

Comment on Interim Charge 3

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Texas Fair Defense Project has, since 2006, worked to improve access to and quality of indigent defense counsel across Texas. While Texas has made significant progress in guaranteeing the constitutional right to counsel regardless of a person's income since then, some themes for indigent defense improvement continue to stand out: Texas must ensure independence of the defense function; create and enforce standards of practice across the state; and assume a greater role in funding indigent defense. The right to counsel is an obligation of the *state*, and while counties have an important role in meeting that obligation, the state must ensure appropriate services are provided to indigent defendants throughout Texas. These themes are weaved throughout the specific issues outlined in this Committee's interim charge and explored below.

Appointment of Counsel

The Code of Criminal Procedure provides detailed guidance on the initial request for counsel, including establishing the right to counsel, opportunity to request counsel at initial magistration, the time for transmitting and ruling on such requests (with variation by county population), and timing of an appointed attorney's initial contact with their client. Some of these laws are routinely ignored in counties throughout the state, such as the requirement to assist defendants in requesting counsel at magistration. Texas Indigent Defense Commission (TIDC) policy monitoring reports continue to find counties failing to notify defendants of their right to appointed counsel, or to rule on those requests, throughout the state.¹

The Code provides less guidance on how attorneys will be selected once a defendant is found to qualify for appointed counsel. Counties are required to develop an Indigent Defense Plan (IDP) outlining how they will assign attorneys. In most counties, the majority of the IDP is formulaic, primarily reciting sections of the Code of Criminal Procedure that already apply to the county regardless of whether included in the IDP. There appears to be little editorial control exercised by TIDC when counties submit their IDPs, even when they describe practices that are illegal.² There is variation across counties in appointment practices, which can be beneficial: for example, counties are able to set their own indigency standards, allowing Tarrant County to set standards based on the local cost of living instead of the federal poverty guidelines. In other ways this practice leads to significant problems. Some counties, like those in the 106th Judicial District, have annual contracts where they pay a flat rate to a single lawyer who can be assigned up to 500 felony cases in a single year. Others, like Harris County, have "alternate assignment plans" that essentially give the court unfettered authority to play favorites among lawyers.³

Variation in courts' attorney assignment practices leads to significant variations in defendants' experiences. In some counties, fewer than five percent of defendants charged with a misdemeanor are assigned a court-appointed lawyer,⁴ compared with the already-low statewide average of 46%.⁵ Other

¹ *E.g.* in Childress County, Comanche County, Fisher County, Maverick County, and Waller County.

² For example, many IDPs continue to include the caveat that "[i]f the defendant is released from custody prior to the appointment of counsel, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first." The Supreme Court ruled in *Rothgery v. Gillespie County* that a magistration hearing under article 15.17 is the initiation of adversarial proceedings, meaning that a defendant who has appeared at magistration is entitled to an attorney on the same timeline regardless of custody status. The inclusion of this language in IDPs is misleading at best, and at worst establishes unconstitutional county policy.

³ See Ketterer, Samantha, "More Harris County judges accused of favoritism in defense appointments." *Houston Chronicle* (Oct. 27, 2020); also Sukhatme, Neel U. and Jenkins, Jay, "Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel" (May 26, 2020). 70 *Duke L.J.* __ (2020).

⁴ *E.g.* Castro County (2% of misdemeanors in 2019), Maverick County (5% of misdemeanors in 2019).

counties presume a defendant is not eligible for court-appointed counsel if they make bond, despite the Code of Criminal Procedure explicitly forbidding that practice.⁶ Lack of public access to magistration hearings, decentralized record storage within counties, and the lack of institutional defender structures make it difficult for the public to challenge these deficiencies proactively. Lack of enforcement by TIDC on even counties with known, consistent violations of appointment law virtually ensures such violations will continue.

Recommendations: TIDC should be empowered to enforce appointment requirements in counties that continue to violate state law, including with new enforcement tools. Counties should be encouraged to automate the attorney assignment process until they have an independent, institutional defender responsible for assigning cases to individual attorneys.

Public Defender Options for Rural Communities

Some of the most concerning and egregious violations of defendants' right to counsel are happening in rural areas of Texas right now, most notably around refusing to appoint attorneys to represent people who qualify for one and incentive structures that encourage quick plea deals over robust defense. TIDC has made significant strides in just the past few years to increase access to full-time public defenders in rural areas, and rural defenders should be commended for their difficult work. Public defender offices (PDOs) have been uniformly proven to provide better representation than other form of appointed counsel.⁷ They can only do this work effectively, however, if they are independent and sufficiently resourced.

