

The Way Forward

Recommendations for Improving Indigent Defense in Texas on the Fiftieth Anniversary of Gideon v. Wainwright

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TFDP

TEXAS FAIR DEFENSE PROJECT

ABOUT TFDP

The Texas Fair Defense Project works to improve the fairness of Texas's criminal courts and ensure that all Texans have access to justice.

TFDP focuses on improving the public defense system and challenging policies that create modern-day debtors' prisons filled with poor people who cannot afford to pay commercial bond fees and post-conviction fines and costs.

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"To sound Gideon's trumpet in Texas, we must insist that criminal defendants have qualified counsel who are equipped with the time and resources to mount a meaningful defense."

The Honorable Wallace B. Jefferson
Former Chief Justice, Texas Supreme Court
State of the Judiciary Address
Presented to the 83rd Legislative Session
March 6, 2013

Introduction

The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹

Fifty years ago, the U.S. Supreme Court ruled that this constitutional guarantee means that all states, including Texas, must provide lawyers to defend individuals who are accused of felony offenses in their courts and who can’t afford to hire a lawyer.²

The Court found that the right to counsel is binding on the states because it is “fundamental and essential to a fair trial,”³ and necessary to ensure that “every defendant stands equal before the law.”⁴

The Court made these pronouncements in the case of Clarence Earl Gideon, a man accused of breaking into a pool hall in Florida.⁵ Mr. Gideon couldn’t afford to hire a lawyer and asked the judge in his case to appoint a lawyer to represent him.⁶ The trial court refused to appoint counsel, and Mr. Gideon was convicted after representing himself at trial.⁷

The Supreme Court granted Mr. Gideon’s request to review his claim that he was convicted in violation of his right to counsel. After the Supreme Court ruled in his favor, Mr. Gideon was represented by appointed counsel at a new trial and found not guilty of the charged offense.⁸

The Supreme Court decision in his case, *Gideon v. Wainwright*, continues to stand for the proposition that poor individuals must be provided counsel when the state seeks to deprive them of their liberty so that they may have a meaningful opportunity to mount a defense and challenge the government’s case.⁹

The Constitutional Right to Counsel

In the fifty years since *Gideon v. Wainwright* was decided, the constitutional right to appointed counsel has been extended to direct appeals,¹⁰ juvenile delinquency cases,¹¹ and minor offenses in which a sentence of imprisonment is imposed,¹² even if the sentence of imprisonment is suspended and the defendant receives probation.¹³

In cases in which the right to counsel is applicable, individuals have the right to counsel once adversary proceedings begin—usually when an individual is brought before a judicial officer for a hearing shortly after arrest¹⁴—and thereafter at all critical stages of the proceedings.¹⁵ For example, individuals are entitled to the assistance of counsel to

investigate and research possible defenses, to prepare for trial,¹⁶ and during plea negotiations.¹⁷

Gideon's legacy has survived and expanded over the years because the right to counsel is viewed as an indispensable check on unfairness in criminal court proceedings; because it plays a key role in producing reliable criminal justice outcomes and protecting the innocent from conviction; and because it provides the gateway through which poor people accused of criminal offenses are able to access all of their other rights.¹⁸

The right to counsel is so essential to a fair trial that it is one of only a handful of rights for which denial of the right results in the automatic reversal of a defendant's conviction.¹⁹ In most cases, a defendant cannot obtain a reversal without showing not only that a right was violated, but also that the violation—even a violation of constitutional magnitude—likely affected the outcome of the case.²⁰ However, courts presume that any denial of the right to counsel resulted in harm because lopsided proceedings in which only one side—the government—is represented by counsel are so contaminated that it would be purely speculative to try to guess at the effect of defense counsel's absence on the outcome.²¹

Because proceedings without defense counsel are unreliable, the right to counsel also is the ultimate safeguard against the wrongful conviction of poor people accused of criminal offenses:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself if the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel he may be put on trial without a proper charge, and convicted on incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.²²

Finally, the right to counsel is the preeminent right in the criminal justice system because without it all other rights would be illusory. A defendant who is not represented by counsel may not be aware of all of his Fourth, Fifth, and other Sixth Amendment rights, and is unlikely to be able to successfully assert those rights without counsel's assistance.²³

The Right to Counsel in Texas Prior to 2001

Texas was, in some ways, ahead of *Gideon* when the Supreme Court issued its opinion in that case fifty years ago. However, until 2001, Texas failed to put in place any system that would enable it to consistently meet its obligation to provide the assistance of counsel to poor people accused of criminal offenses.²⁴

Texas statute afforded poor people the right to appointed counsel in non-capital felony cases four years before *Gideon* was decided, and in practice many judges provided appointed counsel to individuals charged with felony offenses for years before that statute was adopted.²⁵ Texas also had a statute requiring appointment of counsel in misdemeanor cases before the Supreme Court issued the same requirement,²⁶ and Texas statute still affords misdemeanor defendants a more expansive right to counsel than does constitutional case law.²⁷

However, many individuals with a constitutional and statutory right to counsel did not actually obtain counsel in Texas courts.²⁸ And neither state nor county officials were held accountable when defendants' right to counsel was violated.²⁹

Each individual judge was responsible for developing his or her own procedures for appointing counsel, and those procedures varied significantly both within counties and from one county to another.³⁰ Judges sometimes appointed lawyers with little or no criminal law experience, and even experienced attorneys often lacked the training and resources necessary to provide effective representation to their clients.³¹

Although *Gideon* imposes the obligation to provide appointed counsel on state governments,³² the State of Texas did not exercise any oversight over local indigent defense procedures.³³ Texas also failed to provide any state funding for indigent defense services.³⁴

In short, Texas had a “hodgepodge” of indigent defense procedures³⁵ that often failed to provide effective representation, and sometimes failed to provide any representation at all, to poor people accused of criminal offenses.

The Texas Fair Defense Act

Almost four decades after *Gideon* was decided, the Texas Legislature passed the Fair Defense Act of 2001,³⁶ and finally put in place a structure designed to improve indigent defense services in Texas.

The Act greatly increased the consistency and transparency of indigent defense procedures in Texas, and took some steps toward holding officials accountable for local indigent defense systems.

