



**Texas Indigent Defense Commission:
Helping Counties Implement What Works
For System-Wide Cost Savings**



ACKNOWLEDGEMENTS

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JANUARY 2013

The Texas Criminal Justice Coalition (TCJC) works with peers, policy-makers, practitioners, and community members to identify and promote smart justice policies that safely reduce the state's costly over-reliance on incarceration – creating stronger families, less taxpayer waste, and safer communities.

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Texas Indigent Defense Commission: Helping Counties Implement What Works For System-Wide Cost Savings

INTRODUCTION

In 2001, the Texas Legislature passed the Texas Fair Defense Act (FDA). The comprehensive, bipartisan bill, sponsored by Senator Rodney Ellis (D., Houston), addressed a statewide crisis in the criminal justice system by providing state funding for, and oversight of, indigent defense in Texas' 254 counties. One of the central components of the FDA was the creation of the Task Force on Indigent Defense (renamed the Texas Indigent Defense Commission [Commission] in 2012), which was charged with distributing funds to counties, providing them technical support, monitoring county compliance with state standards and constitutional requirements, and developing policies and standards related to indigent defense. **Over the past decade, the Commission has been crucial in helping Texas counties provide constitutionally required counsel to indigent people accused of crimes.** Under the leadership of Commission Chair Sharon Keller (Presiding Judge, Texas Court of Criminal Appeals) and Executive Director Jim Bethke, the Commission has developed into an effective and critical resource for Texas counties, and it has facilitated a number of improvements in indigent defense.

Snapshot of accomplishments since the passage of the Texas Fair Defense Act:

- Texas has increased the number of full-time public defender offices from seven to 19.
- Texas has expanded the number of counties being served by some form of public defender office from seven to more than 155, spanning all nine administrative judicial regions.
- Texas has increased the number of indigent people provided constitutionally guaranteed defense representation by 45 percent (324,000 in 2002; 471,000 in 2011).
- Texas has 79 new defense-related programs—ranging from direct client services to technology initiatives—that were created through Commission funding.
- The jail populations of several Texas counties have decreased, ranging from 12 percent in Taylor County to 50 percent in Hidalgo County. This brings with it cost savings and fewer lifelong collateral consequences for system-impacted individuals.
- Commission-funded innocence projects at Texas' public law schools have exonerated 10 people.
- The Commission has provided vital resources to stakeholders across the state, including:
 - model forms for indigency determinations and magistrate warnings, as well as sample adult and juvenile indigent defense plans and plan templates, all of which are adaptable to fit local needs;

Texas State Senator Rodney Ellis, the sponsor of the FDA and a leader in criminal justice reform, says the FDA's successes are attributable to "(1) mandating standards, (2) providing [discretionary] funding that is used as a 'carrot' for jurisdictions to improve indigent defense services and innovation, (3) consistent political advocacy, and (4) community mobilization." Recognizing that the counties have made substantial gains – noting "we were so far behind we could not help but go up" – he advises that continued funding and commitment is necessary to help realize the goals of the FDA.

HELPING COUNTIES IMPLEMENT WHAT WORKS FOR SYSTEM-WIDE COST SAVINGS

- over 200 presentations and trainings to more than 15,000 people, including judges, lawyers, and other system stakeholders;
- over 55 publications on issues ranging from comprehensive indigent defense system reviews to guides on juvenile justice and mental health in the criminal justice system; and
- an interactive and integrative website that counties use to report indigent defense data to the Commission. Moreover, the website serves as a resource to legislators, the public, and the media by providing detailed information on state and local initiatives, access to publications and training videos, and county-specific indigent defense data.

The keys to the Commission's success in helping counties meet their constitutional obligations to indigent defendants are three-fold: its respect for local control, its commitment to meaningful collaboration, and its focus on transparent operation.



Members of the Texas Indigent Defense Commission Board

THE IMPORTANCE OF COUNSEL

Equal access to justice is a core American and Texas value. A citizen's right to defend himself against criminal charges should not depend on his financial status. Fifty years ago, in 1963, the United States Supreme Court held that every person accused of a felony has a constitutional right to counsel.¹ The Court later recognized the right to appointed counsel for people accused of misdemeanors who face incarceration.² Similarly, the Texas Constitution guarantees the right to representation, and the Texas Code of Criminal Procedure provides that any indigent person facing confinement is entitled to appointed counsel at trial and after conviction.³

Despite these guarantees, Texans have regularly appeared in court without counsel. The state of indigent defense reached crisis level by 2001. Across Texas, there was inconsistency in the delivery of indigent defense services. Reports from the State Bar of Texas, House Research Organization, and Texas Applesed outlined key concerns about constitutionally inadequate representation across Texas:⁴

- ❑ Courts failed to appoint counsel for indigent defendants and accepted uncounseled waivers of the right to an attorney at alarming rates.
- ❑ Even when people were appointed counsel, attorneys often lacked training, resources, and case limits, thereby rendering the appointment ineffective.
- ❑ Counties lacked standards, transparency, and continuity in appointment procedures and defense practices.
- ❑ Counties, judges, and attorneys providing indigent defense lacked accountability, resulting in unjustifiable disparities and substandard representation.
- ❑ Counties suffered from a significant lack of funding for indigent defense.

As a result of these systemic deficiencies, thousands of citizens across the state were pleading guilty or facing trial without benefit of counsel or adequate representation.

