



Follow-up Review of Milam County's Indigent Defense Systems

July 2023

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Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.¹ In this follow-up review, TIDC interviewed local staff and examined FY2022 case file records. TIDC found that previous report findings dealing with methods for determining indigence and practices that directed unrepresented defendants to speak with the prosecutor had been addressed. TIDC found that, in felony and misdemeanor cases, counsel was appointed timely in less than 90% of sample cases. In misdemeanor cases, some defendants waived counsel while their counsel requests were pending.

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

Background

In June 2016, TIDC conducted an informal drop-in review in Milam County, examined a small sample of misdemeanor case files, observed a misdemeanor docket, and spoke with the county judge and various county employees about local procedures for handling counsel requests. The drop-in review revealed that while arrestees often requested counsel at the Article 15.17 hearing, many of these requests were not ruled upon, and a large portion of those arrestees entered uncounseled pleas.

As a result of the June 2016 drop-in review, TIDC conducted a limited scope monitoring review in 2018 to examine methods for handling counsel requests in misdemeanor cases. The report found that misdemeanor defendants were not able to request counsel and receive rulings on those requests according to standards listed in Milam's indigent defense plan. Instead, defendants were directed to speak with the prosecutor. The report made three findings relating to this practice:

1. Determinations of indigence must follow the standards set in the indigent defense plan;
2. Determinations of indigence must be made within three working days of the court receiving the request for counsel; and
3. The court must explain the procedures for requesting counsel prior to communications between the prosecutor and unrepresented defendants.

The County responded by stating that determinations of indigence would follow the standards set in the indigent defense plan and by designating days to determine indigence and assure timely appointments of counsel. Paperwork sent to unrepresented

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

defendants was amended to note that only defendants who had not requested counsel should speak with the prosecutor before the first trial court appearance.

Table 1: History of Monitoring Findings for Milam County

FDA Core Requirement	Description and Initial Year of Finding and Recommendation	Status after 2023 Review	
		Satisfied	Pending
2. Indigence Determinations	Determinations of indigence must follow standards set in the indigent defense plan. (2018)	✓ (2023)	
4. Prompt Appointment	The timeliness of felony counsel appointments does not meet TIDC’s administrative threshold (90% of sample cases receive timely rulings). (2023)		✓(New finding)
4. Prompt Appointment	The timeliness of misdemeanor counsel appointments does not meet TIDC’s administrative threshold (90% of sample cases receive timely rulings). (2018)		✓
4. Prompt Appointment (waivers of counsel)	The court must explain the procedures for requesting counsel prior to communications between the prosecutor and unrepresented defendants. (2018)	✓ (2023)	
4. Prompt Appointment (waivers of counsel)	The court must rule on all counsel requests prior to waivers of counsel.		✓(New finding)

Current Review

TIDC's policy monitoring rules require follow-up reviews where the report included noncompliance findings.³ Prior to conducting this follow-up review, TIDC received a complaint about procedures for appointing counsel in felony cases, so TIDC expanded this review to include felony cases.

Staff members Olivia Lee, Joel Lieurance and Kristin Meeks conducted the follow-up review of Milam County with site visits on December 14, 2022, March 2, 2023, and March 7, 2023. TIDC observed felony and misdemeanor dockets and an Article 15.17 hearing. TIDC examined felony and misdemeanor case files and met with local officials and staff. This review encompasses the policy monitoring core requirements listed below:⁴

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

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

Program Assessment

Description of Local Counsel Appointment Procedures

After arrest in Milam County, defendants go before a magistrate for the Article 15.17 hearing. The magistrates conducting these hearings include two justices of the peace and a municipal judge. The hearings are conducted either in person at the jail or by videoconference. At the hearing, a magistrate determines whether there is probable cause to detain the individual, sets bail, and asks defendants whether they would like to request counsel. Magistrates personally assist with affidavits of indigence and forward them to the appointing courts.

Felony requests for counsel are sent to the district court coordinator, and misdemeanor requests are sent to the staff person in the County Clerk's Office handling misdemeanor cases. Many defendants with misdemeanor charges also have felony charges, and so the misdemeanor court often waits on the felony court before appointing counsel. This coordination ensures the same attorney represents defendants on both the felony and misdemeanor cases. However, the coordination can be logistically difficult.

When felony defendants come to court, the district judge asks each if they have counsel and their intent to either hire or apply for court appointed counsel. In

³ 1 TEX. ADMIN. CODE § 174.28(d)(3).

