



# **Follow-up Review of Midland County's Indigent Defense Systems**

**April 2023**



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## **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 observed misdemeanor dockets, interviewed officials, and reviewed FY2021 data from Midland County. TIDC made two findings regarding:

- Timely ruling on misdemeanor requests for counsel; and
- Providing uncounseled defendants the opportunity to request appointed counsel prior to judicial proceedings which could result in confinement.

TIDC thanks Midland 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 follow-up review regarding its findings within two years.<sup>2</sup>

## **Background**

TIDC monitors local jurisdictions' compliance with the Fair Defense Act ("FDA") through on-site reviews.<sup>3</sup> These reviews seek to promote local compliance with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed.

In July 2007, TIDC issued its initial monitoring report of Midland County. That review found arrestees did not have the ability to request counsel at the Article 15.17 hearing. To address this finding, Midland County implemented procedures in which magistrates ask all defendants whether they wanted to request counsel at the Article 15.17 hearing. This change did not result in misdemeanor defendants having the ability to readily obtain counsel. After two follow-up reviews, a seamless process was created to promptly transmit requests for counsel to the appointing authority, where they could be ruled upon. TIDC 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, TIDC received a complaint regarding the ability of a misdemeanor defendant to request counsel at the arraignment docket. Staff forwarded the complaint to Midland County Court at Law #2. After considering the Court's reply, TIDC's Board directed staff to conduct a limited-scope monitoring review of Midland County to examine local procedures for accepting and ruling upon misdemeanor requests for counsel. The review identified issues with the ability of cite-and-release defendants to request counsel, the timeliness of misdemeanor counsel appointments, and procedures for ruling on misdemeanor requests for counsel prior to uncounseled pleas.

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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).

<sup>3</sup> TEX. GOV'T CODE § 79.037(a)–(b).

**Table 1: Misdemeanor Cases Paid as a Percentage of Cases Disposed**

<b>Year</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Texas 2021</b>
Misdemeanor Cases Disposed (from OCA report)	4,393	4,057	3,853	2,622	2,723	329,309
Misdemeanor Cases Paid	641	562	575	543	435	143,702
% Misdemeanor Cases Paid	15%	14%	15%	17%	16%	44%

## **Current Review**

TIDC’s policy monitoring rules require follow-up reviews where the report included noncompliance findings.<sup>4</sup> TIDC staff members Scott Ehlers, Joel Lieurance, and William R. “Bill” Cox conducted monitoring follow-up visits on May 25-26 and December 15, 2022. The review focused on the ability of misdemeanor arrestees to request and obtain appointed counsel. TIDC compared local practices to two core requirements of the Fair Defense Act:

**REQUIREMENT 1: CONDUCT PROMPT AND ACCURRATE ARTICLE 15.17  
PROCEEDINGS**

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

TIDC observed misdemeanor dockets, interviewed local officials, and examined 100 cases filed in the second half of FY2021 (April to September 2021).

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<sup>4</sup> 1 TEX. ADMIN. CODE § 174.28(d)(3).

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

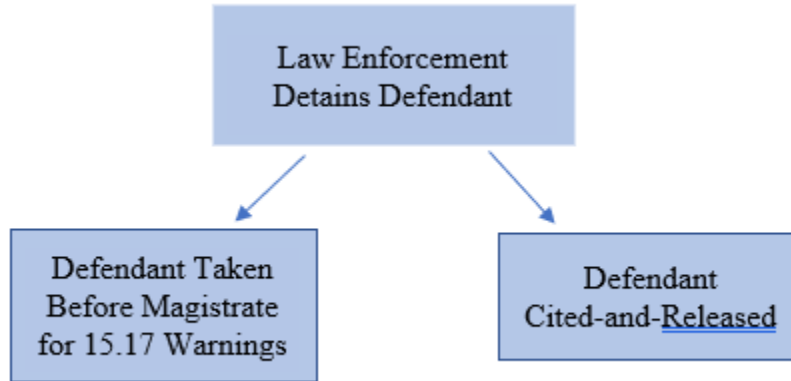
FDA Core Requirement	Description and Initial Year of Finding and Recommendation	Status after 2023 Review	
		Satisfied	Pending
1. Prompt Magistration	Defendants who are cited and released for a class A or B misdemeanor, must receive article 15.17 warnings. Midland County must implement practices to ensure all cite-and-release arrestees are given Article 15.17 warnings.	✓ 2023	
4. Prompt Appointment	Midland County must implement practices to ensure unrepresented defendants charged with jailable misdemeanors and felonies have the opportunity to request appointed counsel prior to judicial proceedings which could result in confinement.		✓ <i>New Finding 2023</i>
4. Prompt Appointment	Counsel must 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 appointment occur within three working days (plus 24 hours allowed for transmitting requests) of the request being made.		✓
4. Prompt Appointment	Procedures are not in place to ensure all misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. Midland must implement practices to ensure all requests for counsel are ruled upon timely.	✓ 2023	