Substandard representation has significant financial and human costs. For example, failure to provide competent counsel can lead to wrongful convictions. With 87 documented exonerations, Texas ranks third in the nation for the number of exonerations of wrongfully convicted individuals.⁵ Wrongfully convicted persons do not only lose their liberty and have difficulty maintaining familial and other relationships, they typically have tremendous trouble adjusting upon release.⁶ The family members of the wrongfully convicted suffer as well, losing contact with a loved one for years, and spending significant sums on appeals. Victims, too, are denied justice and security as perpetrators remain free.

In addition to the devastating effect on individual lives, wrongful convictions result in tremendous costs to the community. They undermine the public's confidence in the criminal justice system, allow criminals to victimize others, and cause a drain on scarce resources. As of May 21, 2012, the State of Texas had paid a total of \$49.5 million to exonerees in an effort to compensate them for their losses.⁷ While many different causes exist for wrongful convictions, some may be avoided if defendants are represented by competent counsel. Indeed, a recent unanimous Texas Supreme Court decision allowed for a \$2 million payment for a man who was released from prison 26 years after the Texas Court of Criminal Appeals found his lawyer to be ineffective.⁸

Failure to provide adequate representation to indigent defendants can also result in unnecessary pretrial incarceration, which burdens county budgets.⁹ On average, counties spend 11 to 14 percent of their

budgets on jail costs. Collectively, Texas counties spend approximately \$2 million per day on pretrial incarcerations.¹⁰ People who are jailed pretrial often lose their jobs; students fall behind in, or are forced to withdraw from, school; and children who have an incarcerated parent are left without economic support or adult supervision, which can lead to youth dropping out of school to take a job or becoming involved in the juvenile or criminal justice system themselves.

Numerous other consequences arise from a poorly maintained indigent defense system. For instance, criminal cases lack finality: cases reversed on appeal result in retrials and sometimes a new round of appeals; this burdens county budgets and takes a toll on victims and their families, who must relive their traumatic experiences while being left in legal limbo. Lawsuits challenging unfair indigent defense practices, such as *Rothgery v. Gillepsie*,¹¹ which lasted four years and climbed to the United States Supreme Court, and *Heckman v. Williamson County*,¹² especially strain county budgets.



Texas Indigent Defense Commission Board Meeting

THE FAIR DEFENSE ACT AND THE TEXAS INDIGENT DEFENSE COMMISSION

The Texas Legislature enacted the FDA to help counties meet their constitutional obligation to provide counsel to indigent defendants.¹³ Specifically, the FDA did the following:

- (1) established requirements regarding timing of appointment, qualifications of counsel, and indigency determinations;
- (2) required counties to adopt a plan for, and report to the Commission on, delivery of indigent defense services, including expenditures;
- (3) provided state funding to supplement county spending on indigent defense. **NOTE:** Funds being expended are not from the state's general revenue, but rather from dedicated fees comprising a percentage of court costs collected by the counties, fees on surety bonds, and a portion of attorneys' State Bar of Texas dues. Indeed, according to a report by The Spangenberg Group using data from 2008, Texas ranks 48th among states in per capita indigent defense spending; among the 10 largest states, Texas ranks last in providing state funds for indigent defense;¹⁴ and
- (4) created the Commission as a standing committee of the Texas Judicial Council, with administrative support from the Office of Court Administration to provide counties funding and technical support, develop standards, and provide oversight.¹⁵

The Commission, which currently has a staff of 11, is overseen by a Board composed of 13 members (appointed and ex-officio).¹⁶ Six of the current members have served on the Commission from its inception.¹⁷ The general duties and functions of the Commission include:

- setting statewide policies and standards for the provision and improvement of indigent defense;
- granting counties funds to provide and improve indigent defense;
- monitoring county compliance with indigent defense laws (fiscal and policy monitoring);
- providing technical support;
- providing program research assistance; and
- serving as an information clearinghouse on indigent defense.

The majority of the funds provided to the Commission are awarded to counties through two general types of grants. First, *formula grants* are based on population and take into account a county's increases in indigent defense costs. The only condition for receiving this type

The Honorable Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals, has served as the Chair of the Commission since its inception in 2001.

An admitted skeptic at the beginning, Judge Keller notes,

“Like many other people, I was worried about the [Commission] being a burden on the counties and the judges. It hasn't been—we have been a lot more helpful.” Judge Keller attributes the Commission's success in part to its commitment to collaboration: “We just invite everyone that we think might care so they can provide their opinion and help focus the issues. The local enthusiasm for trying to improve indigent defense has been amazing to see. All we have to do is ask, ‘How can we help?’ and step back and let [local governments] take the lead.”



of funding is compliance with the planning and reporting requirements of the FDA. Second, *competitive-based discretionary grants* assist counties in developing new, innovative programs or processes to improve the delivery of indigent defense. In 2011, the Commission provided over \$33 million in grants to counties (\$25 million in formula grants and \$8.6 million in discretionary grants). While this state funding represents a substantial improvement from the lack of any state funding prior to the FDA, it represents only 17 percent of total indigent defense expenditures in Texas. Counties paid the remaining 83 percent (\$164,724,287).¹⁸

In approaching its obligations, the Commission considered how it could assist local governments in meeting the requirements of the FDA and state and federal constitutions. It determined that the guiding principles are respect for **local control**, meaningful **collaboration**, and **transparent** and open government.

