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Mr. Don Hase

Executive Director:
James D. Bethke

July 11, 2014

The Honorable Phillip Spenrath
Constitutional County Judge
Wharton County Courthouse Annex
309 E Milam St., Suite 600
Wharton, TX 77488

Re: Texas Indigent Defense Commission Monitoring Reviews of Wharton County

Dear Judge Spenrath:

The Texas Indigent Defense Commission has completed its monitoring review which has two components: 1) a fiscal review; and 2) a policy review.

The objective of the fiscal review was to determine if Wharton County was in compliance with the fiscal requirements of the formula and/or discretionary grants per Commission rules under the Texas Administrative Code (TAC), Uniform Grant Management Standards (UGMS), Texas Government Code, and grant provisions. The objective of the policy review was to verify that local procedures for appointing counsel in misdemeanor cases followed requirements set in the local indigent defense plan and in Articles 1.051, 15.17, and 26.04 of the Code of Criminal Procedure. The policy review was conducted based on some of the conditions noted by the fiscal review.

Attached you will find our report divided into two parts, the first relates to the fiscal review and the second to the policy review. For the fiscal review, TAC rules require that the authorized official or financial officer must provide a written response with a Corrective Action Plan (CAP) for each finding. The counties written response will then be included verbatim in the final report. The CAP must include the steps planned by local officials to address the conditions noted, the implementation date and who is responsible for the implementation. For the policy review, please respond in writing to each of the recommendations. Please direct items requiring a response to the appropriate contact person, and if possible respond in a single report. The County may have already addressed some of the recommendations. List these process changes in your response. Your assistance is greatly appreciated in this matter. Please submit the response by September 15, 2014.

We would like to thank Wharton County officials and employees for their assistance and cooperation during the monitoring process. If you have any thoughts or questions, you may call Joel Lieurance at 512-936-7560 with regard to the policy monitoring review or Debra Stewart at 512-936-7561 with regard to the fiscal monitoring review.

Sincerely,



Debra Stewart, CPA, CIGA
Fiscal Monitor

Joel Lieurance
Policy Monitor

Cc: The Honorable Randy M. Clapp, Local Administrative District Judge
The Honorable Ben Hardin, 23rd District Court Judge
The Honorable Jess Howell, Wharton County Sheriff
The Honorable Jeanette Krennek,, Justice-of-the-Peace, Pct. 1
The Honorable Cynthia Kubicek, Justice-of-the-Peace, Pct. 2
The Honorable Dennis Korenek, Justice-of-the-Peace, Pct. 3
The Honorable Timmy Drapela, Justice-of-the-Peace, Pct. 4
Ms. Sharon H. Boedeker, Wharton County Auditor
Ms. Deidra Becker, Assistant Wharton County Auditor
Ms. Cassie Ritter, Indigent Defense Coordinator
Mr. James D. Bethke, Executive Director, Texas Indigent Defense Commission
Mr. Wesley Shackelford, Deputy Director/Special Counsel, Texas Indigent Defense Commission
Mr. Bryan Wilson, Grants Administrator, Texas Indigent Defense Commission



TEXAS INDIGENT DEFENSE COMMISSION

Monitoring Report: Fiscal and Policy

July 2014



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Honorable Olen Underwood	Vice-Chair – Presiding Judge, 2 nd Administrative Judicial Region of Texas

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Mr. Anthony Odiorne	Burnet, Assistant Public Defender, Regional Public Defender for Capital Cases
Mr. Don Hase	Attorney, Ball & Hase, Arlington

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Debra Stewart	Fiscal Monitor
Joan Thomas	Fiscal Monitor
Sharon Whitfield	Budget and Accounting Analyst
Bryan Wilson	Grants Administrator

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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SUMMARY OF MONITORING REPORT

Summary of Fiscal Monitoring

Wharton County must respond in writing as to how it will address each fiscal monitoring finding.

- 1) Wharton County reported expenses in civil matters as criminal indigent defense expenses and civil cases in the Indigent Defense Expense Report.
- 2) The County made payments on invoices where attorneys had not fully completed the required itemized voucher.
- 3) The County made payments on invoices where attorneys had not included all the cause numbers related to the cases disposed.
- 4) The County paid attorneys that did not qualify for appointment under the county's indigent defense plan. The Auditor's office did not maintain records that these appointments were in accordance with Title 1 Texas Administrative Code Rule §174.4 Emergency Appointment.

Summary of Policy Monitoring

Wharton County must respond to each policy monitoring recommendation in writing.