## Program Assessment

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

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

**Figure 1: Midland Processes for 15.17 Hearings**



Prior to an arraignment docket, misdemeanor defendants take different paths through the Midland County criminal justice system. Some defendants receive a citation with a notice to appear at a court docket and are never booked into the county jail.<sup>5</sup> Most 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 32% of misdemeanor arrestees appearing before justices of the peace at the Midland County Jail request counsel at the hearing.<sup>6</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.

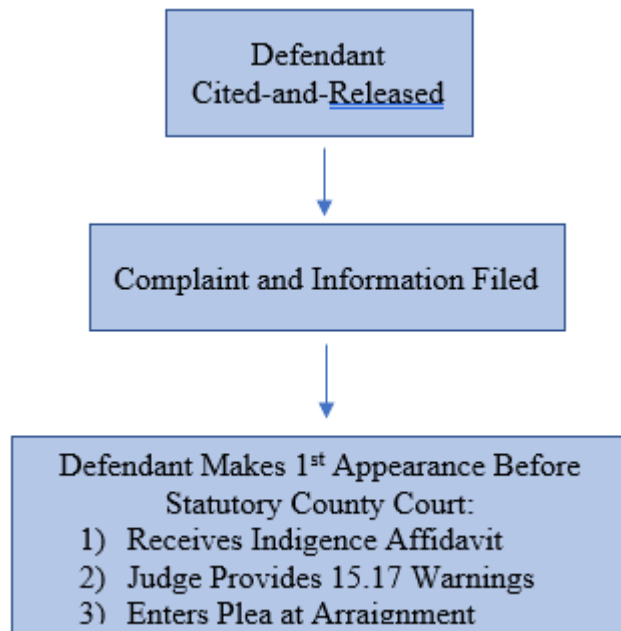
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<sup>5</sup> Midland County appears to exercise cite and release practices for certain misdemeanor offenses, such as driving with license invalid and possession of marijuana under two ounces.

<sup>6</sup> The time period for this data query was from October 2019 to September 2022. Queries may be made at: <http://www.txcourts.gov/statistics/court-activity-database/>.