Rural public defenders, like all public defender offices, need caseload limits, support staff, and pay parity with prosecutors in the region in order to be effective and to attract and retain quality lawyers. While rural areas have recently had difficulty finding enough attorneys to meet their legal needs, established and high-functioning PDOs can bring attorneys to rural areas lacking them. We have seen this already in some of the most sparsely populated parts of Texas, from the Far West Regional Public Defender to offices in the Rio Grande Valley operated by Texas RioGrande Legal Aid, as well as the statewide Regional Public Defender Office for Capital Cases (RPDO).

Recommendations: Expand funding available for rural regional public defenders, with a goal of eventually creating a unified statewide network of rural regional public defenders, similar to the RPDO model. Ensure that all public defender offices have meaningful caseload limits, access to support staff, and resource parity with the prosecution.

Monitoring of Workloads and Performance of Attorneys

Public defender offices funded by recent TIDC grants have caseload limits based on the comprehensive caseload study conducted in Texas in 2014.⁸ In many counties, however, attorneys are appointed to represent far more cases than anyone could competently handle in a year – including in counties that use the “wheel” system,⁹ contracts,¹⁰ managed assigned counsel,¹¹ or public defenders.¹² Overburdened attorneys are a problem in many parts of Texas, with over 40% of defendants being

⁵ In other states, that number was 56% in the last national study. Caroline Wolf Harlow, “Defense Counsel in Criminal Cases,” Bureau of Justice Statistics (2000), 6.

⁶ See, e.g., Smith County Policy Monitoring Report, TIDC.

⁷ Texas Indigent Defense Commission, Public Defender Primer (2020), 7.

⁸ Dottie Carmichael et. al., “Guidelines for Indigent Defense Caseloads: A report to the Texas Indigent Defense Commission,” Public Policy Research Institute, 30 (January 2015)

⁹ Harris County appointed over 400 felony cases to 6 different attorneys in 2019.

¹⁰ The 106th Judicial District, covering 4 rural counties, assigns nearly all cases to one contract attorney, totaling 268 felonies in 2019 (in addition to court appointments that lawyer received in other counties).

¹¹ Travis County appointed 7 attorneys over 500 cases each in 2019.

¹² Bowie County and Dallas County each had lawyers who closed over 1,000 cases in 2019.

represented with a lawyer who handled more than TIDC’s recommended caseload.¹³ Even counties that ostensibly have a limit on attorney caseloads do not always enforce them.¹⁴ TIDC has already invested significant time and resources into developing well-researched caseload guidelines, finding the maximum number of cases that an attorney can competently represent. TIDC should use its rule-making authority to enforce those guidelines on appointed attorneys throughout the state.

Beyond lacking caseload limits, quality control is virtually nonexistent in most counties. Full-time public defender offices, and some Managed-Assigned Counsel programs, provide training and supervision that can meaningfully ensure quality representation. Beyond the small number of counties with that defender infrastructure, however, defendants’ chances of getting a quality attorney are essentially left to chance. Judges provide a check on only the most blatant forms of malpractice in the courtroom, for example, if it is obvious that an attorney commits errors in trial. But most cases do not go to trial. The full extent of quality control in most counties is that their indigent defense plan requires the statutory minimum CLE requirements for their attorneys, and sometimes a minimum amount of trial experience as well (which could be met through prosecution of criminal cases).

More fundamentally, as a structural matter judges are incapable of and should not be providing the kind of supervision and support that is necessary to ensure high-quality defense.¹⁵ The judge is tasked with being a neutral arbiter, and therefore it would be inappropriate for the judge to ask questions about the lawyer’s investigations into a case, or communications of defense theories with the client. The lawyer requires independence from the judge in order to adequately represent the client. Attorneys across the state report that they feel pressure from judges to resolve cases quickly, rather than to provide a zealous defense. If anything, supervision by judges in these scenarios encourages attorneys to do *worse* work than they otherwise would, or at least serve interests other than the clients’. The legislature’s choice to defer supervision of the defense function to individual judges is, in effect, the choice to leave the defense function unregulated and even compromised, at the expense of indigent defendants and the defense attorneys who wish to zealously defend them.

Recommendations: TIDC should establish maximum caseloads for all court-appointed attorneys in Texas. All Indigent Defense Plans should be required to provide for supervision of court-appointed lawyers by an independent entity, not the presiding judge.