- 1) For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel. Article 15.17(a) of the Code of Criminal Procedure does not provide for a delegation of this task. Jail staff may also ask arrestees whether they want to request counsel.
- 2) An arrestee's ability to make bond may not be used as an impediment to a request for counsel. Article 15.17(a) does not provide for a prerequisite inquiry as to whether the arrestee can make bond before he/she can request counsel. *Rothgery v. Gillespie County*, 554 U.S. 991 (2008), held that the Sixth Amendment right to counsel attaches when a defendant appears before a magistrate and learns of the charges against him and his liberty is subject to restriction (i.e. the Article 15.17 hearing which was held to be the initiation of adversarial judicial proceedings).
- 3) Wharton County must ensure that waivers of counsel meet the requirements found in Article 1.051(f) – (h). Waivers not meeting the provisions of Article 1.051(f-1) or (f-2) are presumed invalid. To ensure that waivers meet the requirements:
 - 1) All requests for counsel must be ruled upon prior to any communication between the defendant and the prosecutor and
 - 2) The court must determine that waivers of counsel (for purposes of entering a plea) are voluntarily and intelligently made. The waivers must occur prior to the plea, and the language must substantially conform to Article 1.051(g).

FISCAL REPORT

Wharton County on-site fiscal monitoring visit was conducted on February 24-26, 2014. The fiscal monitor reviewed financial records to determine whether grant funds were spent in accordance with the terms and conditions of the Texas Indigent Defense Commission grants.

The expenditure period of October 1, 2012 to September 30, 2013 (FY 2013) was reviewed during the fiscal monitoring visit.

OVERVIEW

Objective

The objectives of this review were to:

- determine whether grant funds were used for authorized purposes in compliance with laws, regulations, and the provisions of the grant;
- validate policies and procedures relating to indigent defense services;
- provide recommendations pertaining to operational efficiency; and
- assist with any questions or concerns on the indigent defense program requirements.

Scope

The county's indigent defense expenditures were monitored to ensure compliance with applicable laws, regulations, and the provisions of the grant during FY 2013. The fiscal monitor reviewed records located in Wharton County Annex, Auditor's Office.

Methodology

To accomplish the objectives, the fiscal monitor met with the county auditor, the county judge, the indigent defense coordinator/district court administrator, and the assistant county auditor who prepares the indigent defense expenditure report (IDER). The fiscal monitor reviewed:

- random samples of paid attorney fees, expert witnesses, licensed investigations, and other direct litigation expenses for verification;
- general ledger transactions, invoices, and the IDER accounting procedures manual;
- IDER and attorney fee schedule;
- public appointment list, attorney applications, attorney criminal and juvenile continuing legal education training documentation, any applicable contracts; and
- the county's local indigent defense plan.

County Background

Wharton County was incorporated in 1846 and is located between Houston and Victoria in the gulf coast area of Texas. The County covers an area of 1,090 square miles and includes an estimated population of 41,561. Neighboring counties are Austin, Brazoria, Colorado, Fort Bend, Jackson and Matagorda.

Wharton County's court system is comprised of a county court and two district courts (the 329th District Court and the 23rd District Court). No criminal cases were reported as being heard in the 23rd District Court. In FY 2013, the county received \$28,674 in formula grant disbursements.

Wharton County's comprehensive annual financial report was reviewed for the fiscal year ended December 31, 2012. Pattillo, Brown & Hill, L.L.P., a licensed certified public accountants firm, audited Wharton County's financial statements for the governmental activities, each major fund, and the aggregate remaining fund information for the year ended December 31, 2012. The independent auditor's report issued an unqualified opinion regarding these basic financial statements.

The Government Finance Officers Association (GFOA) of the United States and Canada awarded Wharton County a Certificate of Achievement for Excellence in financial reporting for the FY 2011 comprehensive annual financial report (CAFR). The county has received a Certificate of Achievement for the last 24 consecutive years. The CAFR must satisfy both generally accepted accounting principles in the United States and applicable legal requirements.

Commission Background

In January 2002, the 77th Texas Legislature established the Texas Task Force on Indigent Defense. In May 2011, the 82nd Texas Legislature changed the name to the Texas Indigent Defense Commission (Commission) effective September 1, 2011. The Commission remains a permanent standing committee of the Texas Judicial Council and administratively attached to the Office of Court Administration (OCA).

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.

The purpose of the Commission is to promote justice and fairness to all indigent persons accused of criminal conduct, including juvenile respondents, as provided by the laws and constitutions of the United States and Texas. The Commission conducts these reviews based on the directive in Section 79.037(c) Texas Government Code, to "monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant...", as well as Section 173.401(a), Texas Administrative Code, which provides that "the Commission or its designees will monitor the activities of grantees as necessary to ensure that grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of the grant."

Formula Grant

The county submitted the FY 2013 indigent defense on-line grant application to assist in the provision of indigent defense services. Wharton County met the formula grant eligibility requirements and was awarded \$28,674 for FY 2013.

Discretionary Grant

Wharton County did not apply for a discretionary grant for FY 2013; therefore grant funds were not available to review.