The Fair Defense Act increased the consistency of indigent defense procedures across the state by requiring judges to adopt uniform procedures at a county level.³⁷ These countywide procedures must include a small number of specific provisions, primarily relating to the timing of counsel's appointment, which are mandated statewide.³⁸ County procedures also must include one or more of the attorney selection methods set out in state statute.³⁹ In addition, county procedures must include additional mandatory elements, such as indigency standards,⁴⁰ attorney qualification standards,⁴¹ and attorney compensation rates.⁴² However, the statute does not require jurisdictions to address these elements in any specific manner, and different jurisdictions have addressed them in a variety of different ways.⁴³

The Fair Defense Act also significantly improved the transparency of the state's indigent defense systems. County procedures must be in writing and submitted to the Texas Indigent Defense Commission, which was created by the Act.⁴⁴ Counties also must report information about their indigent defense appointments and expenditures to the Commission.⁴⁵ The Commission publishes county indigent defense procedures and all other indigent defense data submitted by counties on its website,⁴⁶ where it is available to policymakers, defendants and their families, and members of the general public.

Finally, the Fair Defense Act increased accountability for the delivery of indigent defense services to a limited degree. The Act shifted responsibility for indigent defense procedures from individual judges to Texas counties,⁴⁷ and counties are eligible to receive state grant funds for indigent defense "based on a county's compliance with standards adopted by the [Texas Indigent Defense Commission] and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense."⁴⁸ The Commission is charged with awarding state grant funds for indigent defense programs, and will not award grants to counties that do not submit required indigent defense data reports or do not submit written indigent defense procedures that contain elements required by the Act.⁴⁹

Still Reaching for *Gideon*

There is no question that the Fair Defense Act represents a major improvement over the disorganized indigent defense procedures that preceded it. However, while the Act did put in place a structure for improving the delivery of indigent defense services in Texas, it did not actually put in place or pay for an improved indigent defense system.

Fifty years after *Gideon* was decided, Texas's indigent defense system still is characterized by disparate procedures, disparate financial investments, and insufficient accountability for systemic failures to provide effective representation to poor people who are accused of criminal offenses.

Because Texas counties maintain almost unfettered discretion over many elements of their indigent defense procedures, Texas’s indigent defense “system” is still a hodgepodge of more than 254 different local systems.⁵⁰ While some counties have made significant efforts to transform their systems and improve the quality of representation,⁵¹ other counties continue to employ practices that result in mass waivers of the right to counsel and other abuses that were decried before the Fair Defense Act was passed.⁵² The result of these disparate county procedures is that poor criminal defendants’ access to counsel, as well as the quality of representation they receive, varies widely across the state.

Despite the allocation of some state funding for indigent defense in the Fair Defense Act and through subsequent legislative enactments,⁵³ Texas counties still bear the brunt of the financial burden related to meeting the state’s obligations under *Gideon*. State grant funds covered less than 14% of more than \$207 million spent on indigent defense in fiscal year 2012; counties paid the remaining 86%.⁵⁴ This heavy dependence on county funding further complicates efforts to deliver indigent defense services in a consistent manner that would enable indigent defendants to obtain quality representation in any county in Texas. Variations in county tax bases produce disparate investments in the right to counsel,⁵⁵ while overall per capita expenditures are very low compared to other states.⁵⁶

Moreover, few mechanisms are in place to hold officials accountable for violations of the Fair Defense Act or defendants’ right to counsel. Although the Texas Indigent Defense Commission reviews counties’ written procedures to determine if they contain elements required by the Act, the Commission only has resources to conduct a very small number of onsite reviews to assess whether counties are in fact complying with their own written procedures, as well as state and federal law.⁵⁷ When it does identify a compliance issue through an onsite assessment, all the Commission can do is threaten to withhold the state grant award to the offending county.⁵⁸ This award may not be in an amount sufficient to cover the cost of corrective action or motivate the county to come into compliance.⁵⁹

The Way Forward

Passage of the Fair Defense Act in 2001 does not represent a discrete moment at which Texas’s history of indigent defense failures came to an end and a new, improved system was put into place. Rather, it marks the beginning of a process that involves decentralized efforts to transform longstanding practices that prevent poor people accused of criminal offenses from obtaining the effective assistance of counsel.

This process has advanced at different paces in different counties across the state. The process is still ongoing—although some jurisdictions have made a considerable amount of progress, in others defendants’ experience now is not very different than it was before the Fair Defense Act was passed.⁶⁰

The persistence of practices that violate defendants' right to counsel is discouraging, and results in concrete harm to individuals in the criminal justice system every day.⁶¹

However, there is a way forward.

Indigent defense practices in Texas remain dynamic. State⁶² and local⁶³ policymakers, criminal defense lawyers,⁶⁴ the organized bar,⁶⁵ and advocates⁶⁶ continue to work to improve local indigent defense systems and the quality of representation provided to poor people accused of criminal offenses. The sentiment may not be universal, but there is broad consensus that we are not yet where we need to be, and a willingness to keep moving forward.⁶⁷

This report is intended to assess the state of indigent defense in Texas at the 50th anniversary of *Gideon v. Wainwright*. It is informed by the Texas Fair Defense Project's experience since 2004 challenging unconstitutional indigent defense practices and working with state and local officials to improve local indigent defense systems.

The report focuses on two specific problems that continue to undermine indigent defendants' right to counsel in Texas state courts: outright denial of the right to counsel, particularly in misdemeanor cases, and excessive attorney caseloads that deprive poor people accused of crime of adequate representation even when they are provided counsel. Denial of counsel was a widespread problem before the Fair Defense Act was passed,⁶⁸ and has not been resolved as the Fair Defense Act has been unevenly implemented by counties across the state. The problem of excessive caseloads has flown under the radar in Texas due to the difficulty of obtaining data about attorney caseloads in county-based systems that rely largely on assigned counsel, but the anecdotal data that is available has raised sufficient concerns that the Legislature recently required counties to collect and report systematic caseload data.⁶⁹

The report also offers recommendations for how Texas can address these problems and close the gap between current practices and the promise of *Gideon v. Wainwright*. Our recommendations include specific proposals that will increase access to counsel and reduce defense attorney caseloads, as well as broader proposals to improve the allocation of limited indigent defense resources in order to invest in programs that improve the quality of representation.

With these recommendations, Texas can move closer to *Gideon's* guarantee that every person accused of a criminal offense, whether rich or poor, will be treated fairly by the courts and have a meaningful opportunity to defend his or her liberty.