Local Control / Empowering Communities

Central to the Commission’s approach is its commitment to **respect local control**, giving support where needed while ensuring that counties understand that with autonomy comes responsibility. The Commission has taken a “bottom-up approach” while working with local officials to improve indigent defense. Executive Director Jim Bethke explains the Commission’s open-minded approach:

We did not have any preconceived notions about what was the best way to provide indigent defense services. In large part, we had to be educated. We looked back at 38 years of what other jurisdictions had done to see what worked and what didn’t. We operated much like a consulting firm, viewing the counties as our clients. Although we provided technical support—and in some instances oversight—the counties are the ones that ultimately direct and ‘own’ the projects.

Each Texas county develops its own indigent defense plan and can access Commission models and resources. The Commission provides evidence-based research and expert assistance to local officials to assist them in making informed decisions. **Placing the knowledge directly into the hands of the people charged with providing indigent defense services ultimately results in a more cost-effective and consistent delivery of constitutionally mandated indigent defense services.**

Project Example: Cameron County

Cameron County officials knew they had some issues relating to the provision of counsel to indigent defendants, but they were not quite sure how to address them. In 1996, The Spangenberg Group released a troubling report outlining some significant problems in the county’s criminal justice system. Over 10 years later, it did not appear that these problems had been resolved. Most critically, although the FDA and the county’s local indigent defense plan required prompt appointment of counsel for qualified defendants, people languished in jail for weeks before receiving counsel—delaying justice and overcrowding the jail. In 2008, District Court Judge Arturo Nelson (D., Brownsville) and County Judge Carlos Cascos (R., Cameron County) requested that the Commission conduct an assessment of the county’s indigent defense system and recommend improvements. Commission staff arranged for The Spangenberg Group and David Slayton (now administrative director of the Office of Court Administration) to assist with the review. After conducting site visits, reviewing court files and data, and meeting with stakeholders, the team issued a report detailing the various barriers to prompt access to counsel and making recommendations on how to remove those barriers.

At the county’s request, the Commission provided funding to create an indigent defense services department to manage appointments. The county replaced its contract system with an assigned counsel program. County leaders demonstrated their commitment to indigent defense by raising additional revenue to address chronic underfunding of indigent defense and to ensure its citizens’ constitutional rights were safeguarded. Although the county continues to struggle with funding, **there have been noticeable improvements in indigent defense, including faster and more efficient assignment of counsel, resulting in enhanced access to justice.** Cameron County’s experience is an excellent example of the Commission working with local partners to solve problems.

“Cameron County’s continued improvement is the result of the county’s willingness to make the administration of justice more efficient while meeting the requirements of the law and doing what is morally right. We could not have done it without the help of the Texas Indigent Defense Commission and the guidance of its Commission members.”

— Judge Arturo Cisneros Nelson,
138th District Court

Project Example: Mental Health Initiatives

In 2007, Travis County received a grant to establish the first freestanding mental health public defender office in the United States. It is estimated that 20 to 30 percent of all inmates in the Texas correctional system have mental health problems,¹⁹ and they are in need of specialized treatment and services to prevent further contact with the criminal justice system. Through a start-up grant from the Commission, the Travis County **Mental Health Public Defender (MHPD) Office** was created to help (1) enhance legal representation by providing attorneys with specialized knowledge needed to defend individuals with mental illness; (2) minimize the number of days that an individual with mental illness spends in jail; (3) increase the number of dismissals among defendants with mental illness; and (4) reduce recidivism by providing intensive case management services. Composed of two attorneys, two social workers, two case workers, and administrative staff, the MHPD Office provided representation in 1,236 legal cases and 1,762 case management referrals by spring 2011. As a result of the holistic representation that integrated legal help with social services, the MHPD Office achieved dismissals in 42 percent of its cases, defendants were jailed for fewer days than the average in Travis County, and both client satisfaction and success in the community increased, with recidivism rates decreasing by 38 percent.²⁰ In 2012, the MHPD Office became fully funded by Travis County.

“The Commission has done a fantastic job. The members have the right temperament to build consensus. The Commission helps to point out what is wrong and then help a county succeed. It is not just ‘our way is the best way,’ but instead the Commission helps counties look to others in the state for best practices.”

— Texas State Senator Rodney Ellis

Several other counties, including Bexar, Dallas, El Paso, Fort Bend, Harris, and Limestone, learned from Travis County’s experience and implemented different versions of the program that were consistent with their local needs. Each program is designed to ensure that assigned counsel with mental health expertise is teamed with professionals, such as social workers, to serve defendants with mental health needs. **In each county, this has resulted in lower rates of incarceration—as well as reduced recidivism—and more consistent and successful defendant engagement in mental health services.**²¹

In Lubbock and Montgomery Counties, the effects have been even broader. Inspired by the success of the Travis County MHPD Office, both counties recently used it as a model to develop **Managed Assigned Counsel** programs to coordinate representation of defendants suffering from mental illness, and who are accused of misdemeanors or felonies, with specialized advocates and support. Although the results of program implementation are not yet available, county officials are hopeful that increased assistance for these populations will have significant individual and community-wide benefits.

Collaboration

The Commission has been very deliberate in taking a collaborative approach. Executive Director Jim Bethke noted the Commission’s approach to starting a project:

The key to successfully developing and implementing projects or policy is making sure that we have the right people at the table from the start. It is not enough to have warm bodies in the chair; we have to listen and respond to their concerns. Even if we cannot satisfy everyone’s wants, we will explain what actions we are taking—and not taking—and why.