Other Related Issues

During the desk review of the FY 2013 IDER, it was noted that no licensed investigation expense or expert witness expense was recorded. This report combined with the court clerk's reports to the Office of Court Administration show that counsel was appointed in 48.39% of the felony cases compared to the statewide average of 70.35%. In misdemeanor cases, counsel was appointed in 8.81% of cases, while the statewide average was 41.59%. During the review it was noted that civil cases were routinely included in the indigent defense expenditure report, which if they were removed from the IDER only further decreases the percentage of cases appointed counsel. Due to this concern it was decided that a policy monitoring review regarding appointment of counsel was warranted.

FINDINGS

- ❖ Wharton County reported expenses in civil matters as criminal indigent defense expenses and civil cases in the Indigent Defense Expense Report.

Finding One

The county included civil expenses, such as child protective services and guardianship cases, with the criminal indigent defense expenses in the FY 2013 Indigent Defense Expense Report submitted under Texas Government Code 79.036 (e). Of the 40 invoices from the 329th District Court reviewed, 15 were found to be child protective services cases. Of the 18 County Court invoices reviewed, three (3) invoices were for patient protection or guardianship cases. Both child protective services and guardianship matters are civil cases.

FY13 Cases Paid	
County Court-at-Law	99
23rd District Court	0
329 th District Court	499
Total	598

Additionally, the County counted two invoices for mediation services in the amount of \$1,146 in the Other Direct Litigation Expense category. These mediation expenses were for civil cases.

None of the expense for civil matters should be included in the criminal indigent defense expense report. The IDER is overstated in both dollar amount and number of cases due to the inclusion of civil cases reported. This could mean that the FY 2014 formula grant calculation for Wharton County resulted in an amount that could be greater than would have been authorized if reported without the civil cases. Please refer to the Indigent Defense Expenditure Report Procedure Manual: http://www.txcourts.gov/tidc/pdf/FY2013_IDER_ManualFinal.pdf.

FY 2013 Licensed Investigations, Experts, and Other Direct Litigation Expenditures				
Expenditures	Total Vouchers			
	Reported		Reviewed	Reviewed Value
	Paid	FY 2013		
Investigation	0	\$0	0	\$0
Expert Witness	0	\$0	0	\$0
Other Direct Litigation	2	\$1,146	2	\$1,146
Total	2	\$1,146	2	\$1,146

The county must review all invoices to identify the civil case payments and case counts that were inadvertently reported in the IDER. The county should submit a corrected FY 2013 Indigent Defense Expense Report to the TIDC. The county should develop procedures to ensure all civil and criminal expenses are accounted for separately. All county employees that process invoices should be trained on the difference between civil cases and criminal cases.

County Response for Finding One:

Wharton County Action Plan

Contact person(s): _____

Completion date: _____

- ❖ The county made payments on invoices where attorneys had not fully completed the required itemized voucher.

Finding Two

Wharton County utilizes a streamlined form that consolidates the Request for Counsel, the Order Appointing Counsel and the Attorney Request for Payment (itemized invoice) even though these events happen at different times. Attorneys are not completing the amount to be paid as evidenced by blank request amounts on the form. Attorneys do not always sign the form before it is presented to the presiding judge. This is evidenced by the judge signing on the line designated for the attorney. According to Article 26.05 of the Code of Criminal Procedure, “No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings....”

The County should examine its invoice structure and work processes to support the court processes and the County’s legal reporting requirements. The Commission has developed model forms available on the agency website: <http://www.courts.state.tx.us/tidc/docs/Model%20Attorney%20Fee%20Voucher.doc> Also, the examination of the invoice structure and work processes should consider the additional information required to be reported for FY 2014 and future years as added by the 83rd Legislature in House Bill 1318.

County Response for Finding Two:

Wharton County Action Plan

Contact person(s): _____

Completion date: _____

- ❖ The county made payments on invoices where attorneys had not included all the cause numbers related to the cases disposed.

Finding Three

Attorneys do not include all cause numbers related to the cases disposed on the streamlined form. There were several of the consolidated forms submitted that listed one cause number; however, more than one case was indicated as disposed. Without a cause number for each case disposed, it is difficult to determine which cases are disposed under a payment or whether a case had been previously paid. Please see definition of a “case” in the Procedure Manual for the Indigent Defense Expense Report “ ...Finally, if an indictment or information contains more than one count (Article 21.24, CCP), report this as one case and report the case under the category for the most serious offense alleged.”

Similar to finding two the County should examine its invoice structure and work processes to support the court processes and the County’s legal reporting requirements. Case numbers for each case listed as disposed on the itemized voucher should be identified. This should eliminate confusion with the number of cases disposed. Also, the examination of the invoice structure and work processes should consider the additional information required to be reported for FY 2014 and future years as added by the 83rd Legislature in House Bill 1318.

