdemeanor offenses such as driving with license invalid and possession of marijuana under two ounces.

<sup>7</sup> These defendants may post a pre-set bail bond or have a bond adjusted by the magistrate prior to the Article 15.17 hearing.

<sup>8</sup> The time period for this data query was from October 2016 to September 2017. Queries may be made at: <http://www.txcourts.gov/statistics/court-activity-database/>.

unrepresented defendants entered guilty pleas, and a third unrepresented defendant was re-set for another hearing after having rejected the prosecutor's offer.

### **Bonded Defendants**

For bonded defendants (cash, surety, and personal), the judge gave initial warnings to all defendants in the court room simultaneously and advised them of certain rights, including the right to a jury trial and the right to counsel. The warnings did not include the full scope of warnings set out in Article 15.17. Select collateral consequences of a conviction were mentioned, like potentially losing a driver's license or deportation. The judge informed defendants that if they wanted to request counsel, they needed to ask about it when they come before him. None of the bonded defendants were represented by counsel present in the court room. The judge also described the procedures for defendants to plead and discuss their case with the prosecutor.

The judge then individually called defendants before him, informed each of the charges filed, and asked each how he/she wanted to plea. Defendants who gave an initial plea of guilty or no contest were instructed to sign a temporary waiver of counsel in order to speak with the prosecutor. If a defendant entered an initial plea of not guilty, the judge would re-set the defendant for a later docket so that he or she could retain private counsel. One defendant from the docket requested the appointment of counsel.

After the first group of defendants entered their pleas and signed waivers to speak to prosecutors, the judge called another group of defendants. This group had requested counsel at the Article 15.17, and the judge had appointed counsel for them prior to the arraignment docket. However, none of these defendants were aware of the appointment. The judge told the defendants the name of the attorney who had been appointed for him/her and told each to contact that attorney. The monitor found that some appointments had occurred weeks prior to the docket. None of these attorneys appeared at the docket.

The docket concluded with several defendants reaching tentative plea deals. If a plea deal had been struck with the prosecutor, the defendant made a second appearance before the judge for him to approve the plea agreement. The judge approved all pending plea agreements. In family violence cases, the judge gave an additional warning after the plea was taken. In these cases, the judge warned defendants that it was a felony charge for them to possess a firearm for the next five years, and if they had any firearms or ammunition, to promptly get rid of them.<sup>9</sup>

Based on the monitor's observations, bonded defendants came through the misdemeanor arraignment docket with the following outcomes:

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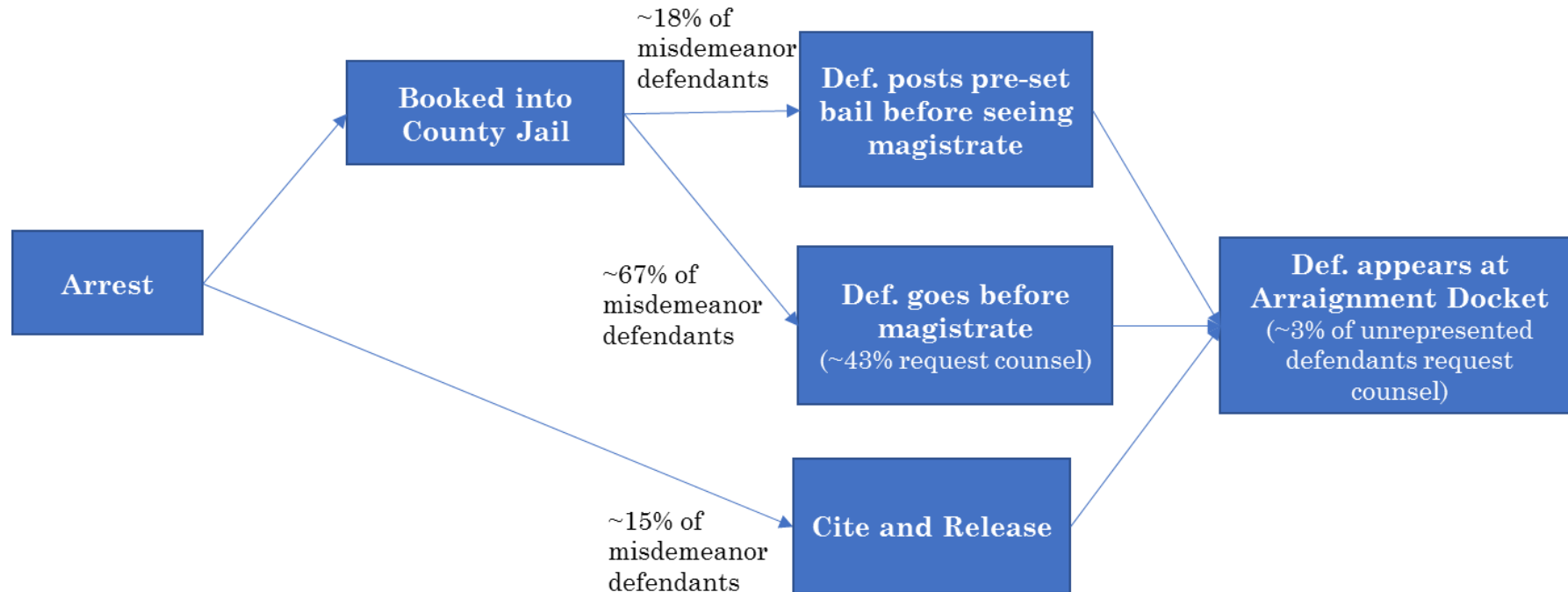
<sup>9</sup> If defense counsel were present, a resulting benefit would be to provide defendants with relevant information about the implications of a guilty plea or conviction. For instance, defense counsel could have mentioned the federal lifetime ban on possession of a firearm to those persons who plead guilty at arraignment to misdemeanor assault family violence (*See* 18 U.S.C. § 922(g)(9)).

- (a) 27 defendants initially pled guilty or no contest in order to speak with the prosecutor, and 15 of these defendants returned for the judge to approve guilty pleas;
- (b) 6 defendants entered not guilty pleas and were reset so they could have an opportunity to retain counsel;
- (c) 1 defendant requested counsel;
- (d) 2 defendants retained counsel, but their attorneys had not yet entered a notice of appearance;
- (e) 1 defendant was diverted to a veteran's court; and
- (f) 8 defendants had been appointed counsel earlier but received such notification at the docket.

The monitor noted a contrast between defendants appearing before a magistrate at the Article 15.17 hearing and defendants appearing at the arraignment docket. About 43% of persons at the Article 15.17 hearing request counsel, but only about 3% of unrepresented defendants at the misdemeanor arraignment hearing request appointed counsel. The differences may be an indication that defendants are not fully aware how to request appointment of counsel at the arraignment docket. Midland County may benefit from an arraignment check-in form similar to the Commission's "Explanation of Rights to Defendants Without an Attorney" model form (Appendix A).



## Diagram: Paths to Misdemeanor Arraignment Docket



### Notes

1. The percentages listed in this diagram are rough approximations based upon the monitor's file review.
2. Cite and release practices (authorized by Article 14.06(c) of the Code of Criminal Procedure) occur when law enforcement does not take an arrestee to jail, but instead issues a citation directing the arrestee to appear in court. Cite and release defendants were evidenced by an absence of both a magistrate warning record and a bail bond record in the clerk's case file. They composed 15% of the monitor's case sample.
3. Defendants making a pre-set bail bond prior to receiving magistrate warnings were evidenced by an absence of a magistrate warning record but the inclusion of a bail bond records in the clerk's case file. They composed 18% of the monitor's case sample.
4. The 43% rate at which arrestees requested attorneys at the Article 15.17 is based on a query of Judicial Council Monthly Court Activity reports for the time period from October 2016 – September 2017. Queries may be made from: <http://www.txcourts.gov/statistics/court-activity-database/>.
5. The 3% rate at which defendants make in-court requests for counsel is based on: 1) observing 1 person request counsel of 35 defendants entering initial pleas and 2) examining case file data showing 1 of 32 unrepresented persons request counsel at the arraignment docket.