⁴ A full monitor review will cover all seven core requirements. This review does not cover:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS;

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS;

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS. or

REQUIREMENT 6: STATUTORY DATA REPORTING.

misdemeanor cases, the county judge lays out the three options for defendants (retain counsel, request appointed counsel, or waive counsel), and then asks each their choice. Both levels inform defendants of their options in court and allow for counsel requests.

Requirement 2: Determine indigence according to standards directed by the indigent defense plan.

Article 26.04(l) of the Code of Criminal Procedure requires the courts to adopt procedures and financial standards for determining whether a defendant is indigent. Milam County’s indigent defense plan presumes indigence if defendants receive certain public benefits, are incarcerated, or have net household income less than the Federal Poverty Guidelines.⁵

At the time of the 2018 review, misdemeanor defendants who requested counsel were denied indigence in order to proceed pro se. These denials were not based on the local financial standard.

In the current review, neither TIDC’s court observations nor file review examination revealed any defendants who were denied indigence in order to proceed pro se. Based on TIDC’s examination, Milam County has addressed the 2018 finding, making determinations of indigence based upon the factors in the indigent defense plan.

<p style="text-align: center;"><u>FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2</u></p> <p style="text-align: center;">Determine indigence according to standards directed by the indigent defense plan.</p> <p>FINDING 1 AND RECOMMENDATION: Determinations of indigence do not always follow the financial standard established by the local indigent defense plan. In making determinations of indigence, the court must rule upon counsel requests according to whether the local financial standard of indigence has been met.</p> <p><i>Successfully Addressed.</i></p>
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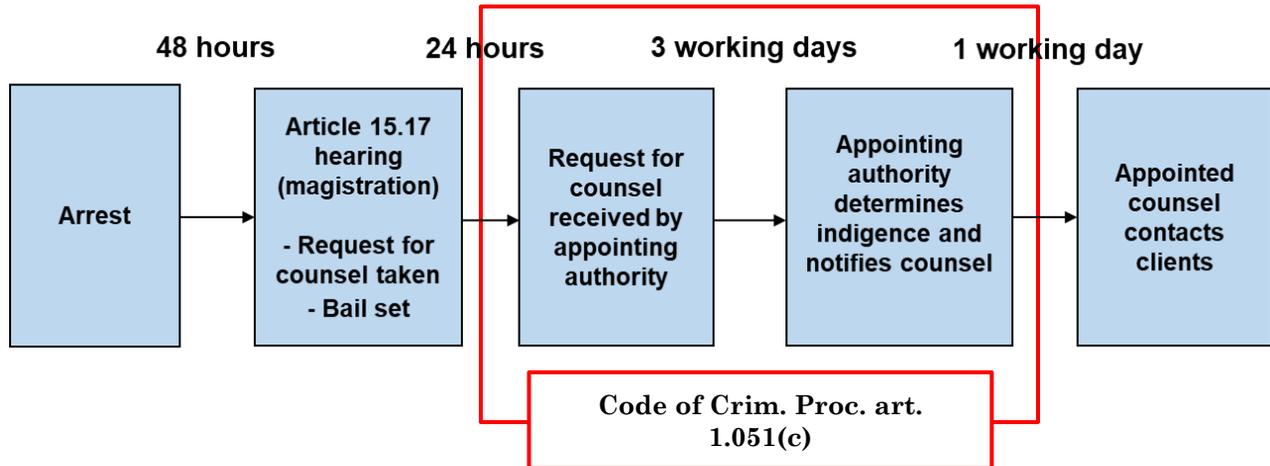
⁵ The standard in Milam County presumes an individual is indigent if:

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 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, or*
3. *The accused’s net household income does not exceed the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register, and the accused is assessed to not have sufficient resources to retain counsel after taking into account the factors listed under "ii" below.*

Requirement 4: Appoint counsel promptly.

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

Figure: Timeline for Appointment of Counsel in Adult Criminal Cases



The first opportunity for most defendants to request counsel is at the Article 15.17 hearing when a defendant appears before a magistrate and is informed of the charges against him or her. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has the first opportunity to request counsel at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial of indigence. Under TIDC’s monitoring rules, a county is presumed to promptly appoint counsel if at least 90% of indigence determinations in the monitor’s sample are timely.⁶

Timeliness of Appointments in Felony Cases

In Milam County, the 20th District Court Judge is the appointing authority for felony cases. TIDC examined 65 felony cases filed in FY2022 (October 2021 – September 2022) to determine the timeliness of felony appointments. From this sample, TIDC found 52 requests for counsel. Counsel was appointed in a timely manner in 60% of those cases. This falls below TIDC’s threshold (90% timely) for presuming a jurisdiction’s procedures ensure timely appointment of counsel. Several of the untimely samples involved defendants who promptly made bail. Milam County must implement practices that satisfy this appointment timeline in felony cases.

