



# **Policy Monitoring Follow-up Review of Fisher County's Indigent Defense Systems**

**March 2023**



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**Mission:** Protecting the right to counsel, improving public defense

## Contents

Executive Summary .....	4
Background .....	4
Current Review .....	5
Program Assessment .....	6
REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS ....	6
REQUIREMENT 4: APPOINT COUNSEL PROMPTLY .....	9
Conclusion .....	11
Summary of Findings and Recommendations .....	11

## **Executive Summary**

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.<sup>1</sup> In this follow-up review, TIDC interviewed officials and reviewed FY2021 data from Fisher County. TIDC made 3 findings regarding:

- Procedures for transmitting financial affidavits to the courts;
- Timely ruling on misdemeanor requests for counsel; and
- Ruling on misdemeanor requests for counsel prior to uncounseled pleas.

TIDC thanks Fisher County officials and staff for their assistance in completing this review. TIDC stands ready to provide technical or financial assistance to remedy these issues. TIDC will conduct a second follow-up review regarding its finding within two years.<sup>2</sup>

### **Background**

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act through on-site reviews. These reviews seek to promote local compliance with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes where needed.

In May 2017, TIDC made a drop-in visit to Fisher County and examined local procedures for appointing counsel in misdemeanor cases. At the time, the Fisher County Jail was not in use, and misdemeanor arrestees were either transferred to other counties' jails or released on bail. For those persons who were promptly released on bail, the County could not produce any forms showing arrestees had been given an opportunity to request counsel. When arrestees were transferred to other counties and requested counsel, their requests were not ruled upon.

In 2019, TIDC conducted a limited scope review to examine whether misdemeanor arrestees are able to request and receive appointed counsel. The review identified issues with procedures for (1) handling counsel requests made to magistrates, (2) reporting those requests to the Office of Court Administration (OCA), and (3) ensuring all requests were ruled upon prior to an uncounseled plea.

Historically, the percent of misdemeanor defendants receiving appointed counsel in Fisher County has been significantly lower than the statewide average (see Table 1).

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

<sup>2</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

**Table 1: Misdemeanor Cases Paid as a Percentage of New Cases Added**

Year	2017	2018	2019	2020	2021	Texas 2021
Misdemeanor Cases Added (from OCA report)	37	66	60	50	58	329,309
Misdemeanor Cases Paid	1	5	5	1	1	143,702
% Misdemeanor Cases Paid	3%	8%	8%	2%	2%	44%

**Current Review**

TIDC staff members Joel Lieurance and William R. “Bill” Cox visited Fisher County to conduct a limited scope review on May 24, 2022. The review focused on the ability of misdemeanor arrestees to request and obtain appointed counsel. TIDC compared local practices to 2 core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

TIDC examined 31 misdemeanor cases filed in FY2021 (October 2020 – September 2021) and interviewed local officials.

**Table 2: History of Monitoring Findings and Recommendations**

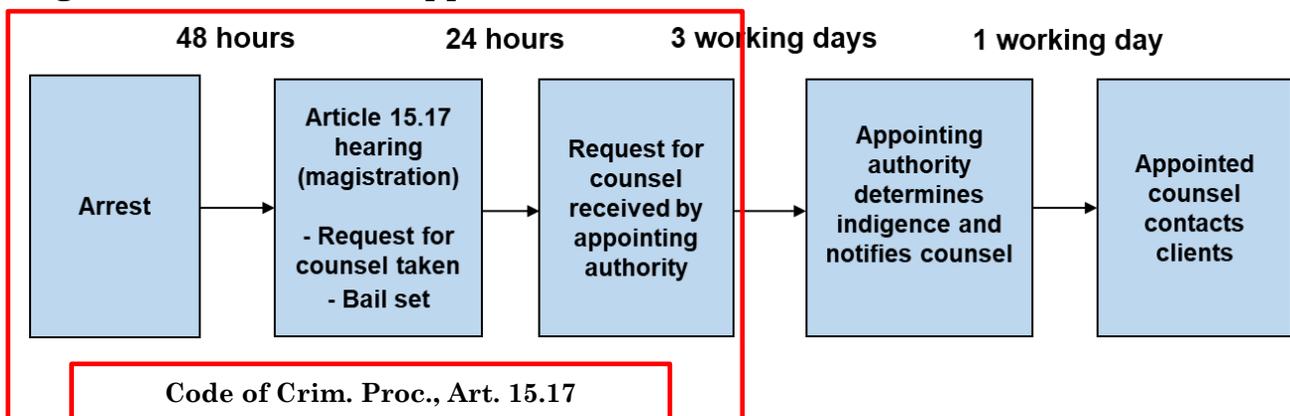
FDA Core Requirement	Description and Initial Year of Finding and Recommendation	Status after September 2023 Review	
		Satisfied	Pending
1. Prompt Magistration	Magistrate must inform arrestees charged with class B misdemeanors and higher offenses of the procedure for requesting counsel, ask all arrestees if they want to request counsel, and record each individual’s responses. (2019)	✓(2023)	
1. Prompt Magistration	To ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports, the justice of the peace must report the number of magistrate warnings conducted and the number of persons requesting counsel to OCA. (2019)	✓(2023)	
1. Prompt Magistration	Counsel requests and financial affidavits must be transmitted to the courts within 24 hours of the request being made. <b>New Finding.</b>		✓
4. Prompt Appointment	Uncounseled defendants with pending counsel requests pled to misdemeanor charges. (2019)		✓
4. Prompt Appointment	TIDC’s review of sample misdemeanor cases was less than 90% timely. <b>New Finding.</b>		✓