## Implications of Cite and Release Requirements on Local Practices

Cite and release policies are authorized by Article 14.06 of the Code of Criminal Procedure. Under Article 14.06(c), persons arrested for certain misdemeanor offenses are not required to be placed in detention at the jail, but may instead be given a citation directing the person to appear before a magistrate.<sup>10</sup> In Midland County, this appearance is at the statutory county court, where the judge acts as a magistrate.

Once the person cited for the offense appears before a magistrate, Article 14.06(a) and Article 15.17(g) require the magistrate to provide the warnings described in Article 15.17.<sup>11</sup> This appearance is the defendant's first contact with a judge, and, the defendant may be unaware of his/her rights. One of the requirements of Article 15.17 is that the arrestee be asked if he/she would like to request counsel.<sup>12</sup> The magistrate must then record whether the person requested the appointment of counsel.

The monitor did not observe a full Article 15.17 hearing for any of the cite and release defendants, and no one was individually asked if he/she wanted to request

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<sup>10</sup> TEX. CODE CRIM. PROC. ART. 14.06(c) states:

*If the person resides in the county where the offense occurred, a peace officer who is charging a person with committing an offense that is a Class A or B misdemeanor may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate of this state as described by Subsection (a), the name and address of the person charged, and the offense charged.*

<sup>11</sup> TEX. CODE CRIM. PROC. ART. 14.06(a) states:

*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.*

TEX. CODE CRIM. PROC. ART. 15.17(g) states:

*If a person charged with an offense punishable as a misdemeanor appears before a magistrate in compliance with a citation issued under Article 14.06(b) or (c), the magistrate shall perform the duties imposed by this article in the same manner as if the person had been arrested and brought before the magistrate by a peace officer. After the magistrate performs the duties imposed by this article, the magistrate except for good cause shown may release the person on personal bond. If a person who was issued a citation under Article 14.06(c) fails to appear as required by that citation, the magistrate before which the person is required to appear shall issue a warrant for the arrest of the accused.*

<sup>12</sup> TEX. CODE CRIM. PROC. ART. 15.17(e) states:

*In each case in which a person arrested is taken before a magistrate as required by Subsection (a), a record shall be made of:*

- (1) the magistrate informing the person of the person's right to request appointment of counsel;*
- (2) the magistrate asking the person whether the person wants to request appointment of counsel;*
- and*
- (3) whether the person requested appointment of counsel.*

appointment of counsel.<sup>13</sup> Midland County must implement practices to follow Article 14.06 so that all cite and release arrestees are given Article 15.17 warnings before a magistrate.

**FINDING 1 AND RECOMMENDATION:** Articles 14.06 and 15.17 of the Code of Criminal Procedure require that if a person is cited for a class A or B misdemeanor charge and released, the magistrate must perform the warnings described in Article 15.17. Midland County must implement practices to ensure all cite and release arrestees are given Article 15.17 warnings.

### **Attorney-Client Meetings**

Article 26.04(j)(1) of the Code of Criminal Procedure requires appointed attorneys make every reasonable effort to contact their client within one working day of the appointment and to interview the client as soon as practicable. The monitor examined cases for three defendants who received notice of their appointment in court on March 1. The orders appointing counsel for all three defendants occurred between January 23 and February 8, 2018. None of the attorneys appeared in court at the docket, and none of them seem to have contacted their appointed clients prior to the docket. Based on this evidence, it appears that attorneys may not be notified of an appointment prior to arraignment. If attorneys were notified on the actual day of appointment, it could be possible for defense counsel to interview the client, obtain exculpatory or mitigating evidence, request discovery, and resolve the case before or at arraignment.

### **Timeliness of Counsel Appointments**

To assess the timeliness of Midland County's appointment procedures in misdemeanor cases, the monitor examined the time from request for counsel until appointment or denial of indigence. Under the Commission's monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor's sample are timely.<sup>14</sup> The monitor examined 84 cases filed in FY2017 and found 31 requests for counsel. Counsel was timely appointed in about 3% of cases (see Table). This falls below the Commission's threshold for presuming a jurisdiction's practices ensure timely appointment of counsel.

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<sup>13</sup> While cite and release defendants did not receive Article 15.17 warnings, neither did defendants who posted bail prior to the Article 15.17 hearing. These defendants may benefit from such warnings.