Defenseless: Poor People Without Lawyers in Texas’s Criminal Courts

The widespread and complete failure to appoint counsel to poor individuals accused of criminal offenses was one of the most egregious documented problems in Texas courts before the Legislature passed the Fair Defense Act in 2001.⁷⁰

Data reported by Texas counties to the Office of Court Administration and the Texas Indigent Defense Commission indicates that outright failure to provide counsel to indigent defendants continues to be an issue in many Texas counties, particularly in misdemeanor cases.⁷¹ Individual stories from litigated cases lead to the same conclusion.⁷²

Failure to provide counsel may be one of the most stubborn indigent defense problems in Texas. But the fact that it has proved resistant to change does not mean that it can be ignored in favor of other, more malleable issues. Ensuring access to counsel is a threshold matter that Texas must confront before it can make informed decisions about how to most effectively deliver indigent defense services and allocate criminal justice resources. Currently, the full scope of the demand for indigent defense services is obscured by practices used to elicit guilty pleas from unrepresented defendants and move high-volume court dockets quickly.

Many of the procedural changes that will improve indigent defendants’ access to counsel are relatively simple to implement. They already have been successfully implemented in dozens of Texas counties that do not rely on significant numbers of uncounseled guilty pleas to resolve criminal cases.⁷³ The biggest obstacle to adoption of these procedures in Texas’s remaining counties is the fact that some criminal justice officials have become accustomed to processing large numbers of cases without counsel,⁷⁴ and have lost sight of the vital role defense attorneys play in maintaining the reliability and fairness of the criminal justice system.

The Role of Defense Counsel in Our Adversarial Criminal Justice System

The foundational principle of the American criminal justice system is that “truth—as well as fairness—is best discovered by powerful statements on both sides of the question.”⁷⁵ Our system is an adversarial one that is designed to produce fair and accurate results through a process in which two skilled opponents present the evidence and law that supports their different sides of a case.⁷⁶

As the Supreme Court has repeatedly recognized, the right to counsel is of paramount importance precisely because of the adversarial nature of our system.⁷⁷ *Gideon* itself ruled

that the right to counsel was fundamental and essential to a fair trial due to counsel's role in our adversarial context:

[I]n 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. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The 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.⁷⁸

The proper functioning of our adversarial criminal justice system requires counsel on both sides of a case.⁷⁹ When only one side is represented by counsel, the criminal justice system is not equipped to distinguish the innocent from the guilty, or to assign punishment that is appropriate to both the offender and the offense.⁸⁰

The Costs of Denying Defendants Access to Counsel

The breakdown of the criminal justice system that occurs when defendants are denied the right to counsel clearly can have dire consequences for individuals who are accused of criminal offenses. These consequences go beyond conviction of the innocent.

For example, in recent years Texas has created a variety of specialty courts and other diversion programs both to reduce the cost of the criminal justice system and respond more effectively to criminal behavior.⁸¹ These programs generally involve probation instead of jail time, and thus offer sentencing benefits to defendants who meet their eligibility criteria and participation requirements.⁸² However, some of these programs are not open to defendants without counsel.⁸³ In these cases, practices that deny poor defendants' access to counsel also deny them access to diversion programs, and create a two-tiered justice system that offers different sentencing options to rich and poor defendants.

A conviction for even a low-level offense that is classified as a misdemeanor⁸⁴ also can trigger serious consequences beyond the criminal justice system. These enmeshed civil penalties can include deportation, loss or denial of employment, denial of a wide array of professional licenses, loss or denial of a driver's license, ineligibility for student loans, and

expulsion from school.⁸⁵ Particularly in misdemeanor cases, the enmeshed civil penalties resulting from a conviction may be more severe than the criminal sentence.⁸⁶ One of defense counsel's duties in a criminal case is to explain these enmeshed civil penalties to their clients, particularly when their clients are evaluating whether to plead guilty.⁸⁷ Defendants without lawyers may plead guilty without any information about enmeshed civil penalties,⁸⁸ and only understand the full consequences of their decision when it is too late to try to avoid or mitigate those penalties.⁸⁹

In addition to these negative consequences for individuals accused of criminal offenses, denial of counsel, and the manner in which it undermines the adversary system, corrupts the entire criminal justice system and subverts broader criminal justice reforms.

At the most basic level, the unreliable results that are produced when defendants don't have access to counsel undermine public confidence in the criminal justice system and the courts.⁹⁰

Moreover, efforts to improve the reliability of the system and reduce wrongful convictions won't have their intended impact when people accused of crime don't have lawyers to identify and challenge unreliable scientific testimony, suggestive identification procedures, or the prosecution's failure to turn over evidence that helps the defense.⁹¹

Denial of counsel also takes away poor criminal defendants' ability to challenge improper law enforcement practices through advocacy in their individual criminal cases.⁹² Police officers who know they won't have to face defense counsel have little to deter them from violating an individual's rights by conducting an illegal search or seizure.⁹³

Finally, denial of counsel also complicates efforts to reduce the criminal justice system's reliance on lengthy prison sentences that waste taxpayer resources and fail to contribute to public safety.⁹⁴ The recent growth in diversion programs in Texas has been motivated to a significant degree by the objective of saving taxpayer money.⁹⁵ Taxpayer money continues to be wasted when poor defendants are excluded from these programs solely because they don't have a defense lawyer.⁹⁶

Widespread denial of counsel also has likely tainted the design of many of these diversion programs. In an attempt to strike a balance between saving money and holding defendants accountable, diversion programs often require defendants to enter a guilty plea. However, this balance has been struck in a system in which denial of counsel is common, and with incomplete data on the cost of providing counsel to all defendants who are entitled to counsel. Poor defendants who participate in a post-plea diversion program are entitled to the appointment of counsel before entering the program because failure to comply with all of the program's participation requirements will result in an automatic conviction.⁹⁷ Post-plea diversion programs also subject even those defendants who successfully complete them to many of the same enmeshed civil penalties they would face if they had been

convicted.⁹⁸ Diversion programs that were designed to reduce the cost of counsel in a constitutional manner—by diverting defendants prior to entry of a guilty plea rather than by denying defendants access to counsel in proceedings in which they are entitled to counsel—also would better perform their intended function of enabling defendants who successfully complete the programs to reenter society free from the penalties of a criminal conviction.