County Response for Finding Three:

Wharton County Action Plan

Contact person(s): _____

Completion date: _____

- ❖ The county paid attorneys that did not qualify for appointment under the county's indigent defense plan or the Auditor's office did not maintain records that these appointments were in accordance with TAC Rule §174.4 Emergency Appointment.

Finding Four

The County paid attorneys in FY 2013 for indigent defense representation when the County did not have current validation of eligibility for those attorneys; therefore, Wharton County may have paid attorneys when they were not eligible to receive payments.

Of the seventeen attorneys paid in FY 2013 for public appointment, ten remained on the current list presented for review. Of the ten on the list, only eight had applications for the appointment list available for review.

Of the ten attorneys on the current public appointment list, all ten reported CLE hours in criminal law. Three of the ten reported CLE hours required to receive appointments in juvenile cases; however, only two of the three were actually assigned any juvenile cases in FY 2013. In addition to the two attorneys with reported juvenile CLE, there were four other attorneys that were assigned juvenile cases. Two of the four were on the current list but indicated that they did not have juvenile CLE. The final two attorneys that were appointed to juvenile cases were not on the current list, nor did they have any CLE reported. According to TAC rule §174.2, an attorney may be appointed under this rule only if an attorney completes a minimum of six hours of continuing legal education pertaining to juvenile law during each 12-month reporting period or is currently certified in juvenile law by the Texas Board of Legal Specialization. The court may also make an emergency appointment to an attorney who does not meet these requirements if no attorney who meets the requirements is available.

The monitor recognizes that there was an effort to maintain an appointment list with valid attorneys; however, it is a challenge to meet the ongoing requirement of checking for up-to-date CLE to keep the list current. Maintaining a current list is crucial for ensuring judges are only appointing qualified attorneys for indigent defense. In addition, an up-to-date list ensures the County Auditor is only making payments to eligible attorneys.

There should be a procedure in place that verifies all attorneys included on the appointment list are eligible to receive appointments for indigent defense. The list should also denote what types of cases each attorney is qualified to handle. The verification should include:

- Ensuring a completed application is on file for each attorney on the list,
- Verifying each attorney has met the current CLE requirements, and
- Documenting the case type and level for each attorney.

As changes to the list are made throughout the year, an updated list should be provided to the auditor's office. The county auditor should verify the records.

County Response for Finding Four:

Wharton County Action Plan

Contact person(s): _____

Completion date: _____

POLICY REPORT

The Texas Indigent Defense Commission (“Commission”) is required to monitor local jurisdictions’ compliance with the Fair Defense Act (“FDA”).¹ The policy monitor conducted a limited scope review in Wharton County to analyze the procedures for appointing counsel to indigent defendants in misdemeanor cases.

Purpose of the Policy Monitoring Review

The fiscal monitoring review found issues in the County’s ability to accurately track criminal cases paid. Specifically, non-criminal cases were included in the FY13 Indigent Defense Expense Report (IDER). Additionally, the percentage of misdemeanor cases receiving appointed counsel was significantly below the state average, and the percentage of misdemeanor arrestees requesting counsel at Article 15.17 hearings was very low. See Table 1 which shows misdemeanor appointment data in Wharton County and statewide.

Table 1: Wharton County Misdemeanor Appointment Data

Year	2010	2011	2012	2013	Texas 2013
Population (Non-Census years are estimates)	41,280	41,280	41,288	41,561	26,251,278
Misdemeanor Charges Added (from OCA report)	1,348	1,265	1,275	1,124	549,030
Misdemeanor Cases Paid	187	149	122	99	228,357
% Misdemeanor Charges Defended with Appointed Counsel	13.9%	11.8%	9.6%	8.8%	41.6%
Misdemeanor Trial Court Attorney Fees	\$25,975	\$20,325	\$13,475	\$13,225	\$36,880,978
Total Misdemeanor Court Expenditures	\$25,975	\$20,325	\$13,475	\$13,225	\$37,705,538

Timeline and Methodology

The limited scope policy monitoring review of Wharton County was conducted by TIDC staff with site visits to the County between April 2 - 3, 2014 and on April 22, 2014. Throughout this report all references to Commission staff use the term “monitor.” The monitor used interviews, observations, and examinations of records to document the procedures for appointing counsel in misdemeanor cases. The monitor met with the following persons: three justices-of-the-peace; sheriff’s office staff; and criminal defense attorneys. The monitor observed a misdemeanor arraignment docket and Article 15.17 hearings. The monitor examined misdemeanor case files in the county clerk’s office; magistrate warning forms maintained by the justices-of-the-peace; the local indigent defense plan; and Texas Judicial Council Monthly Court Activity Reports to the Office of Court Administration (OCA).

The policy monitoring review examined the procedures for appointing counsel to indigent defendants in misdemeanor cases. The report has two parts: (1) methods to administer Article 15.17 hearings and (2) methods to determine indigence, assign counsel, and accept waivers of counsel.