Administration and Funding of Indigent Defense Services

The current system of indigent defense provision in Texas is essentially a multitude of local strategies with little cohesion. Judges in each county or judicial district design the defense plan, often with little or no defense attorney standards or supervision structures. Counties are left with the responsibility to pay for whatever system the local judges devise, with limited support from the state. Because the costs of poor representation are borne primarily by low-income criminal defendants, followed by state coffers in the form of prison beds, counties have devoted few resources to protecting this constitutional right. What few protections and requirements of state law could be enforced by the TIDC are rarely levied against counties; in the 19 years since the Fair Defense Act, funding has only been withheld one time, following multiple years of the Hidalgo County Juvenile Court refusing to follow state law on appointments (the money was returned to the county later that year).

¹³ Davis, Nicholas T., George S. Naufal, H. Caspers and G. Burkhart. “Indigent Defense Caseloads in Texas: Assessing the Extent of High- Volume Practice,” (2018).

¹⁴ *E.g.* La Juanda Lacy received nearly 300 court-appointed felonies in Smith County in 2019 despite having a contract capping her caseload at 200.

¹⁵ American Bar Association, 10 Principles of a Public Defense Delivery System (2002) (“[Principle] 1 - The public defense function, including the selection, funding, and payment of defense counsel, is independent.”)

As a result, indigent defense is underfunded throughout the state. The per-capita average county spending is \$10, which puts Texas in the lowest tier of states.¹⁶ This lack of funding, combined with judges' control over appointment and pay for defense lawyers, ensures that the defense role in most counties will not have the necessary resources or independence to be effective. But the average masks dramatic spending differences across the state, from as little as \$1 per person in Maverick County to \$49 per person in Kenedy County in 2019.¹⁷ This variation and low average will remain problems, both for counties and defendants across Texas, until the state provides more funding and encourages counties to invest more in public defense. Indigent defense spending saves money in the long run because of lower jail, prison, and supervision expenses.¹⁸ If a person is not incarcerated in jail or prison, they are better able to work and pay taxes. The biggest beneficiary of these financial savings is the state, in the form of prison expenses. The state should take a more proactive role in funding indigent defense to reap those benefits. Ideally, the state should take over most or all indigent defense funding, but at minimum it should devote as much money as counties spend.

Compensation for court-appointed lawyers also varies dramatically across the state, with some payment structures disincentivizing quality representation. Flat-fee, per-case payment structures are common and especially problematic. In Bastrop County, an attorney described the flat-fee system as functionally “budgeting 2.67 hours” to each felony case, and explained that because it was impossible to get paid for additional work on cases that resulted in plea deals, his client couldn't get the amount of work she requested from her appointed lawyer.¹⁹ Other counties pay hourly rates but have low payment caps, essentially requiring any attorney that wants to properly represent their client to do the lion's share of the work *pro bono*.²⁰ In other counties, judges simply cut attorneys' reported billable hours because they don't think the lawyer should have worked so hard on the case.²¹ Compensation structures that make the defense lawyer more accountable to the judge than their client cause ethical conflicts for attorneys and can lead to low quality representation for defendants. Statewide minimum standards for attorney compensation structure, as well as amounts, could encourage independent and zealous advocacy.

Also troubling, in most counties the court-appointed defense lawyer can only be guaranteed reimbursement for expenses on investigators and expert witnesses with the pre-approval of the judge before whom the case will be tried. This creates an impossible conflict for the defense attorney, because the same judge who will be ruling on the case will have heard the potential defense theory to justify the funding. If the defense attorney does not ultimately present evidence of the type that they wanted to find, the judge will know what the investigation or expert was expected to turn up and might make impermissible inferences against the defendant. Even the most well-meaning judge will create the *appearance* of bias by controlling the type and amount of resources available to each individual defendant. Many attorneys, hesitant to put their client or their employer-judge in this position, opt not to use investigators or experts at all. Scores of counties, and hundreds of courts, reported \$0 in investigation and expert witness expenditures for indigent defendants in their 2019 Indigent Defense Expenditure Reports. Investigation is widely considered a fundamental requirement for ethical, competent representation.²²

¹⁶ “In Your State,” *Gideon at 50*, <http://gideonat50.org/in-your-state#per-capita-spending>.

¹⁷ TIDC County Data Sheets, <http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=162>.

