



SIXTH AMENDMENT CENTER

P.O. Box 15556, Boston MA 02215

Texas House of Representatives Criminal Jurisprudence Committee **Interim Charge 3:** **The State of Indigent Defense**

Testimony of Jon Mosher, Deputy Director
Sixth Amendment Center

Introduction

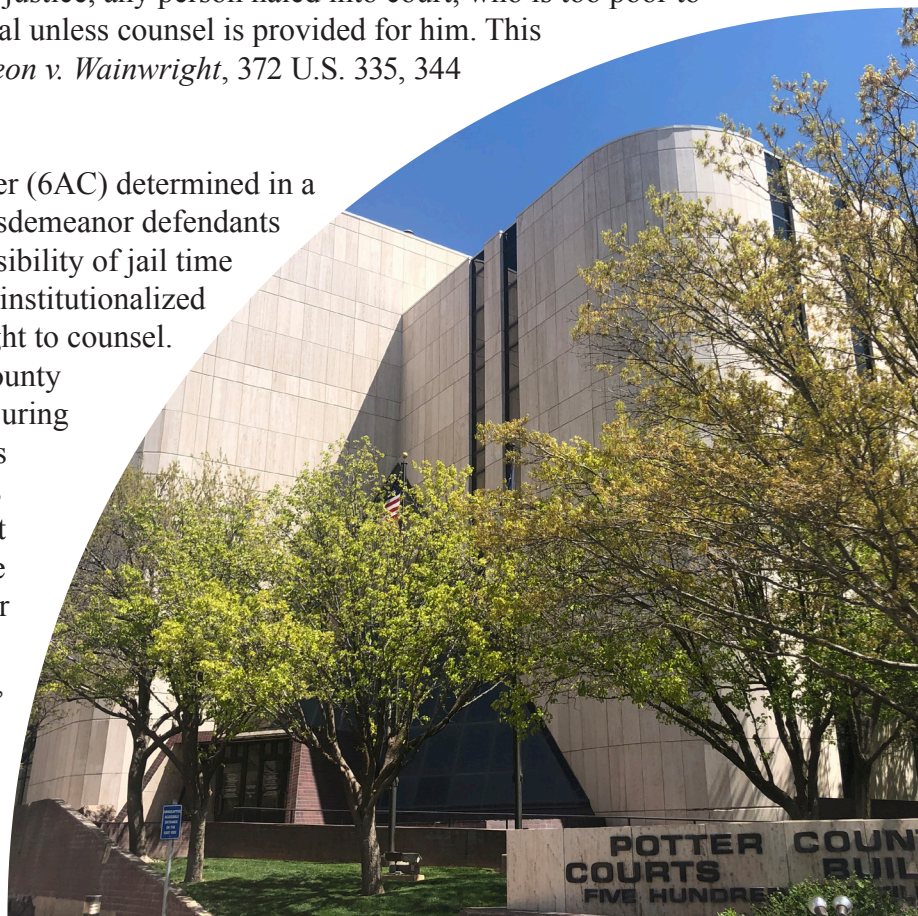
The United States of America stands for the universal notion that every individual possesses the inalienable right to liberty and to determine one's own path to happiness free from undue governmental control. In fact, "liberty" is so central to the idea of American democracy that the founders of our nation created a Bill of Rights to protect personal liberty from the tyranny of government. All people, they argued, should be free to express unpopular opinions, choose one's own religion or take up arms to protect one's home and family without fear of reprisal from the state.

The Bill of Rights' Sixth Amendment prohibits federal, state and local governments from taking the liberty of a person of limited financial means unless a competent attorney is provided to the indigent accused at all critical stages of a criminal procedure. Without the aid of an effective lawyer, almost any individual stands the risk of the government putting him in jail when charged with a crime. The majority of us would not know, for example, what is and is not admissible in a court of law let alone how to procedurally convince twelve jurors that the government has failed to prove their charge beyond a reasonable doubt.

The U.S. Supreme Court declared in 1963 that "reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Despite this, the Sixth Amendment Center (6AC) determined in a 2019 study that more than 74% of all misdemeanor defendants in Potter County (Amarillo) face the possibility of jail time without speaking to a lawyer because of institutionalized pressure to forego their constitutional right to counsel.

In fact, some senior prosecutors in the county attorney's office are concerned that pressuring misdemeanor defendants in these ways is "fraught with perils" and likely produces unjust outcomes. But even those indigent defendants who do receive counsel in the early stages of a felony and misdemeanor cases oftentimes have a lawyer in name only due to excessive attorney caseloads, financial conflicts of interests, and undue judicial influence, among other structural deficiencies.



A constructive denial of the right to counsel “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648 (1984). U.S. Supreme Court caselaw explains that deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way. Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel – what the U.S. Supreme Court calls a constructive denial of counsel.