⁶ 1 TEX. ADMIN. CODE § 174.28.

Table 2: Times from Request to Appointment in Felony Cases

	Number from Sample	Percent of Sample
Total records examined	65	
Requests for counsel	52	
Request for counsel ruled upon in 'x' workdays		
0 workdays	14	
1 to 3 workdays + 24 hours allowed to transmit a request	17	
Timely Rulings on Requests	31	60%
Between 4 and 7 workdays	6	
More than 7 workdays	14	
No ruling on request	1	
Untimely / No Rulings on Requests	21	40%

Timeliness of Appointments in Misdemeanor Cases

The Milam County Court Judge is the appointing authority for misdemeanor cases. TIDC examined 93 misdemeanor cases filed in FY2022 (October 2021 – September 2022) to determine the timeliness of misdemeanor appointments. From this sample, TIDC found 45 requests for counsel. Counsel was appointed in a timely manner in 49% of those cases. This falls below TIDC's threshold (90% timely) for presuming a jurisdiction's procedures ensure timely appointment of counsel. Several of the untimely samples involved defendants who promptly made bail. Milam County must implement practices that satisfy this appointment timeline in misdemeanor cases.

Table 3: Times to Appointment in Misdemeanor Cases

	Number from Sample	Percent of Sample
Total records examined	93	
Requests for counsel ¹⁶	45	
Request for counsel ruled upon in 'x' workdays		
0 workdays	18	
1 to 3 workdays + 24 hours allowed to transmit a request	4	
Timely Rulings on Requests	22	49%
Between 4 and 7 workdays	1	
More than 7 workdays	12	
No ruling on request	10	
Untimely / No Rulings on Requests	23	51%

Waivers of Counsel

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made. Under Article 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 denied, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must explain the procedures for requesting counsel to an unrepresented defendant and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If a defendant enters an uncounseled plea, the defendant must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).

Ruling on Requests Prior to Waivers

TIDC's case file examination contained ten misdemeanor samples in which defendants requested counsel at the Article 15.17 hearing, but the court did not rule on the requests. In seven of these cases, the defendant entered an uncounseled plea without the request having been ruled upon. The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Milam County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

Initiation of Waivers

The previous review found that the initial appearance paper notification to defendants directed them to speak with the prosecutor prior to explaining the procedures for requesting counsel. This direction was added at the request of a previous county judge. Based on interviews, the paperwork directing unrepresented defendants to speak with the prosecutor has been removed. However, some of this paperwork was found in our case file review. Milam County officials and staff should review their notification paperwork and remove any notification paperwork that direct unrepresented defendants to speak with the prosecutor.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

FINDING 2 AND RECOMMENDATION (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy the appointment timeline in Article 1.051(c)(1) in felony cases. *New Finding*

FINDING 3 AND RECOMMENDATION (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy the appointment timeline in Article 1.051(c)(1) in misdemeanor cases. *Issue Pending*

FINDING 4 AND RECOMMENDATION: The absence of a ruling in sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Milam County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2). *New Finding*

FINDING 5 AND RECOMMENDATION: Through the initial appearance notification, defendants are encouraged to communicate with the attorney representing the state prior to the trial court explaining the procedures for requesting counsel. The court must explain the procedures for requesting counsel prior to communications between the attorney representing the state and the defendant. *Successfully Addressed.*

Conclusion

TIDC thanks Milam County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.⁷ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

⁷ 1 TEX. ADMIN. CODE § 174.28(c)(2).

Summary of Findings and Recommendations

Milam County must respond in writing how it will address each of these findings and recommendations.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

2023 FINDING 1 AND RECOMMENDATION (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy the appointment timeline in Article 1.051(c)(1) in felony cases. *New Finding*

2023 FINDING 2 AND RECOMMENDATION (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy the appointment timeline in Article 1.051(c)(1) in misdemeanor cases. *Issue Pending*

2023 FINDING 3 AND RECOMMENDATION: The absence of a ruling in sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Milam County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2). *New Finding*