## ***Cite-and-Release Defendants Article 15.17 Procedures***

**Figure 2: Midland Cite-and-Release Processes for 15.17 Hearings**



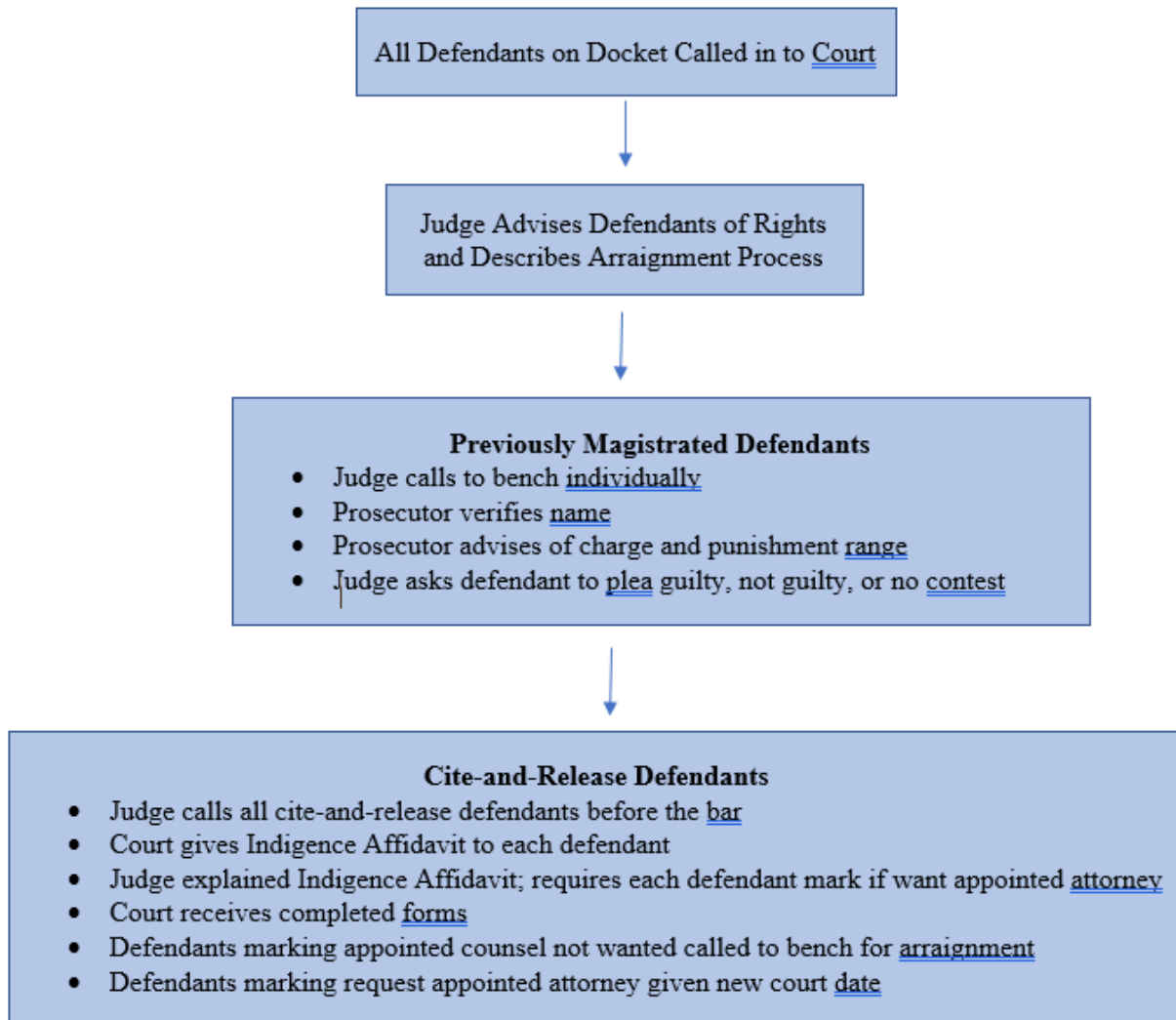
Cite-and-release policies are authorized by Article 14.06 of the Code of Criminal Procedure. Under Article 14.06(c), law enforcement may give a citation directing persons arrested for certain misdemeanor offenses to appear before a magistrate rather than detain them at the jail. In Midland County, this appearance is at the statutory county court, where the judge acts as a magistrate.

Once the cite-and-release defendant 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. This appearance is the defendant's first contact with a judge, and the defendant may be unaware of his or her rights. One of the requirements of Article 15.17 is that the arrestee be asked if he or she would like to request counsel. The magistrate must then record whether the person requested the appointment of counsel.



## *Initial Arraignment Docket for Misdemeanor Defendants*

Figure 3: Midland County Court Uncounseled First Appearance Process



TIDC staff observed Midland County’s initial misdemeanor arraignment dockets for uncounseled defendants on May 26 and December 15, 2022, in County Court at Law #2. The docket was divided into two parts: (1) arraigning defendants who previously appeared before a magistrate (covered later in this report), and (2) magistrating and arraigning cite-and-release defendants.

When the Court reached the cite-and-release defendants, the Judge provided each with an Affidavit Regarding Indigence, a copy of which is included in Appendix A. The Judge conducted the 15.17 hearings, explaining that because these defendants were not arrested and booked into jail, “we will need to decide if you want to request a court appointed attorney or talk to the District Attorney, see what you can work out on your own, and decide later if want to request an appointed attorney.” The Judge further explained that there are two blanks on the form. The first says, “At this time I have the ability to hire an attorney and decline to request an appointed attorney.” The Judge told

defendants “you can select this blank and see what you can do with the prosecutor, or hire your own attorney.” The Judge then explained the second blank is to enter a plea of not guilty and ask the court to appoint an attorney to represent you.