## Program Assessment

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

A person must be brought before a magistrate within 48 hours of arrest.<sup>3</sup> At this hearing, the magistrate must inform the arrestee of the right to counsel, procedures for requesting counsel, and ensure the person has reasonable assistance in completing the necessary forms for requesting assistance of counsel.<sup>4</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>5</sup>

**Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases**



#### ***Ability of Arrestees to Request Counsel***

Prior to being booked into the Fisher County jail, arrestees go before a local magistrate (typically the justice of peace) for the Article 15.17 hearing. At the Article 15.17 hearing, the magistrate must inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused's request for counsel.<sup>6</sup> The magistrate must make a record of each step of this exchange.<sup>7</sup> If the arrestee requests counsel, the magistrate must ensure that reasonable assistance in completing the financial affidavit is provided to the arrestee. The request and associated paperwork must then be transmitted to the appointing authority within 24 hours of the request having been made.

According to monthly justice court reports to OCA, more than half of misdemeanor defendants request counsel at the Article 15.17 hearing. TIDC's sample

<sup>3</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

of Fisher misdemeanor cases also included counsel requests. These pieces of data are an indication that defendants have the ability to request counsel at the Article 15.17 hearing.

### ***Assistance with Forms and Transmissions to the Courts***

At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel.<sup>8</sup> Magistrates must transmit requests for counsel to the appointing authority within 24 hours of the request being made.<sup>9</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant-issuing county.<sup>10</sup>

TIDC's case sample included several cases in which defendants requested counsel at the Article 15.17 hearing where the County Court did not receive the requests within 24 hours. Some of these defendants entered uncounseled pleas without the court ruling on the request. Fisher County must develop procedures that ensure counsel requests and associated financial forms are sent to the appointing authority within 24 hours of the request being made.

### ***Reports on Hearings and Requests***

Justices of the Peace and Municipal Judges must submit Judicial Council Monthly Court Activity Reports to OCA. The reports document the number of Article 15.17 hearings conducted and the number of requests for counsel from these hearings.<sup>11</sup> TIDC uses these reports, as well as court observations and case file records, to determine if magistrates inform arrestees of their right to counsel and if arrestees are able to invoke that right.

For FY2021 (October 2020 – September 2021), the Justice of the Peace for Fisher County report conducting 26 magistrations hearings for Class A or B misdemeanors and 32 hearings for felony cases. Arrestees made requests for counsel in 16 (61.5%) of the misdemeanor hearings and 26 (81.3%) of the felony hearings, indicating the justice court is reporting the data to OCA.<sup>12</sup>

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<sup>8</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>9</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>10</sup> TEX. CODE CRIM. PROC. ART. 15.18 (a-1).

<sup>11</sup> 1 TEX. ADMIN. CODE § 171.7.

<sup>12</sup> Court activity may be queried from OCA's court activity database, available at <https://www.txcourts.gov/statistics/court-activity-database/>.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

**Conduct prompt and accurate magistrature proceedings.**

**2019 FINDING and RECOMMENDATION 1:** Magistrate must inform arrestees charged with class B misdemeanors and higher offenses of the procedure for requesting counsel, ask all arrestees if they want to request counsel, and record each individual's responses. *Successfully Addressed*