Judge Keller credits Executive Director Jim Bethke for the Commission’s success: “The Commission is a reflection of Jim’s personality—he is collaborative. He also has a great staff. Everybody works really hard; they care about the job, they care about the Commission, and they are very knowledgeable.”



Executive Director Jim Bethke

Bethke also explained, “One lesson we have learned is that without sufficient stakeholder ‘buy-in,’ even the best plans are likely not to succeed.” Through its work with county system stakeholders, the Commission has been successful at building nontraditional alliances for the purpose of working toward a common goal. Defenders and prosecutors who appropriately take adversarial positions in the courtroom are encouraged to share data and ideas to help understand and resolve challenges in the criminal justice systems of a particular county. In working together for a specific purpose, the parties continue to recognize that they serve different functions and are able to maintain proper boundaries. The Commission also partners with educational institutions for research, local and national nongovernmental agencies for development of recommended best practices, and public interest organizations and state and national governmental agencies in a variety of areas.

Project Examples: Local and Regional Collaboration

► *Capital Defense*

Smaller Texas counties face special challenges in providing indigent defense. They routinely lack a sufficient case volume to maintain a full-time public defender office, yet relying on individual appointments sometimes proves ineffective. This is especially true in capital cases. When a prosecutor files a capital charge, a county can expect to incur from \$150,000 to \$1 million in defense expenses. Small counties with limited budgets cannot afford a single case, much less multiple ones.

In 2007, officials in Lubbock concluded that they had a shortage of qualified capital attorneys, mitigation specialists, and investigators in their region. The Commission worked with partners in Lubbock to conceive and implement the **Regional Public Defender Office (RPDO) for Capital Cases** (originally the West Texas Regional Public Defender for Capital Cases). Based in Lubbock County and organized through inter-local agreements, the program is designed to provide quality capital defense while effectively managing costs. A typical rural county will pay an annual fee ranging from \$1,000 to \$10,000 as an “insurance” policy in the event that it must provide counsel in a capital case. When a capital case is filed in a participating county, attorneys from the RPDO represent the defendant at no additional cost to the county. These capital-qualified attorneys come with investigative and expert support. **In the first two years of operation, the RPDO saved member counties approximately \$650,000. In 2012, the RPDO actually returned \$408,334 of unexpended county dues to participating counties.**²² The program began by serving 70 counties. Over the past four years, it has expanded to serve more than 155 counties. The RPDO, which is committed to being “effective, efficient, and ethical,” was awarded the Texas Association of Counties’ Best Practices Award. In addition, the RPDO was one of 20 model programs in the nation awarded the 2009 Best of Category Award in the Criminal Justice and Public Safety Category by the National Association of Counties.²³

By providing start-up operational costs and participating in stakeholder meetings throughout the region, the Commission has been instrumental in helping to launch, promote, and support this project. Because of the insurance policy provided by the RPDO, indigent capital defendants in over half of Texas’ counties are served by a team of highly qualified, specialized professionals, and participating counties can rest easy knowing that a single case will not break their banks.

► *Non-Capital Defense*

When the Commission discovered extremely low appointment rates for misdemeanor cases in rural counties in the Caprock region of Texas, and that many of these counties lacked even basic elements of an indigent defense system, it decided to explore the possibility of adapting the RPDO to serve these unmet needs. The Commission worked with the Texas Association of Counties (TAC) to coordinate a meeting of Panhandle counties interested in developing regional indigent defense programs. At TAC’s request, the Texas Tech University School of Law agreed to take a participating role. After a series of meetings between county judges, Commission staff, and law professors from Texas Tech law school, the **Caprock Regional Public Defender Office (CRPDO)** was born.²⁴ Ten counties initially opted to participate in the program; since then, another six counties have joined. The CRPDO has the capacity to represent indigent defendants in misdemeanor, juvenile, and felony proceedings.²⁵ **As a result of the program, more indigent defendants are receiving qualified counsel in a timely fashion.**

Some of CRPDO's cases are handled by Texas Tech law students under the supervision of attorneys and professors. This enables the office to access the University's resources, and it provides students with courtroom experience that serves as a valuable opportunity to develop skills and foster a commitment to public service and indigent defense. A recent participant in the Texas Tech Criminal Defense Clinic explained the benefits of the program: "This opportunity has been great practice experience. More importantly, it has reinforced my belief that the criminal justice system needs more attorneys who are in this fight for the principle and not the money."²⁶

\$700,000 US Department of Justice John R. Justice Grant

The Commission teamed up with a seemingly unlikely ally to access federal funds to help repay the student loans of attorneys who opt to work in the criminal justice system. Rather than exclusively focusing on obtaining money for public defenders, the Commission worked with the Texas District and County Attorneys Association, along with the Office of the Governor, to successfully develop and submit an application for federal student loan reimbursement funds that would be evenly split between public defenders and prosecutors. The respective agencies worked together to submit surveys to their constituencies and used the information to design the program. Each organization collaborated with national entities to help ensure the success of the application. They also worked together to establish a distribution mechanism through the Texas Higher Education Coordinating Board. Unfortunately, due to federal budget issues, the program has been cut each of the past two years and is in danger of not being renewed. However, collaborative efforts such as these hold promise for future efforts at improving the criminal justice system.