<sup>14</sup> 1 TEX. ADMIN. CODE § 174.28.

**Table: Timeliness of Misdemeanor Appointments**

<b>Midland Misdemeanor Appointment Sample</b>	<b>Sample Size</b>	<b>Number from sample</b>	<b>Percent</b>
Number of Case Files Examined	84		
Number of Case Files Containing a Request for Counsel		31	
Appointment / Denial of Indigence Occurred in: <sup>15</sup>	30		
0 work days		0	0%
1 – 3 work days + 24 hour transfer		1	3.3%
<b>Total Timely Appointments / Denials</b>		<b>1</b>	<b>3.3%</b>
4 to 10 work days + 24 hour transfer		20	66.7%
More than 10 work days + 24 hour transfer		4	13.3%
No ruling on request		5	16.7%
Total Untimely Appointments		29	96.7%

**FINDING 2 AND RECOMMENDATION:** Article 1.051 of the Code of Criminal Procedure requires counsel be appointed to persons determined to be indigent within three working days of the court receiving the request for counsel. Midland County must implement practices so that determinations of indigence, appointments of counsel, and notifications of appointments occur within three working days (plus 24 hours allowed for transmitting requests) of the request being made.

## Waivers of Counsel

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers of counsel that are voluntarily and intelligently made.<sup>16</sup> Articles 1.051(f-1) and (f-2) require a waiver of counsel for the purpose of speaking with the prosecutor. Article 1.051(g) requires a waiver for the purpose of entering an uncounseled guilty plea.

Under 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 ruled upon, and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. A pending request for counsel must be ruled upon before a waiver of counsel is allowed. 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 1.051(g).<sup>17</sup>

<sup>15</sup> The monitor excluded one sample case in which timeliness could not be determined.

<sup>16</sup> TEX. CODE CRIM. PROC. ART. 1.051(f) states:  
*A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.*

<sup>17</sup> The waiver language of Article 1.051(g) states:

## Ruling on Requests Prior to Waivers

The monitor found that when counsel was requested, three cases from the monitor's sample were not ruled upon before defendants entered guilty pleas. When misdemeanor arrestees request counsel, the courts must have a system in place to rule on all requests and either appoint counsel or determine the person is not indigent. Article 1.051(f-2) states:

*... If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:*

- (1) has been given a reasonable opportunity to retain and has failed to retain private counsel; or*
- (2) waives or has waived the opportunity to retain private counsel.*

**FINDING 3 AND RECOMMENDATION:** 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 requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor.

## Conclusion

The monitor appreciated the professionalism and assistance provided by Midland County officials and staff. Midland County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, we will monitor the county's transition and adjustments to the Commission's findings.

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*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)*

## **Summary of Findings and Recommendations**

Midland County must respond in writing how it will address each of these recommendations.

**FINDING 1 AND RECOMMENDATION:** Articles 14.06 and 15.17 of the Code of Criminal Procedure require that if a person is cited for a class A or B misdemeanor charge and released, the magistrate must perform the warnings described in Article 15.17. Midland County must implement practices to ensure all cite and release arrestees are given Article 15.17 warnings.

**FINDING 2 AND RECOMMENDATION:** Article 1.051 of the Code of Criminal Procedure requires counsel be appointed to persons determined to be indigent within three working days of the court receiving the request for counsel. Midland County must implement practices so that determinations of indigence, appointments of counsel, and notifications of appointments occur within three working days (plus 24 hours allowed for transmitting requests) of the request being made.

**FINDING 3 AND RECOMMENDATION:** 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 requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor.

# Appendix A – Model Form: Explanation of Rights to Defendants Without an Attorney

Cause Number: \_\_\_\_\_

IN THE [INSERT COURT]  
[INSERT COUNTY] COUNTY, TEXAS

<b>JUDGE’S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT ATTORNEY</b>
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As a defendant in a criminal case, you have three options:

1. You may hire an attorney;
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you;
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be reset to give you time to do so.

If you want an attorney and do not have the money to hire one, you will need to fill out a financial questionnaire so that the proper person can determine whether or not to appoint an attorney to represent you.

You may not speak to the prosecutor about your case unless you sign a written waiver of your right to represented by an attorney.