¹⁸ Eve Brensike Primus, “Defense Counsel and Public Defense.” *Arizona State University College of Law, Reforming Criminal Justice* 121, 131-32.

¹⁹ Complaint, available at <http://www.tidc.texas.gov/media/58488/ps-meeting-2020-final.pdf> p. 55.

²⁰ *E.g.* Carson Childress Collingsworth Donley Hall District and County Court Attorney Fee Schedule (establishing hourly rate of \$70 to \$100 for felonies, but capping payment at between \$150 for misdemeanors and \$400 for first degree felonies “unless the Court finds exceptional circumstances or that good cause for exceeding said total amounts exists.”)

²¹ Sixth Amendment Center, “The Right to Counsel in Armstrong & Potter County, Texas: Evaluation of Adult Trial Level Indigent Defense Representation,” 154 (2019).

²² American Bar Association, *Criminal Justice Standards the Defense Function*, Standard 4-4.1 Duty to Investigate and Engage Investigators.

Recommendations: Increase the state share of indigent defense funding to cover at least half of indigent defense expenditures. Expand TIDC enforcement of county violations of the Fair Defense Act and related law. Establish minimum standards for attorney compensation and eliminate flat-fee compensation per case. Divorce the decision to fund investigation or expert witnesses in individual cases from the presiding judge, either with independent defense entities allocating this funding or amending the Code of Criminal Procedure to require a different judge to rule on all such funding requests.²³

Counsel Options for Indigent Defendants During Magistration Proceedings

The outcome at initial appearance has a profound effect on a person's life and the trajectory of their case. When a person is detained at that hearing, either because bail is denied or set at an unaffordable amount, they can lose their job, housing, possessions, custody of children, access to government benefits, and medical care. It also has downstream consequences for their case: people detained pretrial are significantly more likely to be convicted, and to have a longer sentence.²⁴ Many of these harms cannot be fixed by giving the defendant a lawyer later in the process – by that time evidence could be lost, job loss and eviction could already have occurred, and the defendant could have made uncounseled statements against their interest in court. These harms can be mitigated, if not prevented, with counsel at magistration. This is also one place where indigent defense spending can most directly create budget savings at the local level, because counsel at magistration can reduce pretrial jail populations and costly pretrial supervision by ensuring that people have only the least restrictive conditions necessary for their release before trial.²⁵

Best practice would be vertical representation starting at arrest, meaning the attorney who represents a defendant at magistration is assigned to continue representing them throughout the trial. This model for providing representation at magistration is extremely rare in Texas. It sometimes happens in parts of Cameron County, but possibly nowhere else in the state. Vertical representation essentially involves appointing the lawyer a few days earlier than the Code of Criminal Procedure currently requires. This would not necessarily cost much more money or cause additional hardship on attorneys: Because the attorney must perform an initial interview with their client anyways, combining the initial meeting with bail argument can both improve representation and, if the initial advocacy is successful at securing release, eliminate the need for time-consuming subsequent jail visits and bond reduction motions.

Horizontal representation at magistration, where lawyers do not continue representing the client after the initial hearing, is slightly more common; it happens as a matter of course in Bexar, Fort Bend, and Harris counties.²⁶ However, in the vast majority of counties in Texas there is no opportunity for an indigent defendant to have a lawyer present information and argument at the initial bail-setting hearing. Federal litigation in *Booth v. Galveston County* may force counties' hands on this front, in which a federal judge already declared that the Sixth Amendment requires representation by counsel at the initial magistration hearing. If that ruling is upheld by the Fifth Circuit, nearly every county in Texas will immediately be liable to civil suit unless they start providing counsel at magistration hearings.

Recommendations: As a matter of sound public policy and to protect counties from exposure to litigation, the state should enter funding arrangements to help counties provide counsel at magistration. When feasible, the attorney assigned at magistration should also be appointed for the full case.

²³ Other states require funding decisions be made by a judge other than the presiding judge to avoid the inherent conflicts described above. *E.g.* Cal. Penal Code 987.9(a).

²⁴ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford L. Rev.* 711 (2017).

²⁵ Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *Cardozo L. Rev.* 1719, 1720 (2002) (showing represented defendants charged with nonviolent offenses are 2.5 times as likely to be released on recognizance and to receive affordable bail).

²⁶ Dallas County provides counsel at magistration by their Mental Health Public Defender, but only for people identified as having serious mental illness. El Paso County is also in the process of establishing counsel at magistration in 2020, with help of a TIDC improvement grant.