¹ Tex. Gov’t Code § 79.037(a)-(b).

I. Methods to Administer Article 15.17 Hearings

After arrest in Wharton County, all persons are booked at a central jail facility within the County and receive Article 15.17 warnings from a magistrate (typically one of four justices-of-the-peace). The justices-of-the-peace are to determine whether probable cause is present to detain individuals, set bond, and take requests for counsel. According to data reported by the magistrates, about 7% of misdemeanor arrestees requested counsel at Article 15.17 hearings. This compares with about 31% of misdemeanor arrestees who requested counsel statewide. See Table 2 below.²

Table 2: Percent of Misdemeanor Arrestees Requesting Counsel at Article 15.17 Hearings³

Magistrate	Article 15.17 Warnings for Class A and Class B Offenses	Requests for Counsel	Percent Requesting Counsel
JP1	340	30	8.8%
JP2	435	14	3.2%
JP3	220	28	12.7%
JP4	312	21	6.7%
Wharton Municipal Court	49	1	2.0%
Wharton County Total	1,356	94	6.9%
JPs - State of Texas ⁴	116,862	36,489	31.2%

Observations of Article 15.17 Hearings

The monitor observed magistrate warnings administered by two justices-of-the-peace on April 3, 2014 and on April 22, 2014. Both hearings were conducted over a videoconference system where the judge was present in his/her office, and the arrestee was present at the jail. At the Article 15.17 hearing on April 3, five people received admonitions. The first two arrestees were told of the right to counsel, but were not asked whether they wanted to request counsel. The monitor mentioned that Article 15.17 requires the magistrate to ask all persons whether they want to request counsel. The judge replied that the jail asks all arrestees whether they want to request counsel and provides them with forms for doing so. The monitor then stated that tasks by jail staff devoted to counsel requests are laudable, but Article 15.17 does not allow for the magistrate to delegate to others the task of asking arrestees whether they want to request counsel. For the remaining arrestees, the judge asked arrestees if they were going to make bond or wanted to request counsel. The monitor did not observe anyone request counsel at the hearing.

At the Article 15.17 hearing on April 22, six people received admonitions. All persons were asked, "Do you want to request counsel or are you going to bond?" The first arrestee stated she was going to try to make bond. The second said that she wanted to attempt to make bond first, and then possibly request counsel. She seemed confused as to whether she could make bond and request counsel. The third arrestee stated that he planned to attempt to make bond. Then he asked for appointed counsel. The judge responded by saying that if the arrestee wants to request

² Many jurisdictions have difficulty reporting data showing requests for counsel at Article 15.17 hearings. The 31% rate of request for misdemeanor arrestees was based on reports by justices-of-the-peace, but only includes those justices-of-the-peace who reported a positive number of requests for counsel during the time frame in question.

³ This data was obtained from a query of Texas Judicial Council Monthly Court Activity Reports for the Period from September 2012 to August 2013, available at: <http://card.txcourts.gov/Secure/login.aspx?ReturnURL=default.aspx>.

⁴ This only includes justices-of-the-peace who reported requests for counsel.

court appointed counsel, he will have to remain in jail. The arrestee decided not to request counsel at the Article 15.17 hearing. The fourth arrestee stated that he was hoping to make bond. The judge replied, “If you don’t bond out, we can appoint someone for you.” The remaining two persons planned to attempt to make bond. One of these two already had retained counsel. Each of the arrestees at this hearing signed the magistrate warning form stating they were not requesting the appointment of counsel.

The monitor spoke with jail staff who stated that when an arrestee requests counsel, they provide the arrestee with the necessary paperwork. If the arrestee needs help completing the paperwork, jail staff provide assistance. After the form is complete, jail staff notarize the form, and promptly send the paperwork to the felony courts’ coordinator. The felony courts’ coordinator receives both misdemeanor and felony requests for counsel.

Article 15.17(a) of the Code of Criminal Procedure requires magistrates to inform arrestees of the right to request appointment of counsel if the person cannot afford counsel. Article 15.17(a) states:

. . . The magistrate shall also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel. . . .

A record is to be made showing that each person was asked if he/she wanted to request counsel and showing whether the person requested counsel. Article 15.17(e) of the Code of Criminal Procedure states:

(e) 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.*

Article 15.17(e) does not provide exceptions to recording whether an arrestee wants to request counsel. Every person who is brought before the magistrate under Article 15.17(a) is required to be asked whether he/she wants to request counsel, and the magistrate must make a record of informing the arrestee of the right to appointed counsel as well as a record of whether the arrestee wants to request appointed counsel. Article 15.17(a) does not provide for a prerequisite inquiry as to whether the arrestee can make bond before he/she can request counsel.