Shannon Edmonds, a former prosecutor who worked for Lt. Governor Ratliff when the FDA was passed in 2001, praised the Commission for its collaborative approach: "It is good having an agency that is open and welcomes participation from all stakeholders in the criminal justice system. This has allowed Texas to avoid some knock-down drag-out policy battles that could have occurred if the [Commission] had taken an adversarial approach, which can be counter-productive in the area of policy." As the Director of Government Relations and a staff attorney at the Texas District and County Attorneys Association, Mr. Edmonds worked with the Commission to obtain federal money for repayment of student loans for prosecutors and public defenders. He is also a member of the Commission's legislative workgroup.

Timothy Cole Advisory Panel on Wrongful Convictions

In 2008, the Texas Legislature passed House Bill 498, establishing the Timothy Cole Advisory Panel on Wrongful Convictions (Panel). Named after the first person in Texas to be posthumously exonerated through DNA, the Panel was asked to prepare a study on wrongful convictions and make recommendations for preventing future wrongful convictions. The bipartisan panel, which was chaired by the Jim Bethke, was composed of legislators, policy-makers, judges, law enforcement officials, representatives of the defense bar, and academics.

The Panel brought together diverse stakeholders to help understand the sources of wrongful convictions and develop strategies for reducing the risk of future errors. Within a year of convening, the Panel released a report outlining its findings and proposing 11 recommendations for reform.²⁷ Two of the recommendations became

law, enacted by the Texas Legislature in 2011. House Bill 215 aimed to reduce witness misidentifications (the leading cause of wrongful convictions) by requiring all law enforcement agencies to adopt written guidelines and policies incorporating best practices on conducting photo and live lineup identification procedures. Additionally, Senate Bill 122 removed procedural barriers to post-conviction DNA testing. The remaining recommendations continue to be under consideration for local and state action.

Transparent and Open Government

From the outset, the Commission asked itself how it could create a check on the system and make people responsible without overburdening them. The Commission decided that meeting its oversight duties required flexibility, positivity, and transparency. This approach is best reflected in the Commission's *FY11 Annual and Expenditure Report*, which includes a discussion of how it monitors county compliance with the FDA: "The Commission staff always strives to make monitoring reviews constructive, not punitive."²⁸ In an effort to achieve accountability and transparency, the Commission requires each county to electronically submit its annual indigent defense expenditure reports and biennial indigent defense plans. In the first year of implementation, some counties did not have the capacity—or in some instances, the will—to abide by this directive. The barriers to compliance varied according to the localities. The Commission granted non-reporting counties a one-year waiver and sought to help each individual county identify necessary resources to enable it to report electronically. The Commission then sought to facilitate solutions, either by providing tangible resources (e.g., computer hardware), offering its services (e.g., training), or making necessary connections (e.g., having someone from the County Information Resources Agency assist local officials). By 2005, Texas counties were 100 percent compliant with expenditure reporting requirements. Similarly, as of 2010, all counties submitted their indigent defense plans electronically.

The annual **Indigent Defense Expenditure Report**, which is available to the public and policy-makers, provides a thorough snapshot of county expenditures and appointment rates.²⁹ The reporting requirements are based on state law and administrative rules. Each county's indigent defense plan is also made available online to the public.³⁰ While Commission staff reviews each report and plan, **the Commission does not have sufficient resources to conduct an onsite assessment of every county's expenditures.** However, a thorough desk review is conducted on all 254 counties. **The Commission also does not have the capacity to assess whether each county is actually complying with its indigent defense plan.** This is a challenge, as technical compliance with the reporting rules does not mean that a county is in fact meeting its obligations to indigent defendants. The Commission has attempted to develop mechanisms to identify those counties most in need of additional oversight or assistance.

The Commission selects individual counties for review based on objective risk assessment scores and geographical data. Where fiscal reporting issues are identified, the Commission provides technical assistance to help bring the county into compliance. In fiscal year 2011, the fiscal monitor traveled to 19 counties, conducting formal reviews in 13 and providing technical assistance to the remaining six. Collectively, these 19 counties received grant disbursements totaling more than \$1.3 million. Indigent defense process reviews—some of which are requested by individual counties—are more comprehensive and occur less frequently than desk reviews because of resource limitations. Process reviews include interviews, court observations, and examination of case files and court records. Where issues are identified, counties submit formal responses to outline how they will remedy the problems. Upon request, Commission staff provides technical assistance. Through discretionary grants and resource development, the Commission has also improved accountability and transparency within the counties.³¹

Project Example: Bell County's Fair Indigent Defense Online Program

In 2010, Bell County received funding to create Fair Indigent Defense Online ("FiDO"). This important innovation captures data to effectively manage the delivery of local indigent defense services. The system tracks defendant profiles, indigency determinations, attorney assignments, case-processing information, attorney hours, and fee payments. Not only has this streamlined the defense and information-sharing process, making it more effective and efficient, it also has provided key data to policy-makers as they review their indigent defense delivery system. Commission funding also helped to make the system exportable to other counties with only applicable hardware costs. This allows counties to adapt the program to their needs at a much lower cost than starting from scratch.