Texas state law requires the county in which a criminal prosecution is instituted to pay the cost of appointed counsel and all reasonable and necessary expenses of the defense at both trial and appeal. State law also requires the trial court judges who have jurisdiction over criminal cases in each county to adopt a local plan to provide and oversee attorneys to represent indigent defendants. 6AC found the system established by the judges of Armstrong and Potter counties to select, train, and supervise the private attorneys who are appointed to represent indigent defendants in criminal cases denies those defendants the constitutional right to effective assistance of counsel.

Constructive denial of counsel in Armstrong and Potter counties is rooted in insufficient resources and low attorney compensation. Court appointed attorneys are paid a single flat fee, in most cases, without regard to how much or how little time the attorney must devote to that case (e.g., \$400-\$500 for a misdemeanor or state jail felony). Although the indigent defense plan in Armstrong and Potter counties calls for “reasonable” attorney compensation as determined by the “time and effort expended” by the attorney, payment of a presumptive flat fee per case does just the opposite. Because attorneys are presumptively paid exactly

About the Sixth Amendment Center

Founded in 2013, the Sixth Amendment Center (6AC) has been an authorized training & technical assistance provider of the U.S. Department of Justice (DOJ) Bureau of Justice Assistance since 2013. 6AC’s work on behalf of the DOJ includes: serving as an *ex officio* member of the Nevada Supreme Court Indigent Defense Commission and the Michigan Governor’s Indigent Defense Advisory Commission; and providing technical assistance to the Tennessee Supreme Court Indigent Defense Representation Task Force, the Idaho Interim Legislative Task Force on Indigent Defense, and the Utah Judicial Council, among others.

6AC is a national, non-partisan, non-profit organization dedicated solely to ensuring that justice systems fulfill their constitutional obligation to provide effective representation to the indigent accused. Because 6AC is not a membership or stakeholder organization, it is widely regarded by policymakers and criminal justice stakeholders as the most objective and reliable source of detailed information about jurisdictional successes and failings in providing the right to counsel to the poor. 6AC’s work is supported by generous contributions by the Charles Koch Foundation and the Public Welfare Foundation.

In 2019, 6AC published *The Right to Counsel in Armstrong County and Potter County, Texas: Evaluation of Adult Trial Level Indigent Defense Representation*. Armstrong County and Potter County commissioned the report. The U.S. Department of Justice funded the work through the Bureau of Justice Assistance, FY 17 National Initiatives Adjudication: Training and Technical Assistance to Support Protection of Constitutional Rights Under the Sixth Amendment (DOJ Office of Justice Programs Grant Award # 2017-YA- BX-K003). The report is available at: https://sixthamendment.org/6AC/6AC_tx_armstrongpotterreport_2019.pdf.

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the same amount no matter how few or how many hours they devote to a defendant's case, it is in the attorney's own financial interest to spend as little time as possible on each individual defendant's case. As a result, court appointed attorneys in Armstrong and Potter counties fail to perform some of the most basic indicators of zealous advocacy, like conducting investigation and communicating with the client.

For example, court appointed lawyers in Potter and Armstrong counties "never" use investigators in misdemeanor cases and rarely do so in felony cases; they do not visit their in-custody in jail, and many attorneys do not meet with out of custody clients either. Instead, most appointed attorneys meet with the defendants they are appointed to represent, both in-custody and out of custody, only at the courthouse before or after scheduled court proceedings.

Moreover, flat fee compensation for appointed attorneys means that the public defense lawyers can increase their earnings only by taking as many cases as possible and disposing of them as quickly as possible. The judges in Armstrong County and Potter County do not monitor the number of appointments they make to each lawyer, making it impossible to know whether any given attorney's caseload or workload is excessive. However, when measured against Texas' caseload guidelines created at the direction of the state legislature, the workloads of court appointed lawyers in Armstrong and Potter counties are particularly troubling. One court appointed attorney carried an indigent defense workload at 230% of the Texas caseload guidelines. A different attorney was paid for a caseload at 152% of the Texas caseload guidelines, but he reported spending only 18% of his time on that caseload, meaning the lawyer was carrying an indigent defense caseload in that required more than eight full time attorneys under the Texas caseload guidelines.

Implications for the rest of Texas

The U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states – not local governments – under the due process clause of the Fourteenth Amendment. Every state in the nation must therefore have a system for providing an attorney to represent each indigent defendant who is charged with a crime and facing the possible loss of their liberty. Texas state law requires the county in which a criminal prosecution is instituted to pay the cost of appointed counsel and all reasonable and necessary expenses of the defense at both trial and appeal. If a state chooses to delegate its right to counsel responsibilities to its counties and judges, the state must guarantee not only that those local governments and local officials are capable of providing effective representation but also that they are in fact doing so.

