

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

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence.

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, **and spousal income that is available to the defendant.** The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans.

### ***2.a. Indigence Determinations in Adult Criminal Cases***

For adult criminal cases in Tarrant County, a person is indigent if he or she has a household income at or below the Living Wage Calculator guidelines as established and revised periodically by the Massachusetts Institute of Technology (MIT), and whose

liquid assets do not exceed \$15,000.<sup>13</sup> The court may also consider the complexity of the case, the estimated cost of presenting a legal defense, the fees charged by lawyers in the community for providing defense services in similar cases, or whether the defendant has retained counsel in related legal matters.

Tarrant County's longstanding procedure has been for defendants to interview with a financial screener from the Office of Attorney Appointments who uses the MIT Calculator and whose determination is reviewed by a judge only if a person does not qualify for counsel. During TIDC's November visit, the County followed this procedure.<sup>14</sup> During TIDC's February visit, the misdemeanor courts had recently begun having a judge review indigence determinations and consider the income of all other persons related by birth, marriage, or adoption who reside with the defendant, which was allowed by the indigent defense plan.<sup>15</sup>

TIDC observed a misdemeanor docket in February. At the docket, the judge reviewing indigence determinations questioned defendants who had requested counsel and been interviewed by screeners. He asked one defendant about his mother's income and a second defendant about his grandmother's income (both defendants lived with family, and one was a student with no income).

Parental income of adult defendants is not an indigence factor listed in Article 26.04(m). Article 26.04(m) only references the income of the defendant and spousal income available to the defendant. Additionally, *Abdnor v. State*, 712 S.W.2d 136 (Tex. Crim. App. 1986), restricts indigence determinations to considering the income of only the persons who are legally bound to pay for the defendant's legal expenses. Parents are not legally bound to pay their adult children's legal expenses.

Additionally, in questioning defendants, the judge told defendants that the law presumes they can afford a lawyer and that "indigent" means that they are on Supplemental Security Income (SSI), or cannot afford to feed and clothe themselves.<sup>16</sup> Article 1.051 of the Code of Criminal Procedure states that, for the purposes of Article 26.04, "indigent" means a person who is not financially able to employ counsel." There is no presumption that a person can employ counsel. Tarrant County uses the MIT Calculator as its default indigence standard, which accounts for expenses beyond food and clothing. The indigent defense plan allows the court to depart from the standard based on the estimated cost for an attorney, which may be well beyond what a defendant has available for basic necessities. Moreover, a person is not required to forego basic necessities to pay for an attorney.

Tarrant County must, in its plan and in practice, make indigence determinations that comply with Article 26.04(m) and *Abdnor v. State*. The County reported in March that the judges have returned to not considering non-spousal income and having screeners from the Office of Attorney Appointments interview defendants. The judges planned to meet in April to formally update the indigent defense plans to reflect this change but were delayed by the COVID-19 pandemic. TIDC will continue to monitor for this update.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

### **Determination of Indigence.**

**FINDING 1:** 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.

### **Summary of Findings and Recommendations**

Tarrant County must respond in writing how it will address the report's finding.

**FINDING 1:** 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.

#### ***Tarrant County Response to Finding 1***

As indicated in footnote 15 of the Initial Monitoring Review, the misdemeanor courts' indigent defense plan had included the provision to consider household income which was defined as the income of all other persons related by birth, marriage, or adoption who reside the defendant, but instead in practice only the financial condition of the defendant and the defendant's spouse were considered.

But in February 2020 TIDC observed a docket in which the judge reviewing indigence determinations questioned defendants about income of persons who were not legally bound to pay for the defendant's legal expenses.

Prior to receiving the Initial Monitoring Review, the judges in March 2020 returned to not considering non-spousal income. In addition, on April 13, 2020, the Tarrant County Criminal Courts Misdemeanor Court Appointment Plan was revised to narrow the income consideration to the defendant's income and spousal income available to the defendant. The plan was updated on the TIDC website.