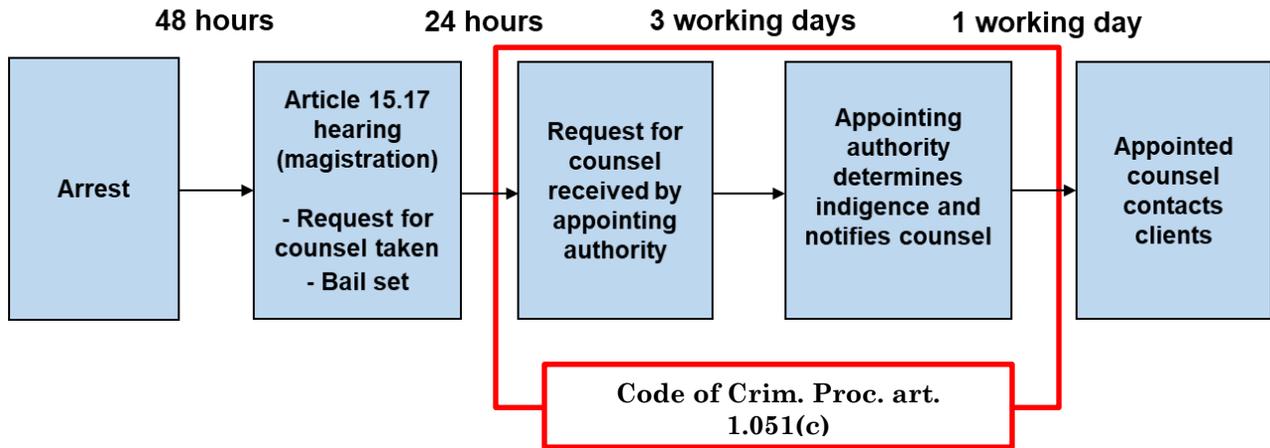
**2019 FINDING and RECOMMENDATION 2:** In order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports, the justice of the peace must report the number of magistrate warnings conducted and the number of persons requesting counsel to OCA. *Successfully Addressed*

**2023 FINDING and RECOMMENDATION 3:** TIDC's case sample included several cases where defendants requested counsel at the Article 15.17 hearing, but the County Court did not receive the requests within 24 hours. Fisher County must develop procedures that ensure counsel requests and associated financial forms are sent to the appointing authority within 24 hours of the request being made. *New Finding*

## 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 3 working days of receiving the request.

**Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases**



### *Timeliness of Appointments in Misdemeanor Cases*

To assess the ability of Fisher County defendants to receive prompt appointment of counsel in misdemeanor cases, TIDC examined 31 sample misdemeanor cases filed in FY2021 (October 2020 – September 2021). From this sample, 16 persons requested counsel, including 14 at 15.17 hearings. Counsel was appointed timely for three of the 16 requests (**19% timely**). This does not meet TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel. In six cases, defendants entered uncounseled pleas without a documented denial of the request.

**Table 3: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	31		
Total cases with a counsel request <sup>13</sup>		16	
<b>Appointment / denial of indigence occurred in:</b>			
0 working days		3	
1 – 3 working days + 24-hour transfer			
<b>Total timely appointments / denials</b>		<b>3</b>	<b>19%</b>
More than 3 working days + 24-hour transfer		3	
No ruling on request		10	
<b>Total untimely appointments / denials</b>		<b>13</b>	<b>81%</b>

<sup>13</sup> Additional requests may have been made; however, TIDC did not obtain magistrate warning forms for all sample cases.

### ***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).

TIDC's case file examination contained ten samples in which defendants requested counsel at the Article 15.17 hearing, but the court did not receive the requests. In six 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)). Fisher 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).

#### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4**

##### **Prompt Appointment**

**2019 FINDING and RECOMMENDATION 4:** The absence of a ruling on some sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Fisher 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). ***Issue Pending.***

**2023 FINDING and RECOMMENDATION 5:** 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 allowed for transferring requests to the courts) of the request being made. Fisher County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. ***New Finding.***

## Conclusion

TIDC appreciated the professionalism and assistance provided by Fisher County officials and staff. Fisher County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, TIDC will continue to review the County's transition and adjustments to the report's findings.

### **2023 Summary of Findings and Recommendations**

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

**2023 FINDING and RECOMMENDATION 3:** TIDC's case sample included several cases in which defendants requested counsel at the Article 15.17 hearing, but in which the County Court did not receive the requests within 24 hours. Fisher County must develop procedures that ensure counsel requests and associated financial forms are sent to the appointing authority within 24 hours of the request being made. *New Finding*

**2023 FINDING and RECOMMENDATION 4:** The absence of a ruling on ten sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waivers of counsel (Art. 1.051(f-2)). Fisher 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). *Issue Pending.*

**2023 FINDING and RECOMMENDATION 5:** 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 allowed for transferring requests to the courts) of the request being made. Fisher County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. *New Finding.*