Be aware that there are dangers to self-representation. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens, and employment.

If you choose to proceed without an attorney, you may change your mind at any time and may request counsel from the Court.

\_\_\_\_\_  
Judge Presiding

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**DEFENDANT’S CHOICE** [mark initials next to only **ONE** choice]

- \_\_\_\_\_ I want to reset this case to hire my own attorney.
- \_\_\_\_\_ I have hired an attorney, whose name is: \_\_\_\_\_
- \_\_\_\_\_ I want to apply for court-appointed counsel.
- \_\_\_\_\_ I have a court-appointed attorney, whose name is: \_\_\_\_\_
- \_\_\_\_\_ I want to waive my right to an attorney and represent myself.

Defendant: \_\_\_\_\_ Date: \_\_\_\_\_

# Appendix B – Correspondence



**From:** Shannon Cavasos [<mailto:shannoncavasos35@hotmail.com>]

**Sent:** Monday, September 25, 2017 8:50 AM

**To:** Joel Lieurance <[JLieurance@tidc.texas.gov](mailto:JLieurance@tidc.texas.gov)>

**Subject:** Re: Texas Indigent Defense Commission

Mr. Lieurance,

On 9/22/17, I visited Midland County Courthouse in efforts to help a family member obtain a Court Appointed attorney. This scheduled appearance would be his second appearance before a Judge and he'd not been given an opportunity to complete a financial application nor had he been asked if he needed an attorney (he is charged with a M2 POM>2). In May of 2017, the case was filed and he plead not guilty at his arraignment, he was unemployed and does not have any assets. He was not given the opportunity to apply at that time. However, he was told if he were to change his plea to "no contest or guilty" at that time he would have the chance to speak with Prosecutors to possibly come to a deal.

Upon arrival, the entire morning docket consists of "un-represented" defendants. They had two Prosecutors at the galley wall negotiating plea agreements with un-represented Defendants if they were willing to plea to guilty. At no point are they advising unknowing defendants of their right to counsel.

We then requested to have an attorney appointed or at least be able to complete a written application to be filed on the record and he was denied both by the Judge. He was told by Judge Moore "if he was working he should be able to hire one and he was not going to waste tax payer money on his attorney fees." We told him that we had consulted with attorneys and he could not afford to retain one. We told the Judge this was our second attempt to try to obtain counsel, he was adamant that he would not be assigned an attorney or even given an application. His case was then set again for another conference for Jan 19, 2018.

We went down to County Clerk and asked for an application and were denied again. At this point just to get something on the record we hand drafted a request for an attorney and filed it on the record.

He as long as many other defendants who are going through this system are not aware of their rights or due process, and clearly if you are aware, you will be denied without even being given a financial affidavit or application. The Midland County website does have an indigent defense plan and application on their website but they are not practicing it by any means. I don't know if all their Courts are practicing this or if this is limited to this Court.

We were seen by Judge Marvin Moore in County Court at Law 2.

Thank you for your time.

Shannon Cavasos



September 27, 2017

CHAIR:  
The Honorable Sharon Keller  
Presiding Judge  
Court of Criminal Appeals

The Honorable Marvin L. Moore  
Local Administrative Statutory County Judge  
500 N. Loraine Street, Suite 601  
Midland, TX 79701

EX OFFICIO MEMBERS:  
Honorable Nathan Hecht  
Honorable Sharon Keller  
Honorable Brandon Creighton  
Honorable Andrew Murr  
Honorable Sherry Radack  
Honorable Linda Rodriguez  
Honorable John Whitmire  
Honorable Joseph Moody

Re: Texas Indigent Defense Commission – complaint about appointments

Dear Judge Moore:

MEMBERS APPOINTED BY GOVERNOR:  
Honorable Missy Medary  
Honorable Jon Burrows  
Mr. Don Hase  
Mr. Alex Bunin  
Honorable Richard Evans

I received the enclosed complaint regarding Midland County's misdemeanor appointment procedures. When our agency receives a complaint, we attempt to provide local officials with relevant details to resolve the complaint.