The Judge told defendants to review the form, check the blank they preferred, and complete the blanks for their name and mailing address. The Judge also told defendants if they chose the blank to talk to the prosecutor, they can always change their plea back to not guilty later. After this exchange, each defendant was called before the court. The prosecutor confirmed each defendant’s name, explained the charge and range of punishment, and the Judge asked each person for their plea. At the May docket, all the defendants entered pleas of guilty or no contest; in December 75% pled guilty or no contest, and 25% pled not guilty.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

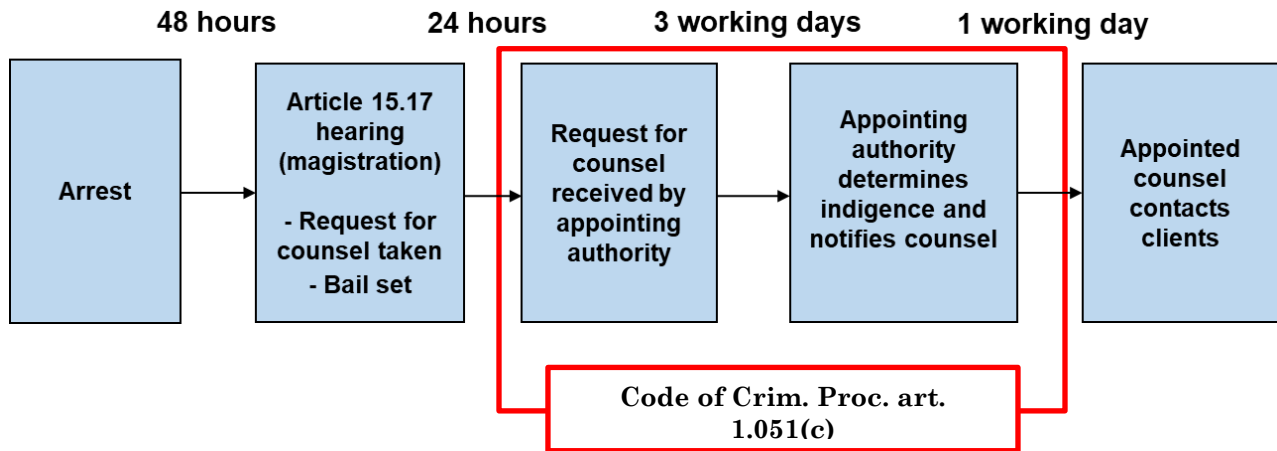
**Conduct prompt and accurate magistration proceedings**

**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. ***Successfully Addressed 2023***

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



### *Previously Magistrated Defendants*

After the Bailiff escorted all the defendants set for the morning docket (both defendants who had received magistrate warnings and cite-and-release defendants), the Judge instructed both groups that the purpose of arraignment is to advise them of the charge and let them enter their plea. The Judge then advised them of their rights in a large group setting. Discussing the right to counsel, the Judge said,

You have the right to an attorney. If you cannot afford an attorney, you can apply for a court appointed attorney. If you qualify, the Court will appoint an attorney for you. If you don't qualify, you will have to hire an attorney.

Next, the Judge outlined the hearing process, stating:

We are going to call you up and read the charge, explain the range of punishment, and get your plea. You can plea guilty, not guilty, or no contest. If you plead not guilty you are done today and need to hire an attorney if you don't request an appointed attorney.

If you plead guilty, you need to talk to the prosecutor. You must sign a temporary waiver of your right to an attorney to talk to the prosecutor. The prosecutor will tell you the deal they are offering. If you like it, you can accept it. If you don't like it, you can change plea to not guilty. You don't lose anything by talking to the prosecutor. If you have any questions, you can ask when you come up.

Then the Judge called each previously magistrated defendant forward, reading the cause numbers. At that time the prosecutor verified each defendant's name, advised

the person of the charges, and listed the punishment range. The Judge asked how the defendant pled, “guilty, not guilty, or no contest.”

Defendants who had previously received magistrate warnings were not given either the Affidavit Regarding Indigence or the additional admonishments that cite-and-release defendants received later in the hearing after the magistrated defendants entered their pleas.

Defendants entering pleas of guilty or no contest were instructed to sign the temporary waiver of counsel and “see if they could work something out with the prosecutor.” Defendants who pled not guilty were instructed to go hire an attorney. If they did not or cannot hire an attorney, they had to appear in court for the setting on the date they were given.