Convictions Without Counsel in Misdemeanor Courts

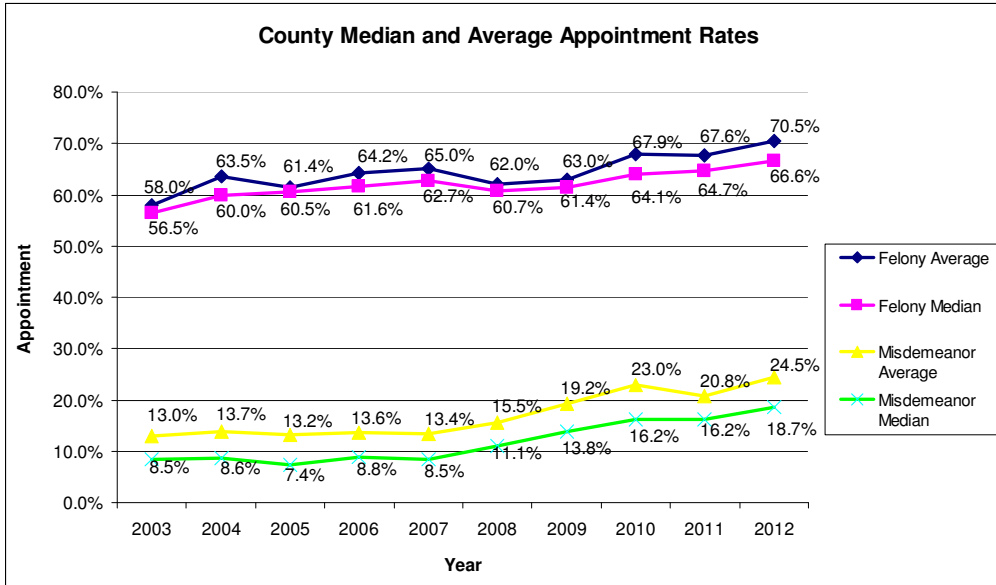
The conviction of poor people accused of misdemeanor offenses in Texas courts on the basis of uncounseled guilty pleas was a documented problem before the Fair Defense Act was passed.⁹⁹ This problem continues today.

According to the Texas Indigent Defense Commission, approximately 40% of the defendants charged in the 548,348 misdemeanor cases filed in Texas in fiscal year 2012 were represented by appointed counsel.¹⁰⁰ This 40% appointment rate compares to the 70% appointment rate in Texas felony cases,¹⁰¹ and the 57% appointment rate reported for misdemeanor cases at the national level.¹⁰²

Even though the 40% appointment rate documented by the Commission is itself low, this number overstates indigent defendants' access to counsel in most Texas counties. Because the Commission calculates this number by dividing the total number of appointments paid in all Texas counties by the total number of cases added in all Texas counties,¹⁰³ high appointment rates in counties with large caseloads skew this statewide appointment rate upward.

Procedures for providing defendants access to counsel are set at the county level, and actual practices for providing access to counsel vary widely among counties.¹⁰⁴ The statewide appointment rate provides little information about how county-level practices affect defendants' access to counsel.

Accordingly, for this report TFDP calculated each county's appointment rate for felony and misdemeanor cases from 2003 to 2012 to examine access to counsel at the county level.¹⁰⁵ TFDP then calculated the average (mean) appointment rate for Texas counties (the sum of all county appointment rates divided by the number of counties) in felony and misdemeanor cases for each examined year, as well as Texas counties' median appointment rate.

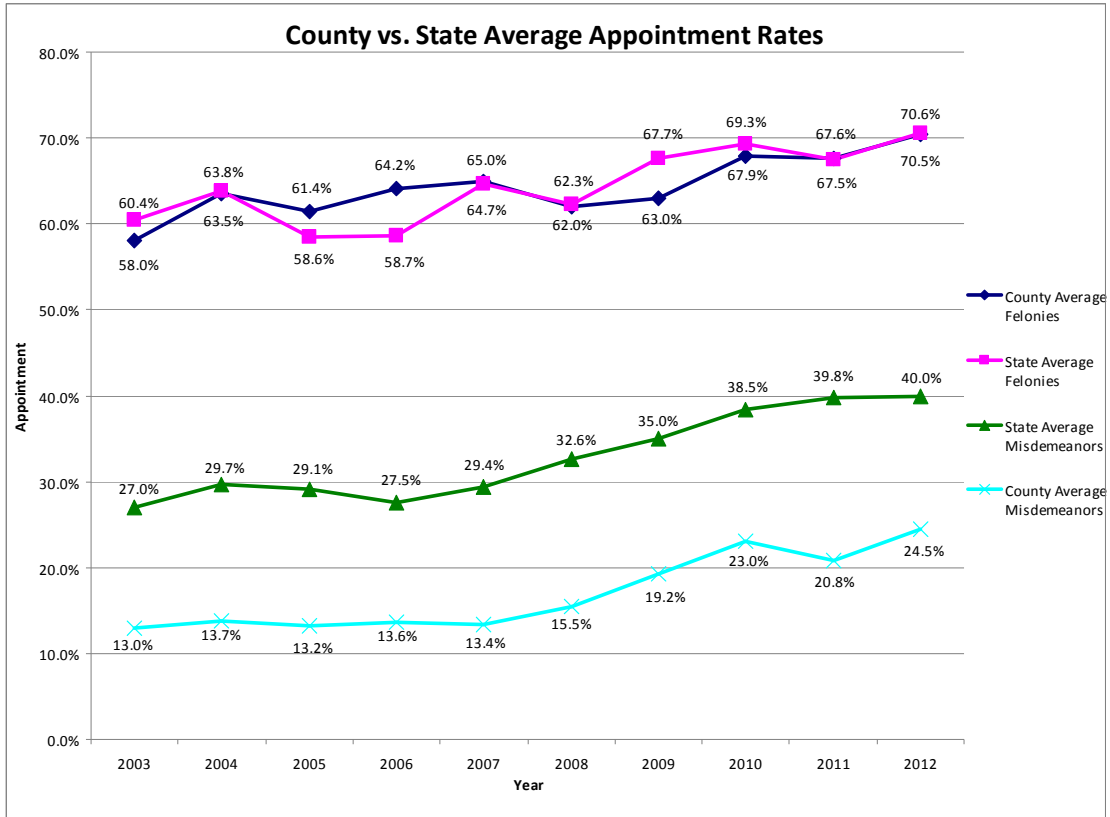


In 2012, Texas counties had an average appointment rate of 70.5% in felony cases and a median felony appointment rate of 66.6%.

In misdemeanor cases, Texas counties had an average appointment rate of 24.5% and a median appointment rate of 18.7% in 2012.