Project Example: Defender Contract Standards

One previous challenge facing Texas was a lack of uniformity in the systems for attorney appointment. In an effort to bring fairness, consistency, and transparency to the appointment process, the Commission adopted contract defender rules in 2006. The rules require counties to have an open attorney application and selection process, set maximum caseloads, and give defenders access to experts and investigators. The rules are designed to provide some guidance, while allowing counties flexibility in their processes.

In creating the standards, the Commission brought representatives from county government, judges, attorneys, and experts to the table. The working group used national standards as its guidelines, adopting some as mandatory and others as best practices. Andrea Marsh of the Texas Fair Defense Project was part of the working group. She explained its efforts to create a workable and equitable system: "There was a perception at least that contracts were not being distributed fairly. We wanted to bring transparency to prevent that, or show it was not happening. The goal was a fair, neutral selection process that could be created by having general rules and principles to provide continuity, but flexibility to reflect local needs and issues."

The Commission's Website

Perhaps the greatest testament to the Commission's commitment to transparency is its website. All tasks undertaken by the Commission and all reports issued by it and the counties are available on the Commission's website. Not only does this site provide easy access to critical information by serving as a clearinghouse for publications and documents, it also tells the story of indigent defense reform in Texas.

CONCLUSION

Texas, through the work of the Commission—and, more importantly, the work of Texas counties and courts—has made much progress in improving the delivery of indigent defense services and access to counsel to defendants in need. At the center of the improvements to indigent defense are Texas’ 254 counties. Because of the Commission’s respect for local control and commitment to ensuring that those responsible for providing defense take ownership of their projects, local actors are held accountable for any shortcomings and given credit for their successes. Through its discretionary grant program, the Commission encourages creativity and forward-thinking strategies for providing indigent defense, which starts at the local level. **Instead of top-down mandates for county governments that may not suit the individual needs of Texas counties, the Commission uses the local knowledge of those who are ultimately responsible for delivering indigent defense services in their county.**³²

Unfortunately for counties, spending for indigent services has more than doubled since the passage of the FDA in 2001, due largely to more defendants passing through the system. Commission funding—instrumental in improving the system—has increased from its initial level, but still covers only 30 percent of the increased costs incurred by counties since the passage of this law. This leaves the lion’s share of the financial burden on the backs of counties. The Commission’s pending legislative budget request seeks to close the funding gap and share more equally in the funding of this constitutional requirement.³³ In its effort to support counties, the Commission is currently asking the State to:

► ***Restore funding and authority to use all previously designated sources of revenue.***

Prior to Texas’ 2011 Legislative Session, the Commission was permitted to roll forward the unexpended balance in its Fair Defense Account every biennium; since then, the Commission’s unexpended funds – intended for indigent defense – have been held by the State as a means to balance the state budget. Designated revenue collected from court fees and costs are intended to support the Commission in its efforts to allocate funds to counties for the improvement of indigent defense services. The impact of the artificial ceiling placed on the Commission’s appropriation during the 2011 Legislative Session has resulted in a reduced revenue stream and may shift an even greater financial burden onto county taxpayers to adequately provide indigent defense services.

► ***Close the unfunded gap for the provisions of the FDA with General Revenue.***

The right to counsel for those who cannot afford it is also grounded in Texas law, yet, as discussed earlier, NO general revenue is appropriated for indigent defense. The entire appropriation for indigent defense is derived from dedicated court fees and costs. At a minimum, the State should provide general revenue to help counties meet the obligations to sufficiently cover the increase in expenses for indigent defense that they have shouldered since the passage of the FDA in 2001.

As the Texas Supreme Court recently noted, “A criminal defendant’s right to counsel—enshrined in both the United States and Texas Constitutions—ranks among the most important and fundamental rights in a free society.”³⁴ With the support of the incoming 83rd Texas Legislature, and the continued commitment of the Commission, counties, and courts, Texas can continue the path forward to ensure that the fundamental right to counsel and fairness in court proceedings ensues in each of Texas’ 254 counties.

NOW THEREFORE, BE IT RESOLVED that the Texas Judicial Council recommends that the Texas Legislature:

- 1) Restore access to all dedicated funds for indigent defense by reinstating estimated appropriation authority and by reestablishing unexpended balance authority between biennia to the Commission; and,
- 2) Close the “unfunded” gap that is being borne by counties for the additional indigent defense costs that they have incurred due to the mandates of the *Fair Defense Act of 2001*.

– RESOLUTION of the TEXAS JUDICIAL COUNCIL
Signed by the Honorable Wallace B. Jefferson, Chair³⁵

ENDNOTES

¹ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

² *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

³ Texas Constitution Article 1, §10; Texas Code of Criminal Procedure Article 1.05(c)–(d) (1987).

⁴ House Research Organization, “The Best Defense: Representing Indigent Criminal Defendants,” November 22, 1999, <http://www.hro.house.state.tx.us/focus/indigent.pdf>; State Bar of Texas Report to the Committee on Legal Services to the Poor in Criminal Matters, “Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas,” September 22, 2000, <http://www.uta.edu/pols/moore/indigent/last.pdf>; Texas Appleseed Fair Defense Project, “The Fair Defense Report: Analysis of Indigent Defense Practices in Texas,” December 2000, http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf.

⁵ National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

⁶ Janet Roberts and Elizabeth Stanton, “A Long Road Back After Exoneration, and Justice Is Slow to Make Amends,” *New York Times*, November 25, 2007, <http://www.nytimes.com/2007/11/25/us/25dna.html?pagewanted=all&r=1&>.