EXECUTIVE DIRECTOR:  
James D. Bethke

The complaint alleges that, at the September 22, 2017 misdemeanor docket, defendants were not told of their right to apply for appointment counsel if without the resources to retain counsel. It further alleges the defendant in question was not allowed to complete a written application for appointed counsel when he requested one in court and later at the county clerk's office.

While I do not know the accuracy of the complaint, I would like to note two references. First, Article 1.051(f-2) of the Code of Criminal Procedure requires the court to advise defendants of the right to counsel and the procedures for requesting counsel. Second, Midland County's Adult Indigent Defense Plan states:

*If a defendant wishes to request counsel prior to the initial appearance, the forms required to request counsel may be obtained at the Texas Indigent Defense Commission's website at <http://tidc.tamu.edu/public.net/> or from the court coordinator of either the 142nd, 238th, 385th or 441st District Court. The defendant may submit these forms to the District Clerk. The court will rule on all requests for counsel submitted in this manner.*

Since this complaint alleges the procedures for requesting counsel were not explained at the docket, and I have no method to determine how this occurs, please describe how the procedures for requesting counsel are explained to unrepresented defendants at the misdemeanor dockets in your court. Please send me this information by October 27, 2017.

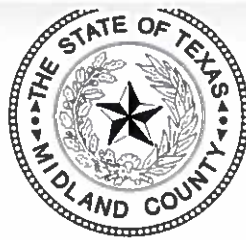
Staff intends to bring this matter before the Commission's Policies and Standards Committee for direction. If you have any questions or need further clarification, you may contact me at (512) 936-7560.

Sincerely,



Joel Lieurance  
Senior Policy Analyst

cc: The Honorable Michael Bradford, Midland County Judge  
The Honorable David Lindemood, Local Administrative District Judge  
The Honorable Dean Rucker, Regional Presiding Judge, 7<sup>th</sup> Region  
Mr. James D. Bethke, Executive Director, Texas Indigent Defense Commission  
(enclosure)



Court Administrator  
JESSICA MONTOYA  
Bailliff/Deputy Sheriff  
KEVIN DUMAS

**MARVIN L. MOORE**  
Judge  
County Court At Law #2

MIDLAND COUNTY COURTHOUSE  
500 N. Loraine, Suite 601  
MIDLAND, TEXAS 79701  
PHONE (432) 688-4460  
FAX (432) 688-4948

October 11, 2017

Joel Lieurance  
Senior Policy Analyst  
Texas Indigent Defense Commission

Mr. Lieurance,

I am responding to your letter of September 27, 2017. The complaint alleges that a defendant was not given the opportunity to apply for a court appointed attorney at a docket call on September 22, 2017.

It is unclear from the complaint if the defendant's name is Shannon Cavasos or if that is the name of a relative of a defendant required to appear at the docket call. Because of this discrepancy I am unable to respond to this complaint specifically.

Regardless, all defendants are informed of their right to appointed counsel at their initial arraignment setting. In fact, each defendant is given such opportunity prior to arraignment either in detention and/or through the clerk's office. In any event, the right to appointed counsel is explained.

Defendants who enter a plea of "not guilty" and who express a desire to retain counsel are given a new court date for a docket call of unrepresented defendants. At this hearing, defendants are again given the opportunity to: 1) waive their right to appointed counsel and dispose of their pending case(s), 2) persist in the plea of not guilty to retain counsel, or 3) persist in their plea of "not guilty" and request appointed counsel.

If a defendant has previously entered a plea of "not guilty" and expressed a desire to retain counsel of their own choosing, the defendant is informed that they may apply for a court appointed attorney at their next setting (like the September 22, 2017 setting). At this subsequent hearing, defendants requesting a court appointed attorney are subject to questioning by the Court regarding various financial issues as well as what actions the defendant has taken regarding attempts to retain counsel. If a defendant has not attempted to contact counsel, I have, many times, reset their hearing and required them to make these efforts. Many times defendants make a determination on their own that they qualify for appointed counsel and chose not to make any effort to retain counsel. However, the court is tasked with making that decision. Also, many defendants make attempts to delay the process or "game" the system to gain further delays.