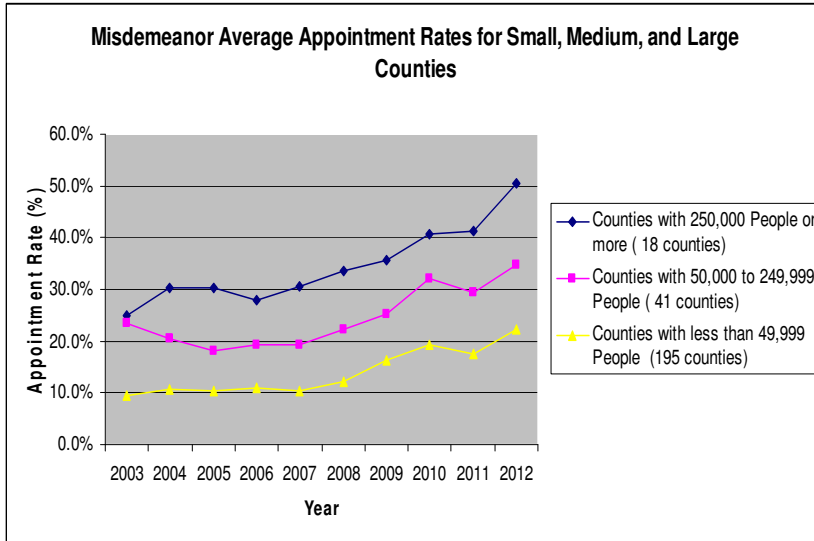
In both felony and misdemeanor cases, both the average and median appointment rates increased by between 10% and 12.5% over the period from 2003 to 2012. In misdemeanor cases, almost all of this increase occurred after 2007. Notably, in that year the Legislature passed a bill that imposed new procedural safeguards to protect the rights of defendants who appear in court without counsel.¹⁰⁶

Further analysis of appointment rate data indicates that there is a high degree of variation in the provision of indigent defense services in misdemeanor cases among Texas counties.



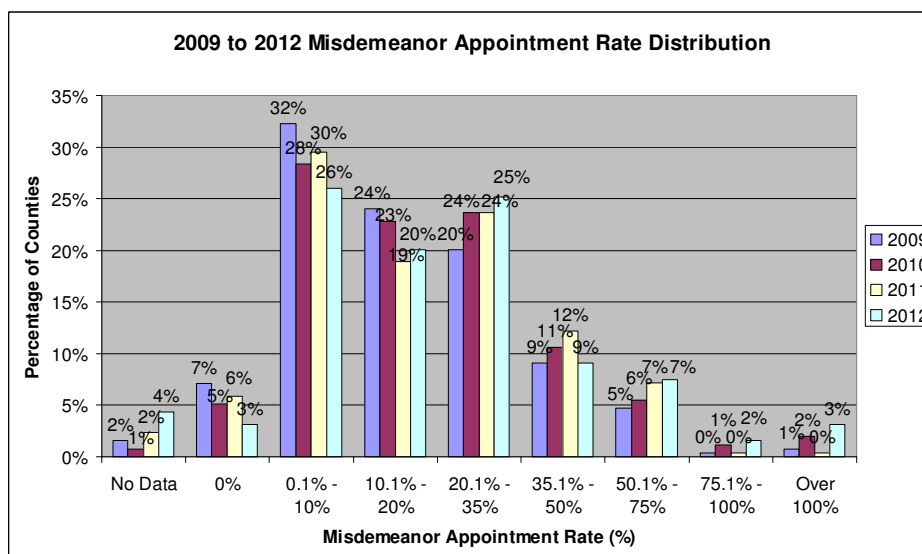
While the average county appointment rate in felony cases is very similar to the statewide appointment rate cited by the Commission, the average county appointment rate in misdemeanor cases is strikingly lower than the statewide appointment rate.¹⁰⁷ For example, in 2012, the average county appointment rate in misdemeanor cases was only 24.5%, compared to the statewide misdemeanor appointment rate of 40.0%.

This differential between the statewide appointment rate and the average county appointment rate highlights how appointment practices in counties with large caseloads result in a statewide appointment rate that is misleadingly high. The average misdemeanor appointment rate in the 18 Texas counties with a population of 250,000 or more was almost 50% in 2012.



In contrast, small counties with a population of less than 50,000 and medium-sized counties with a population between 50,000 and 249,999 had average misdemeanor appointment rates of 21.0% and 28.9% respectively.

And overall, fifty years after the Supreme Court ruled in *Gideon* and more than ten years after the Legislature passed the Fair Defense Act, the majority of Texas counties still appoint counsel to fewer than 20% of the misdemeanor defendants who appear in their courts. That is, 130 Texas counties have a misdemeanor appointment rate that is less than half of the statewide misdemeanor appointment rate. Three percent of Texas counties did not appoint counsel to any individuals accused of misdemeanor offenses in 2012.



Denial of Counsel in Misdemeanor Cases: *Heckman v. Williamson County*

In June 2006, TFDP filed a civil rights lawsuit against Williamson County and five of its judges seeking to enjoin county practices that resulted in the routine denial of the right to counsel in misdemeanor cases. The lawsuit—*Heckman v. Williamson County*—challenged practices that included forcing individuals accused of criminal offenses to speak to prosecutors before they had an opportunity to request counsel, refusing to rule on misdemeanor defendants' requests for counsel, and judicial statements that it was in defendants' best interest to try to resolve their cases by speaking directly to the prosecutor.¹⁰⁸

For example, Williamson County refused to accept a request for appointed counsel from one of TFDP's clients in this litigation, Elveda Vieira. As a result, Ms. Vieira was not able to consult with counsel before she appeared in court and was asked to enter a plea. And when she finally was allowed to request counsel, counsel was not immediately appointed even though Ms. Vieira lived on Social Security disability income and presumptively qualified for appointed counsel under Williamson County's own eligibility guidelines.