Rothgery v. Gillespie County, 554 U.S. 991 (2008), involved circumstances where a defendant who made bond attempted to request counsel. *Rothgery* held that the Sixth Amendment right to counsel attaches when a defendant appears before a magistrate and learns of the charges against him and his liberty is subject to restriction (i.e. the Article 15.17 hearing which was held to be the initiation of adversarial judicial proceedings). The attachment was not considered to occur at a later time if the defendant made bond.

Examination of Magistrate Warning Forms

The monitor examined 61 misdemeanor cases filed with the county clerk between March 5, 2013 and April 2, 2013 to document procedures for conducting Article 15.17 hearings. The magistrate warning form is not part of the misdemeanor case file, and so the monitor attempted

to match case files with magistrate warning forms maintained by the justices-of-the-peace. The monitor was able to match 46 of these cases.

Timeliness of Article 15.17 Hearings

According to persons interviewed, justices-of-the-peace are designated with responsibility to provide magistrate warnings on specific days of a month. The actual time of the warnings may vary, but almost all of the warnings are given in the morning. From the file review, the monitor was able to determine the time from arrest until the Article 15.17 hearing in 42 cases. In all 42 cases, the Article 15.17 hearing was administered within two days, and so appeared to meet the 48 hour time frame set in Article 15.17.⁵ See Table 3 showing the number of days between arrest and the Article 15.17 hearing.

Table 3: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Number of records examined	42	
Article 15.17 hearing occurs x days after arrest:		
0 days	10	23.8%
1 day	31	73.8%
2 days	1	2.4%
Timely Hearings	42	100%

Documentation of Requests for Counsel

Of the 46 magistrate warning forms examined by the monitor, one arrestee requested counsel, 43 did not request counsel, and two did not denote whether they requested counsel but did initial the part of the form covering the request for counsel. The magistrate warning forms appeared to meet the Article 15.17(e) requirement that the forms record whether arrestees are requesting counsel. The two forms not showing whether counsel was requested contained the arrestees' initials next to the question of whether counsel was requested. The arrestee initials give an indication that the arrestees attempted to answer whether counsel was being requested but had not made a decision on the matter.

⁵ Article 15.17(a) requires that the hearing occur within 48 hours. The monitor did not check the actual time between arrest and the Article 15.17 hearings, but compared the arrest date to the date of the hearing. If the arrest date occurred within two days, the monitor presumed that it occurred within 48 hours.

Recommendations Regarding Methods to Administer Article 15.17 Hearings

Please provide a written response to Recommendations 1 and 2 by September 15, 2014.

1) For offenses with a Class B misdemeanor grade and higher, the magistrate must ask all arrestees whether they want to request counsel. Article 15.17(a) of the Code of Criminal Procedure does not provide for a delegation of this task. Jail staff may also ask arrestees whether they want to request counsel.

2) An arrestee's ability to make bond may not be used as an impediment to a request for counsel. Article 15.17(a) does not provide for a prerequisite inquiry as to whether the arrestee can make bond before he/she can request counsel. *Rothgery v. Gillespie County*, 554 U.S. 991 (2008), held that the Sixth Amendment right to counsel attaches when a defendant appears before a magistrate and learns of the charges against him and his liberty is subject to restriction (i.e. the Article 15.17 hearing which was held to be the initiation of adversarial judicial proceedings).

II. Methods to Determine Indigence, Assign Counsel, and Accept Waivers of Counsel

As noted previously, requests for counsel made at the Article 15.17 hearing are forwarded to the felony courts' coordinator. The coordinator is not the appointing authority, but the conduit for transmitting requests to the person with authority to rule upon a request. The indigent defense plan states, "*The appointing authority for misdemeanors is the Wharton County Judge or a District Judge having jurisdiction in Wharton County.*"

Once a request for counsel is received (whether the request was made at the Article 15.17 hearing or at a later time), the appointing authority must rule upon the request according to the standards set in its indigent defense plan. The indigent defense plan sets the following standard of indigence:

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.*

Additionally, the plan states:

- 1. The accused's posting of bail or ability to post bail may not be considered in determining whether the accused is indigent.*
- 2. The resources available to friends or relatives of the accused may not be considered in determining whether the accused is indigent.*

Misdemeanor Docket

The monitor observed a misdemeanor docket on April 2, 2014. At this docket, arrestees initially checked in with the court coordinator. The coordinator explained to each defendant that he/she has three options: 1) to hire an attorney; 2) to proceed without counsel; or 3) to apply for court appointed counsel. The defendant's choice was documented. If counsel was requested, the appropriate paperwork was given to the defendant. After the check-in, the county judge explained these three options to all persons in the court room.

The court called each defendant individually to go over the three options again. Defendants wishing to retain counsel were given a re-set. Defendants wishing to proceed without counsel were allowed to speak with the prosecutor. Defendants who had requested counsel had their requests ruled upon. Defendants could change their mind from their initial statement at check-in. It appeared that some defendants who had initially requested counsel later decided to attempt to hire counsel. At this docket, four defendants requested counsel, and the court appointed counsel for three of them.