The Court still maintains the inherent powers necessary to protect the rights of all who appear before the court and must do so being mindful of the use of taxpayer dollars in carrying out the mandates placed upon the courts. This Court follows the spirit and the letter of the law regarding a defendant's right to appointed counsel.

Again, since I do not have the name of the defendant in the referenced complaint, I cannot be more specific regarding the complaint.

However, all defendants are afforded the opportunity to apply for a court appointed attorney prior to their initial court setting as well as subsequent settings. The Court does comply with Code of Criminal Procedure as well as the Midland County's Adult Indigent Defense Plan.

Please feel free to contact me if you need any additional information.

Sincerely,

Judge Marvin L. Moore  
County Court at Law #2



TEXAS INDIGENT DEFENSE COMMISSION

October 27, 2017

CHAIR:

The Honorable Sharon Keller  
Presiding Judge  
Court of Criminal Appeals

EX OFFICIO MEMBERS:

Honorable Nathan Hecht  
Honorable Sharon Keller  
Honorable Brandon Creighton  
Honorable Andrew Murr  
Honorable Sherry Radack  
Honorable Linda Rodriguez  
Honorable John Whitmire  
Honorable Joseph Moody

MEMBERS APPOINTED BY GOVERNOR:

Honorable Missy Medary  
Honorable Jon Burrows  
Mr. Don Hase  
Mr. Alex Bunin  
Honorable Richard Evans

EXECUTIVE DIRECTOR:

James D. Bethke

The Honorable Marvin L. Moore  
Local Administrative Statutory County Judge  
500 N. Loraine Street, Suite 601  
Midland, TX 79701

Re: Texas Indigent Defense Commission – complaint about appointments

Dear Judge Moore:

I received your letter addressing the complaint from Ms. Cavazos. Thank you for the prompt response. It will be included in our summary of recent complaints at the December 7, 2017 Board Meeting. If you have any questions or need further clarification, you may contact me at (512) 936-7560.

Sincerely,

Joel Lieurance  
Senior Policy Analyst

cc: The Honorable Michael Bradford, Midland County Judge  
The Honorable David Lindemood, Local Administrative District Judge  
The Honorable Dean Rucker, Regional Presiding Judge, 7<sup>th</sup> Region



January 23, 2018

CHAIR:  
The Honorable Sharon Keller  
Presiding Judge  
Court of Criminal Appeals

EX OFFICIO MEMBERS:  
Honorable Sharon Keller  
Honorable Nathan Hecht  
Honorable John Whitmire  
Honorable Brandon Creighton  
Honorable Joseph "Joe" Moody  
Honorable Andrew Murr  
Honorable Sherry Radack  
Honorable Vivian Torres

MEMBERS APPOINTED BY GOVERNOR:  
Mr. Alex Bunin  
Honorable Jon Burrows  
Honorable Richard Evans  
Mr. Don Hase  
Honorable Missy Medary

EXECUTIVE DIRECTOR:  
Geoffrey Burkhart

The Honorable Marvin L. Moore  
Local Administrative Statutory County Judge  
500 N. Loraine Street, Suite 601  
Midland, TX 79701

Re: Texas Indigent Defense Commission – Notification of Limited Scope  
Monitoring Review

Dear Judge Moore:

I recently forwarded you a complaint that we received about the appointment of misdemeanor counsel in your court. I asked for additional information, and you promptly replied to my request. I presented this information at our December 7, 2017 Board Meeting. The Board passed a motion directing staff to conduct a limited scope monitoring review to examine local procedures for accepting and ruling upon misdemeanor requests for counsel.

If possible, I would like to conduct this review in the month of February. For the review, I intend to: (1) review misdemeanor case files, examining whether counsel requests were ruled upon; and (2) observe a misdemeanor court docket. I will call your coordinator next week to inquire about available dockets. If you have any questions or need further clarification, you may contact me at (512) 936-7560.

Sincerely,

Joel Lieurance  
Senior Policy Analyst

cc: The Honorable Michael Bradford, Midland County Judge  
The Honorable David Lindemood, Local Administrative District Judge  
The Honorable Dean Rucker, Regional Presiding Judge, 7<sup>th</sup> Region  
Mr. Geoff Burkhart, Executive Director, Texas Indigent Defense  
Commission