The case eventually reached the Texas Supreme Court, which in June 2012 issued a unanimous opinion holding that criminal defendants can bring class action claims under § 1983 for systemic constitutional violations, and are not limited to pursuing relief for those violations in individual criminal appeals.¹⁰⁹ In reaching this decision, the Court declared that ***"A criminal defendant's right to counsel . . . ranks among the most important and fundamental rights in a free society."***¹¹⁰

In January 2013, Williamson County entered into a settlement agreement in which it agreed to adopt specific new court procedures that will ensure that indigent criminal defendants have unimpeded access to counsel.¹¹¹ The *Heckman* trial court will maintain jurisdiction over the case for four years in order to monitor compliance with the settlement agreement, and TFDP staff are conducting data analysis on a quarterly basis in order to evaluate implementation of the settlement terms. Misdemeanor appointment rates in Williamson County already have increased from 8 percent to 33.5 percent since the *Heckman* litigation was filed.¹¹²

Factors that Contribute to Denial of Counsel in Texas's Criminal Courts

Although these appointment rates certainly suggest that there is an access to counsel problem in Texas's misdemeanor courts, they don't clearly establish why so many defendants are appearing without counsel, or even reveal how many defendants are appearing without counsel.¹¹³

To address these questions, TFDP researchers have observed misdemeanor court proceedings in a number of Texas counties.¹¹⁴ TFDP also operates a statewide intake system through which we provide assistance to indigent defendants who are trying to obtain appointed counsel in counties throughout the state.¹¹⁵

During our onsite assessments, we have observed thousands of defendants enter uncounseled guilty pleas in Texas misdemeanor courts. Through our onsite assessments and our intake system, we also have identified pervasive problems that contribute to indigent defendants entering guilty pleas to misdemeanor charges without the assistance of counsel.

- In some counties, defendants are not informed of their right to appointed counsel when they appear before a magistrate following arrest, or they are not provided the opportunity to request counsel during the magistrate hearing.¹¹⁶
- In some counties, local officials will not transfer or rule on requests for counsel made at magistration if the defendant posts bond subsequent to making the request.¹¹⁷
- Many counties refuse to accept and rule on requests for counsel when a defendant tries to request counsel during the period between the magistrate hearing and arraignment (the defendant's first appearance in the trial court, when a plea is entered). Defendants may attempt to request counsel during this period if they were not given the opportunity to request counsel at the magistrate hearing, if they have not received a ruling on an initial request for counsel made at a magistrate hearing, or if, after attempting to hire counsel, they discover that they cannot afford to hire a lawyer. As a result of this practice, defendants do not have an opportunity to consult with counsel before or during the arraignment.¹¹⁸ For defendants who plead guilty at arraignment, this represents the only opportunity they would have had to consult with counsel.
- Many counties do not have recordkeeping mechanisms in place that allow officials to determine which defendants have pending requests for counsel that have not been ruled on by the time they appear for arraignment, so judges and prosecutors cannot comply with statutory restrictions on their communications with unrepresented defendants who have pending requests for counsel.¹¹⁹

- In some counties, defendants are approached by prosecutors or encouraged to talk to prosecutors before they request counsel or obtain a ruling on a pending request.¹²⁰ These practices often are accompanied by explicit or implicit cues that suggest it is appropriate or normal to resolve a case without counsel, and that the risk involved in doing so is low.¹²¹

Prosecutorial Ethics and Unrepresented Defendants

The disciplinary rules for Texas lawyers prohibit prosecutors from initiating or encouraging “efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial, and post-trial rights.”¹²²

Despite this long-standing prohibition, in 2007 the Legislature was confronted with information that in some Texas counties prosecutors were eliciting waivers of the right to counsel—certainly an important right that defendants possess prior to, during, and after trial—from defendants charged with misdemeanor offenses.¹²³ In response, it passed legislation that specifically bars prosecutors from initiating or encouraging “an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel,”¹²⁴ and absolutely prohibits prosecutors from communicating in any manner with defendants who have pending requests for counsel.¹²⁵

The legislation also restricts judges’ communications with defendants who appear in court without counsel and with defendants who have pending requests for counsel.¹²⁶

Waivers of the right to counsel that are obtained in violation of any of these statutory provisions are presumptively invalid.¹²⁷

- When unrepresented defendants appear for arraignment, judicial admonishments regarding the right to counsel often are incomplete and misleading because they focus exclusively on the right to counsel at trial. For example, defendants at arraignment may be told that they have a right to the assistance of counsel if they choose to go to trial but not that they have a right to counsel at the arraignment itself before they decide whether to enter a plea/what plea to enter. A defendant’s waiver of the right to counsel for purposes of entering a guilty plea is not knowing and voluntary if the defendant was not informed of the right to counsel for negotiation and entry of a plea.¹²⁸

- Many counties do not provide defendants with the information necessary for a knowing and voluntary waiver of the right to counsel,¹²⁹ or only do so after defendants have engaged in uncounseled plea negotiations with the prosecutor, i.e., after a defendant has been denied counsel at a critical stage of the proceedings.¹³⁰ Often information related to the waiver of counsel is provided only via a written waiver form that is presented to the defendant for his or her signature after the defendant has reached a plea agreement with the prosecutor.
- In many counties, judicial admonishments about the possibility that a defendant may have to repay the cost of appointed counsel are incomplete and misleading, and may deter defendants from requesting counsel.¹³¹ Defendants often are told that they “will” have to repay the cost of appointed counsel, whereas state law only allows a judge to order repayment if the judge makes a finding on the record that the defendant has the ability to repay the cost of appointed counsel in whole or in part.¹³² Defendants who do not have the ability to repay the cost of appointed counsel can never be ordered to pay.
- In some counties, failure to provide defendants an opportunity to request counsel prior to arraignment or failure to rule on requests for counsel prior to arraignment means that the defendant’s case must be reset, and resolution of the defendant’s case will be delayed, if the defendant requests counsel at arraignment. This delay may deter defendants from requesting counsel, particularly if repeated court settings will jeopardize a defendant’s employment or if the defendant does not have child care.¹³³
- Most counties have specific financial criteria for determining whether a defendant qualifies for court-appointed counsel. However, in many jurisdictions judges do not apply those criteria in a uniform manner. In many instances, judges deny a defendant’s request for counsel solely because the defendant is employed and/or released on bond, and without examining the defendant’s finances to determine whether the defendant meets the county’s indigence standard or can afford to hire an attorney.

Denial of Counsel Through Delayed Appointment

Being convicted without counsel is not the only way in which an indigent defendant may be denied counsel. Even a defendant who is represented at trial or at entry of a plea may have been denied counsel at a previous stage of the proceedings in a manner that undermines the reliability of the final disposition of the case or causes other significant harm to the defendant.