Defendants who requested counsel were given an indigence application and told to go fill it out in the lobby. At the conclusion of the hearing the court reviewed the applications, determined whether they qualified, and appointed counsel.

TIDC staff did not observe the Court ask any defendants at either docket why they were appearing without counsel, inquire individually if any defendant wished to request appointed counsel, or ask defendants if there was anything else they wanted to ask. When defendants were called individually, the Court asked each defendant, after the prosecutor’s questions, “do you understand the charge,” followed by “how do you plead? Guilty, not guilty, or no contest.”

Midland County’s indigent defense plan’s prompt appointment of counsel section states:

If a defendant appears without counsel in any adversary judicial proceeding that may result in punishment by confinement:

- i. The court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel.

Midland County Courts must adopt procedures following the County’s indigent defense plan and Code of Criminal Procedure Article 26.04 to provide defendants appearing without counsel the opportunity to request appointed counsel.

### ***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 TIDC’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>7</sup> TIDC staff examined 100 cases filed in FY2021 between April 1 and July 29, 2021, identifying 36 requests for counsel. Counsel was timely appointed in about 20% of cases. This falls below TIDC’s threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel.

**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	100		
Number of Case Files Containing a Request for Counsel <sup>8</sup>		35	
<b>Appointment / Denial of Indigence Occurred in:</b>			
0 work days		5	14.3%
1 – 3 work days + 24 hour transfer		2	5.7%
<b>Total Timely Appointments / Denials</b>		<b>7</b>	<b>20.0%</b>
4 to 6 work days + 24 hour transfer		2	5.7%
More than 10 work days + 24 hour transfer		23	65.7%
No ruling on request		3	8.6%
<b>Total Untimely Appointments</b>		<b>28</b>	<b>80.0%</b>

***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 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).<sup>9</sup>

<sup>7</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>8</sup> The monitor excluded one sample case in which timeliness could not be determined.

<sup>9</sup> The waiver language of Article 1.051(g) states:

"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)"

### ***Ruling on Requests Prior to Waivers***

TIDC staff examined 100 case files and observed two arraignment dockets. TIDC did not observe any individuals who had previously requested counsel enter guilty or no contest pleas without counsel.

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

##### **Appoint Counsel Promptly**

**FINDING 2 AND RECOMMENDATION:** Midland County's Indigent Defense Plan and Article 26.04 of the Code of Criminal Procedure require defendants appearing without counsel be given the opportunity to request appointed counsel. Midland County must implement practices to ensure all defendants charged with jailable misdemeanors have the opportunity to request appointed counsel prior to judicial proceedings which could result in confinement. ***New Finding 2023***

**FINDING 3 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. ***Issue Pending***

**FINDING 4 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. ***Successfully Addressed 2023.***

### **Conclusion**

TIDC 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.

## **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. *Successfully Addressed 2023*

**FINDING 2 AND RECOMMENDATION:** Midland County must implement practices to ensure all defendants charged withailable misdemeanors and felonies have the opportunity to request appointed counsel prior to judicial proceedings which could result in confinement. *New Finding 2023*

**FINDING 3 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. *Pending 2023*

**FINDING 4 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. *Successfully Addressed 2023*

# Appendix A – Affidavit Regarding Indigence

CAUSE NO:

## AFFIDAVIT REGARDING INDIGENCE

THE STATE OF TEXAS

IN THE COUNTY COURT

VS

AT LAW \_\_\_\_\_

TEXAS

MIDLAND COUNTY,

The undersigned appeared in person before me today and stated under oath:

My name is \_\_\_\_\_ I am competent to make this affidavit. The facts stated in the affidavit are within my personal knowledge and are true and correct.

I am the defendant in this case. I have been advised by the Court of my right to representation by counsel in the trial of the charges pending against me.

\_\_\_\_\_ **AT THIS TIME**, I certify that I have the means to employ counsel and I decline appointment of counsel in the trial of the charges against me. I understand that I may apply for court appointed counsel at a later time if I choose to do so.

\_\_\_\_\_ I certify that I am without means to employ counsel of my own choosing and I hereby request the court appoint counsel for me.

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Mailing Address

\_\_\_\_\_  
City, State, Zip Code

Signed under oath before me on the \_\_\_\_\_ day of \_\_\_\_\_, 2022.

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