⁷ Editorial & Opinions, “Texas Supreme Court Defines ‘Actual Innocence’ More Broadly,” *Star-Telegram*, May 20, 2012, <http://www.star-telegram.com/2012/05/20/3973424/texas-supreme-court-defines-actual.html#storylink=cpy>.

⁸ *In re Billy Frederick Allen*, Texas Supreme Court, No. 10-0886, May 18, 2012.

⁹ The implementation of a public defender office in Hidalgo County positively impacted misdemeanor pretrial rates, reducing the average number of days between defendants’ arrest and case disposition from 15 to 11 days. See Texas Fair Defense Project, “Benefits of a Public Defender Office: Increasing Accountability and Cost Effectiveness in Harris County’s Indigent Defense System,” September 2009, p. 12.

¹⁰ Brandon Wood, Executive Director, Texas Commission on Jail Standards (TCJS) and Diana Spiller, TCJS Research Specialist, e-mail correspondence to Sarah V. Carswell, Policy Researcher, Texas Criminal Justice Coalition, November 30, 2011. Data available upon request.

¹¹ *Rothgery v. Gillepsie*, 554 U.S. 191 (2008).

¹² *Heckman v. Williamson County*, Supreme Court of Texas, No. 10-0671, June 8, 2012.

¹³ Texas Fair Defense Act, <http://www.capitol.state.tx.us/tlodocs/77R/billtext/html/SB00007F.htm>; 2011 Fair Defense Law, <http://www.txcourts.gov/tidc/pdf/FDACodifiedFinalDec2011.pdf>.

¹⁴ Texas Task Force on Indigent Defense, “State Spending: 2008, 2005” spreadsheet, compiled in 2010; John Reynolds, “Though Underfunded, Indigent Legal Defense Much Improved: State May End Up Cost-Shifting More of the Burden Back to the Counties,” *Quorum Report*, May 13, 2010.

¹⁵ The legislature expressed its confidence in the work of the Task Force in 2011, when it passed legislation transforming the Task Force into the Commission, effective September 1, 2012. While the Commission is still under its administrative arm, it now submits a separate Legislative Appropriations Request from the Office of Court Administration.

¹⁶ Texas Indigent Defense Commission composition, <http://www.txcourts.gov/tidc/pdf/TIDCMembers071812.pdf>.

¹⁷ Sharon Keller, Chair of the Texas Indigent Defense Commission, explains that she and other Commission members were very “hands on” at the beginning. “The biggest challenge was time. It was all brand new, so everything had to be written and proofed; we had to develop procedures for everything. That close to half of the members have served on the board since its inception is also critical, as they have developed an ‘institutional memory’ that is helpful when assessing new policies, projects, and challenges. This is especially important because there has been significant county personnel turnover in the past 10 years.”

¹⁸ Jim Bethke, Executive Director of the Texas Indigent Defense Commission states, “The discretionary grant program has proven to have far-reaching effects, as the programs funded serve as laboratories for innovation. One county or a small group of counties will take a particular approach, develop the idea, and test it. If and when it works, other counties may tailor the program to their own needs and implement similar improvements. When ideas do not succeed, the Commission communicates the lessons learned from the experiences, helping to better understand the challenges and develop solutions in ways that avoid earlier pitfalls.”

¹⁹ Travis County Justice and Public Safety and Travis County Criminal Justice Planning, *Mental Health Public Defender Office, Cost Benefit Analysis, Part 1: Analysis of Performance of the Texas Task Force on Indigent Defense Grant*, May 2011, http://www.co.travis.tx.us/criminal_justice/Research_planning/pdfs/cost_ben_MHPD_110922.pdf.

²⁰ *Ibid.*

²¹ Texas Task Force on Indigent Defense, "Representing the Mentally Ill Offender," Vol. 8, No. 3, April 2010, <http://www.courts.state.tx.us/tidc/pdf/May2010specialednewsletter.pdf>.

²² Mary Alice Robbins, "Counties served by Regional Public Defender for Capital Cases get cash back," *Texas Lawyer*, March 28, 2012, http://texaslawyer.typepad.com/texas_lawyer_blog/2012/03/counties-served-by-regional-public-defender-for-capital-cases-get-cash-back.html.

²³ Logan G. Carver, "County court system earns national recognition for program," *Lubbock Avalanche-Journal Online*, June 10, 2009, http://lubbockonline.com/stories/061009/loc_449333863.shtml.

²⁴ Caprock Regional Public Defender Office, Texas Tech University School of Law, <http://www.law.ttu.edu/acp/programs/clinical/crpd/>.

²⁵ Most counties have opted out of felony representation. The Commission recently voted to permit a total of 26 counties to participate in the program.

²⁶ Texas Tech University School of Law, Criminal Defense Clinic, <http://www.law.ttu.edu/acp/programs/clinical/criminal/defense/>.

²⁷ Timothy Cole Advisory Panel on Wrongful Convictions, *Report to the Texas Task Force on Indigent Defense*, August 2010, <http://www.txcourts.gov/tidc/pdf/FINALTCAPreport.pdf>.

²⁸ Texas Indigent Defense Commission, *FY 2011 Annual and Expenditure Report*, <http://www.txcourts.gov/tidc/pdf/TIDCFY11AnnualReport.pdf>.