The right to counsel includes the opportunity to consult with an attorney sufficiently in advance of trial or a plea that the lawyer can prepare for the trial or plea.¹³⁴ Investigation

during this pre-disposition stage is one of defense counsel's most critical functions.¹³⁵ A defense lawyer who does not, or is not able to, investigate can't provide informed advice on whether a defendant should plead guilty or on what terms, and won't be prepared for trial.¹³⁶

Although uncounseled guilty pleas are not common in Texas felony courts, delayed appointment of counsel that denies defendants access to counsel during critical pre-disposition stages of the proceedings persists in some counties, particularly in cases in which the defendant is released on bond.

The scope of this problem cannot be determined from current data because the appointment information counties report to the Commission does not include information on the timing of appointment, and instead reveals only whether an appointed attorney provided services at some point during the case. However, TFDP has provided assistance to many felony defendants who were without counsel up to and during the first trial court hearings in their cases, which sometimes don't occur until several months after defendants are arrested.¹³⁷ By this point in time, transitory witnesses and evidence such as 911 tapes or security videos may no longer be available, and defense counsel's ability to fulfill his or her investigatory duties may be significantly impaired.¹³⁸

**Delayed Appointment of Counsel to Felony Defendants Released on Bail:
*Rothgery v. Gillespie County***

Walter Rothgery was arrested in for being a felon in possession of a firearm though he was not, in fact, a felon.¹³⁹ After he was released on bond, he immediately tried to request appointed counsel to help him prove his innocence.¹⁴⁰ County officials repeatedly refused to accept his requests for counsel for six months following his arrest.¹⁴¹

When Mr. Rothgery eventually was indicted for the offense, he was re-arrested on an increased bond and spent three weeks in jail before he was appointed counsel.¹⁴² Although the charges against Mr. Rothgery were dismissed quickly once defense counsel finally was appointed, Mr. Rothgery was unable to find a job, lost his housing, and accumulated a significant amount of debt during the period in which he was denied counsel to help him clear his name.¹⁴³

TFDP filed a civil rights action on behalf of Mr. Rothgery that challenged the common Texas practice of delaying appointment of counsel to defendants who are able to post bond. The case reached the U.S. Supreme Court, where the county asserted that individuals who are accused of criminal offenses don't have any right to counsel until a prosecutor files a formal indictment, no matter how long after arrest that occurs.¹⁴⁴

The U.S. Supreme Court rejected this argument and ruled that the right to counsel attaches at a defendant's initial appearance before a magistrate judge, which usually happens within 48 hours of an arrest.¹⁴⁵ "From that point on, the defendant is faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal."¹⁴⁶

Several of the practices that produce uncounseled guilty pleas in misdemeanor cases also result in delayed appointment of counsel in felony cases: individuals are not informed of the right to counsel or provided an opportunity to request counsel at the magistrate hearing, requests for counsel are not ruled on prior to arraignment if the individual posts bond, defendants are not able to request counsel or obtain counsel during the period between the magistrate hearing and arraignment, and judges fail to apply county financial standards for determining whether a defendant is indigent in a uniform manner.

Recommendations

Recommendations for what counties and judges should do to avoid violating the right to counsel are straightforward. Many of the following recommendations involve nothing more than complying with existing state and federal law. Nearly all of them already have been implemented in a number of Texas counties that regularly appoint counsel for indigent defendants in both felony and misdemeanor cases.¹⁴⁷

However, these recommendations bear repeating despite their simplicity. These obvious practices are too often ignored in courts that have become accustomed to processing cases involving unrepresented defendants instead of conducting adversarial proceedings in which defendants are represented by counsel. Breaking the process for appointing counsel down into these components may help individual counties identify the mechanisms that result in mass waivers (informed or not) in jurisdictions where these waivers have become normalized.

More systemic approaches to reducing the number of unrepresented defendants in Texas's criminal courts are discussed in the final chapter of this report.

- Magistrate judges should inform all individuals who appear before them following an arrest of the right to appointed counsel, regardless of whether the individual expresses an intention to hire counsel or to post bond.
- Magistrate judges should help arrested individuals complete the forms for requesting counsel during the initial magistrate hearing, so that defendants are not prevented from completing or submitting the forms from the jail or while released on bond.
- Counties should develop procedures that enable defendants to request counsel, and obtain rulings on those requests, during the period between the initial magistrate hearing and arraignment, so that indigent defendants may consult with counsel prior to arraignment and have the assistance of counsel during arraignment and all subsequent proceedings.
- Counties should develop procedures for tracking requests of appointment of counsel starting at the initial magistrate hearing, to ensure both that all requests are transferred to the appointing authority for a ruling, and that any pending requests for counsel are matched to defendants' court files so the courts can comply with state law regulating their communications with unrepresented defendants who have requested counsel.

- Courts should not encourage unrepresented defendants to speak to a prosecutor, or in any way communicate that entry of an uncounseled guilty plea is normal or expected.
- Prosecutors should not initiate or encourage waivers of the right to counsel.
- Courts should provide complete and accurate information about the right to counsel and the dangers and disadvantages of proceeding without counsel to defendants who express a desire to waive the right to counsel. Defendants should be informed that they have a right to counsel during plea negotiations, the nature of the charges filed against them, and the potential consequences of conviction. This information should be provided verbally to the defendant, and an informed waiver of the right to counsel should be obtained, before the defendant engages in uncounseled plea negotiations with the prosecutor.
- If defendants are informed of the possibility that they will be ordered to repay the cost of appointed counsel, courts should provide them with complete and accurate information about that possibility, including the fact that they cannot be ordered to pay unless the court finds that they have the ability to pay.
- Courts should grant or deny requests for counsel based on whether defendants meet objective financial criteria contained in the county's indigent defense procedures. Courts should not deny requests for counsel solely because a defendant is released on bond or employed, or delay ruling on requests for counsel submitted by a defendant who meets the financial criteria in order to require a defendant to attempt to hire counsel.
- Counties should map their processes for appointment of counsel, and all staff with any responsibility for appointment of counsel should participate in this process. Breakdowns in these processes can remain undiscovered for a long period of time when people with related responsibilities fail to coordinate their activities. For example, a trial court judge may believe that he or she is ruling on all requests for counsel that are submitted by defendants and scrupulously complying with state law regarding communications with defendants with pending requests for counsel, but not realize that the magistrate or the clerk have no process for placing pending requests for counsel in the file that is available to the court during arraignment. Problems such as these can lead to unintentional violations of state law and defendants' constitutional right to counsel.
- Judges should receive training to increase their understanding of the enmeshed civil penalties that may result from a conviction even for a misdemeanor offense. The main purpose of this training would be to increase judicial understanding of the

human stakes involved in cases that may not otherwise appear to be serious enough to warrant counsel.