For those defendants who spoke to the prosecutor, some decided to accept the plea offer. Those that took the offer signed various plea papers, and the waiver of counsel was one of the terms of the plea offer. The language did not follow the language from Article 1.051(g) of the Code of Criminal Procedure. Defendants who accepted the plea offer initialized this form while speaking with the prosecutor. Defendants then went before the judge to finalize the plea. The monitor spoke to court officials about this practice, stating it did not conform to Article 1.051(g).

Under Article 1.051(g), the court may accept a pro se plea after the court determines that a waiver is voluntarily and intelligently made. The language of the waiver must substantially conform to Article 1.051(g). In order for Article 1.051(g) to be followed, the waiver cannot be a term of the plea agreement but must occur before the plea. Article 1.051(g) states:

(g) 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 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)"

Before the end of the docket, court officials amended their procedures for handling waivers of counsel and created a form with the language of Article 1.051(g). The court then made findings that waivers were being voluntarily and intelligently made prior to accepting a plea.

Examination of Misdemeanor Case Files

The monitor examined 61 misdemeanor cases filed with the county clerk between March 5, 2013 and April 2, 2013 to document procedures for ruling on requests for counsel. All 61 cases had been disposed. Eleven were disposed with retained counsel; four with appointed counsel; and 46 went pro se. The monitor found four files with requests for counsel. All four were appointed counsel. The monitor did not find any denials of indigence in the case files.

Concerning the timing of counsel appointments, the sample size was not large enough to determine whether the County had procedures in place for making timely appointments of counsel. However, of the four cases in which counsel was appointed: one was appointed on the day of request; one was appointed three working days after the request; one was appointed a month after the request; and one was appointed eight months after the request. While the sample size is not large enough to make a recommendation, the County does not appear to have procedures in place to always track and rule on requests for counsel within the three working day time frame set in Article 1.051(c).

Concerning waivers of counsel, all files with pro se pleas contained waivers of counsel, but the waiver language did not conform to Article 1.051(g). Instead, the waivers were a term of the plea agreement. On a positive note, no persons from the sample who had requested counsel entered an uncounseled plea while having a pending request for counsel.

Summary of Waiver of Counsel Provisions

Waivers of counsel provisions are found in Article 1.051(f) - (h) of the Code of Criminal Procedure. Article 1.051(f) states that waivers obtained in violation of (f-1) or (f-2) are presumed invalid. Under Article 1.051(f-1), the prosecutor may not initiate or attempt to obtain a waiver from an unrepresented defendant. The prosecutor cannot even communicate with the defendant until all requests for counsel have been denied, the defendant has been given a reasonable opportunity to retain private counsel, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must advise unrepresented defendants of the right to appointed counsel and must explain the procedures for requesting counsel. The court may allow the defendant to communicate with the prosecutor after the defendant has waived the opportunity to retain private counsel. If the defendant speaks with the prosecutor and then wishes to plead guilty, the court must determine that a waiver for purposes of entering a plea is voluntarily and intelligently made. The language of the waiver must substantially conform to the waiver language of Article 1.051(g).

Comparing these provisions with Wharton County's procedures, the monitor found:

- 1) The County explains the right to appointed counsel to all defendants at its misdemeanor dockets.
- 2) The County documents defendants' decisions as to whether they would like to retain counsel, proceed without counsel, or apply for court appointed counsel.
- 3) The monitor could not determine if all requests for counsel are denied prior to a waiver of counsel (for purposes of speaking with the prosecutor). The monitor did not see any waivers with requests for counsel pending at the time of the waiver, but the monitor did not see any denials of indigence in the case files examined.
- 4) At the time of the review, the County did not have procedures to ensure that waivers of counsel were voluntarily and intelligently made prior to a guilty plea. The language of the

waiver did not conform to Article 1.051(g). The County remedied this issue during the observed docket.

Recommendation Regarding Methods to Determine Indigence, Assign Counsel, and Accept Waivers of Counsel

Please provide a written response to Recommendation 3 by September 15, 2014.

3) Wharton County must ensure that waivers of counsel meet the requirements found in Article 1.051(f) – (h). Waivers not meeting the provisions of Article 1.051(f-1) or (f-2) are presumed invalid. To ensure that waivers meet the requirements:

1) All requests for counsel must be ruled upon prior to any communication between the defendant and the prosecutor and

2) The court must determine that waivers of counsel (for purposes of entering a plea) are voluntarily and intelligently made. The waivers must occur prior to the plea, and the language must substantially conform to Article 1.051(g).