Although the state legislature created the Texas Indigent Defense Commission (TIDC) in 2011 to disseminate limited state funding through grants to counties, TIDC neither provides direct representation to indigent defendants nor has the power to force counties or judges to comply with any law, rule, standard, or policy relating to the provision of indigent defense services. And, even if TIDC did have the authority to enforce the State of Texas' Sixth and Fourteenth Amendment right to counsel obligations, TIDC has extremely limited ability to do so. Despite

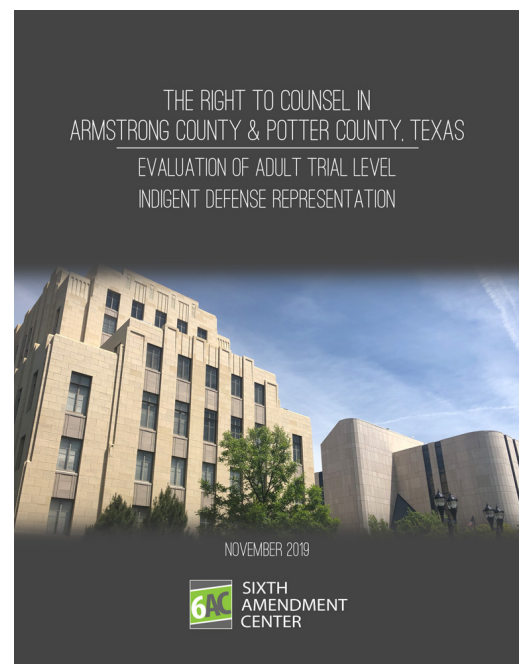
the State of Texas' constitutional obligation to ensure that each and every person facing a potential loss of liberty has an effective lawyer at every critical stage of a criminal prosecution in each of its well over 900 trial courts spread across 254 counties, TIDC operates with just 12 employees.

The absence of state oversight results in constitutional violations in Armstrong and Potter counties, as documented in 6AC's 2019 study. However, 6AC also noted that it is difficult, at best, to make local-based recommendations for the improvement of indigent defense services in Armstrong County and Potter County, because so many of the problems described throughout the report are inherently tied to decisions made by the state.

For example, under Texas law, the judges of each county are responsible for establishing "countywide procedures" for the provision of counsel to indigent defendants at trial and appeal for crimes punishable by incarceration. Thus, in implementing Texas' statutory scheme, nearly every aspect of the provision of trial level right to counsel services is subject to undue judicial interference, because judges in Texas are required to:

- set the qualifications and training required of attorneys to be appointed in indigent defense cases;
- select the attorneys eligible to be appointed in criminal cases, and individual judges directly choose the attorney who is appointed in each specific case;
- provide supervision over cases if supervision occurs;
- determine whether and when attorneys are removed from eligibility to be appointed in criminal cases;
- set the compensation paid to attorneys appointed to represent indigent defendants through funds allocated by the counties; and
- determine whether experts and investigators are allowed in each specific criminal case and set the compensation paid to experts and investigators in the criminal cases of indigent defendants.

Statutorily required judicial interference opens the door for judges to unduly influence appointed attorneys. To be clear, it is not that the Armstrong and Potter County judges who oversee indigent defense services are malicious or consciously trying to undermine the basic constitutional right to counsel. Instead, the judges there are working within a legal and financial construct created by the State of Texas that presents them with a series of impossible choices.



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Still, when public defense attorneys are provided through a system overseen by judges, the appointed attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, rather than solely advocating for the stated interests of the defendant they are appointed to represent, as is their ethical and constitutional duty. Public defense attorneys in judicially controlled systems understand that their personal compensation along with the resources needed to properly defend an indigent person require the approval of the judges. So, it does not take a judge to say overtly, for example: “Do not file motions in my courtroom.” Fearing the loss of income that can result from displeasing the judge, appointed attorneys often take on more cases than they can ethically handle, triage their available working hours in favor of some clients but to the detriment of others, and agree to work without resources necessary to effective representation, thereby failing to meet the parameters of ethical representation owed to all clients – all issues documented in our 2019 report. Yet, policymakers in Armstrong and Potter counties do not have the authority to change state law.

Conclusion

While we found right to counsel deficiencies in Armstrong and Potter counties, we do not know whether any correlation can be made to other counties in the state. TIDC and its predecessor agency, the Texas Task Force on Indigent Defense, have been in existence now for approximately 20 years combined, but during that time no comprehensive statewide evaluation has been conducted to assess the impact the organization has had on right to counsel services throughout Texas. Policymakers should conduct a statewide assessment of indigent defense services to determine the strengths of TIDC and where other systemic deficiencies exist that result in unconstitutional practices.

The Sixth Amendment Center stands ready to assist the Texas legislature to ensure that no person faces potential jail time without first having the aid of a lawyer with the time, ability, and resources to present an effective defense, as required by our Constitution. I can be reached at:

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As the Supreme Court stated more than half a century ago in *Gideon*, “[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”