²⁹ Texas Indigent Defense Commission Grant and Plan Management Website, *Indigent Defense Expenditure Report*, <http://tfid.tamu.edu/ExpenditureReport2/ExpenditureReportResults.asp>.

³⁰ Texas Indigent Defense Commission, County Indigent Defense Plans, <http://tfid.tamu.edu/public.net/Reports/IDPlanNarrative.aspx>.

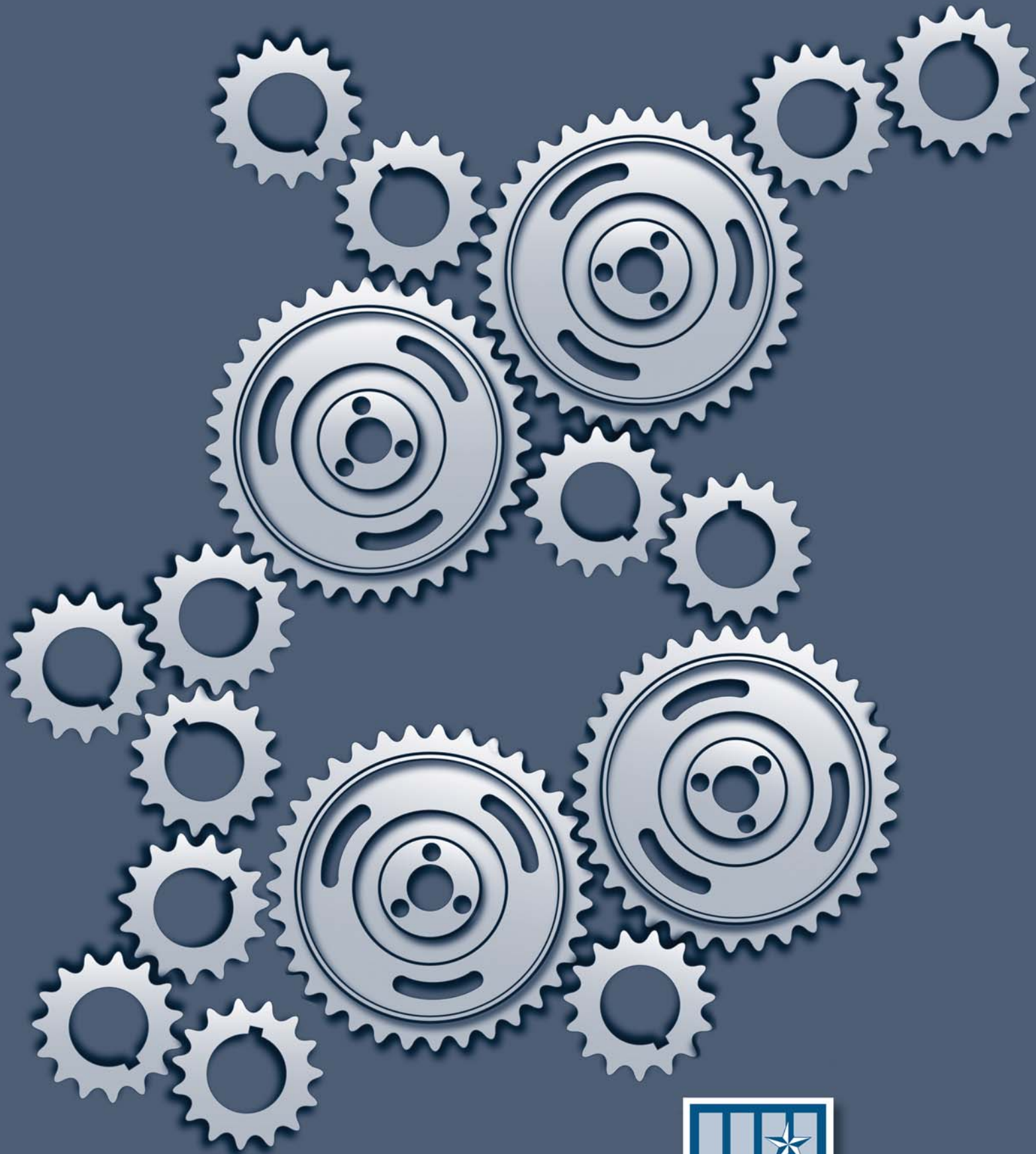
³¹ Counties may still have room for improvement. In 2011, the state felony appointment rate was 69.0 percent; the overall state appointment rate for misdemeanants was 40.7 percent. During 2011, 14 counties did not provide counsel to misdemeanants while another 81 counties failed to provide counsel in at least 90 percent of misdemeanor cases.

³² Sharon Keller, Chair of the Texas Indigent Defense Commission, notes: "Anyone that pays attention will recognize that the Commission has transformed indigent defense in Texas. It is amazing to me and I am proud to be a part of it. We have done this without becoming a bloated, inflated regulatory agency."

³³ Texas Indigent Defense Commission, Legislative Appropriations Request for Fiscal Years 2014 and 2015, submitted August 16, 2012, <http://www.txcourts.gov/tidc/pdf/FINALLARSsubmission081612.pdf>.

³⁴ *Heckman v. Williamson County*, Supreme Court of Texas, No. 10-0671, June 8, 2012.

³⁵ Texas Judicial Council Resolution in support of Additional State Funding for Indigent Defense, <http://www.txcourts.gov/tidc/pdf/TJCresolution.pdf>.



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