Conclusion

The monitor appreciated the professionalism and assistance provided by Wharton County officials and staff. Wharton 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 findings and recommendations

APPENDIXES

APPENDIX A - INDIGENT DEFENSE EXPENDITURE REPORT

Wharton County Indigent Defense Expenditures			
Expenditures	2011	2012	2013
Population Estimate	41,280	41,288	41,561
Juvenile Assigned Counsel	\$62,240.41	\$9,100.00	\$7,900.00
Capital Murder	\$48,829.32		
Adult Non-Capital Felony Assigned Counsel	\$74,993.73	\$135,133.33	\$115,701.77
Adult Misdemeanor Assigned Counsel	\$20,325.00	\$13,475.00	\$13,225.00
Juvenile Appeals			
Adult Felony Appeals		\$6,000.00	\$21,035.35
Adult Misdemeanor Appeals			
Licensed Investigation	\$10,032.06	\$649.70	
Expert Witness	\$65,636.42	\$1,000.00	
Other Direct Litigation	\$12,210.40	\$4,065.40	\$1,145.86
Total Court Expenditures	\$294,267.34	\$169,423.43	\$159,007.98
Administrative Expenditures	\$23,599.66	\$24,332.39	\$26,055.67
Funds Paid by Participating County to Regional Program			\$15,903.00
Total Court and Administrative Expenditures	\$317,867.00	\$193,755.82	\$200,966.65
Formula Grant Disbursement	\$27,637.00	\$22,706.00	\$28,674.00
Equalization Disbursement		\$6,846.00	
Discretionary Disbursement			
Reimbursement of Attorney Fees	\$22,557.00	\$15,773.75	\$20,855.59
Reimbursement by State Comptroller for Writs of Habeas Corpus	\$25,000.00		
Total Assigned Counsel Cases	413	575	598

Indigent Defense Expenditure Reporting

Source: Texas Indigent Defense Commission records

Wharton County Data Sheet

Year	2011	2012	2013
Population (Non-Census years are estimates)	41,280	41,288	41,561
Felony Charges Added (from OCA report)	802	1,039	899
Felony Cases Paid	170	393	435
% Felony Charges Defended with Appointed Counsel	21.20%	37.82%	48.39%
Felony Trial Court-Attorney Fees	\$123,823.05	\$135,133.33	\$115,701.77
Total Felony Court Expenditures	\$205,107.01	\$140,848.43	\$116,847.63
Misdemeanor Charges Added (from OCA report)	1,265	1,275	1,124
Misdemeanor Cases Paid	149	122	99
% Misdemeanor Charges Defended with Appointed Counsel	11.78%	9.57%	8.81%
Misdemeanor Trial Court Attorney Fees	\$20,325.00	\$13,475.00	\$13,225.00
Total Misdemeanor Court Expenditures	\$20,325.00	\$13,475.00	\$13,225.00
Juvenile Charges Added (from OCA report)	120	98	99
Juvenile Cases Paid	94	59	50
Juvenile Attorney Fees	\$62,240.41	\$9,100.00	\$7,900.00
Total Juvenile Expenditures	\$68,835.33	\$9,100.00	\$7,900.00
Total Attorney Fees	\$206,388.46	\$163,708.33	\$157,862.12
Total ID Expenditures	\$317,867.00	\$193,755.82	\$200,966.65
Increase In Total Expenditures over Baseline	202.31%	84.27%	91.13%
Total ID Expenditures per Population	\$7.70	\$4.69	\$4.84
Commission Formula Grant Disbursement	\$27,637.00	\$22,706.00	\$28,674.00
Commission Equalization Grant Award		\$6,846.00	

Indigent Defense Expenditure Reporting

Source: Texas Indigent Defense Commission records

APPENDIX B - CRITERIA

Criteria

Uniform Grant Management Standards

Texas Government Code, Section 79.036. Indigent Defense Information

Texas Government Code, Section 79.037. Technical Support; Grants

Texas Code of Criminal Procedure, Article 1.051

Texas Code of Criminal Procedure, Article 15.17

Texas Code of Criminal Procedure, Article 26.04

Texas Code of Criminal Procedure, Article 26.05

Texas Administrative Code - Title 1, Part 8, Chapter 174 Subchapter A Rule 174.1

Texas Administrative Code - Title 1, Part 8, Chapter 174 Subchapter A Rule 174.2

Texas Administrative Code - Title 1, Part 8, Chapter 174 Subchapter B Definitions

FY 2013 Indigent Defense Expenditure Report Manual found at:

http://www.txcourts.gov/tidc/pdf/FY2013_IDER_ManualFinal.pdf

Wharton County Adult Indigent Defense Plan found at:

<https://tidc.tamu.edu/IDPlan/ComplianceChecklist.aspx?pid=80>

Wharton County Juvenile Indigent Defense Plan found at:

<https://tidc.tamu.edu/IDPlan/ComplianceChecklist.aspx?pid=251>