Managing Defender Caseloads: The Key to Providing Poor People with Effective Advocates

A state cannot fulfill its obligation to poor people accused of criminal offenses merely by appointing counsel. The right to counsel guarantees more than the physical presence of someone who happens to be a lawyer; it secures “the right to the effective assistance of counsel.”¹⁴⁸ “An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”¹⁴⁹

Defense attorneys cannot fulfill their constitutional responsibilities to each of their clients unless the state affords them the time and resources necessary to provide meaningful representation. Defense attorneys have a finite amount of time, and high caseloads can make it impossible for even the most experienced and committed attorneys to provide effective representation to every poor person they are appointed to defend.

Though excessive defender caseloads have been an issue of national concern for years, they only recently have become a topic of discussion in Texas. In contrast to indigent defense systems in other states, which collect data on defense attorney caseloads, most Texas counties do not track the number of cases in which an individual attorney is appointed or retained. In the few counties in which caseload data has been collected and analyzed, the numbers are alarming.

As implementation of the Fair Defense Act has significantly increased the types and amount of data that is available to inform public understanding of county indigent defense systems, the absence of data about attorney caseloads has become more notable. The Legislature has responded to this situation with recent legislation that finally begins to address the issue of attorney caseloads. With this step, Texas is in a position to make changes that can improve the landscape for defense attorneys and their clients—easing the caseload burden on defense attorneys and improving the representation they are able to provide to their clients.

Excessive Caseloads Make It Impossible for Defense Lawyers to Provide Effective Representation to Each of Their Clients

The right to counsel is meaningless if a defendant is represented by an attorney who has so many cases that the attorney can spend no more than a few minutes on each case.¹⁵⁰ Even the most able attorney cannot provide effective representation to every client under these constraints.

In order to provide meaningful representation to poor people accused of criminal offenses, defense attorneys must act promptly to protect a client’s rights, build a relationship with

the client, communicate regularly with the client, independently investigate a client's case, and interview witnesses.¹⁵¹ When defense attorneys have more cases than they can handle, they may not have time to do all of those things, and in addition conduct legal research, file pretrial briefs, or adequately prepare for hearings. Defense attorneys instead are forced to engage in triage. They must prioritize one case over another, often working on a particular case only when an urgent deadline looms, and shortchange other cases altogether.¹⁵²

The hectic pace can lead to mistakes and wrongful convictions, as well as increased pressure on defendants to plead guilty, if only to get out of jail.¹⁵³ These failures also often lead to longer prison sentences for those people who are convicted.¹⁵⁴

At some point caseloads get so high “that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned. Advising a client to take a fantastic plea deal in an obstruction of justice or domestic violence case may appear to be effective advocacy, but not if the client is innocent, the charge is defective, or the plea would have disastrous consequences for his or her immigration status.”¹⁵⁵

Criminal convictions impact employment, housing options, access to public benefits, immigration status, child custody,¹⁵⁶ and a myriad of other aspects of people's lives. Individuals with criminal convictions face lifetime struggles to find employment. Even a conviction that only involves probation without prison time can make it very difficult for individuals to find and keep a job.¹⁵⁷ A defense attorney with the time to provide careful, effective representation can negotiate a deferred adjudication or shorter sentence, or defend an individual at trial for an acquittal.¹⁵⁸

Excessive Caseloads – the National Crisis

Overburdened defense attorneys with excessive caseloads have been the focus of national attention for decades.¹⁵⁹ One former chief public defender called excessive caseloads, “the most common, profound and destructive problem that defenders face.”¹⁶⁰

The national conversation about caseloads often has focused on the plight of public defenders—attorneys who are salaried employees of a county department or independent agency that is responsible for representing poor people accused of crimes. Excessive caseloads for public defenders generally are driven by significant increases in case filings in an era of mass incarceration,¹⁶¹ paired with decreases in government funding for public defender offices.¹⁶²

In part, the national focus on excessive caseloads in public defender offices is due to the fact that these offices have displayed such demonstrably high caseloads¹⁶³ while

historically being unable to control their caseloads by turning down cases.¹⁶⁴ Now public defender offices generally know how many cases their attorneys are handling, and how those numbers compare to local or national caseload standards.¹⁶⁵ Caseload numbers from public defender offices are readily available, and if a public defender's caseload becomes too high it does so in the public eye. For example, a 2007 national study found that 70% of county-based public defender offices had caseloads that exceeded national caseload standards.¹⁶⁶

There have been widespread efforts to reduce caseloads for public defenders.¹⁶⁷ Public defender offices have worked to establish caseload limits that are based on weighted caseload studies.¹⁶⁸ These studies collect data on how many hours defense attorneys spend on different tasks and then the program establishes caseload limits that are appropriate given the number of work hours the attorneys have available and the relative time required for different kinds of cases.¹⁶⁹

Once they've established caseload limits, public defender programs often have had to advocate for the right to enforce those limits by refusing to accept additional appointed cases once an individual attorney or the office surpasses the applicable limit.¹⁷⁰ Public defender offices in some jurisdictions even have filed litigation against their county or state seeking the right to turn down appointments.¹⁷¹ Additionally, indigent defendants have filed class action lawsuits claiming that the inability of their attorneys to provide effective representation is tantamount to a denial of counsel.¹⁷² Though excessive caseloads persist in many jurisdictions, there are national and statewide strategies in place to advocate for increased funding and the ability to enforce caseload limits.

The Development of Weighted Caseload Standards

Existing national caseload standards were recommended in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), and are commonly referred to as the NAC standards. The NAC standards have been very influential, but they also have never been updated to reflect changes in criminal defense practice that have occurred in past 40 years. Further, the NAC standards are based only on the opinions of Commission members regarding how many cases an attorney can handle, and are not supported by any statistical data.¹⁷³

The NAC standards continue to provide a useful benchmark for evaluating whether a defense attorney's caseload is excessive, and have been adopted by most Texas public defender offices that have been established since passage of the Fair Defense Act.¹⁷⁴ However, the current best practice for evaluating defense attorneys' capacity to provide effective representation is a "workload" standard developed through a weighted caseload study.¹⁷⁵ While the NAC standards and other traditional caseload standards provide fixed caseload limits, workload standards are more flexible. Workload targets account for variations in the complexity of an attorney's caseload, the availability of support staff, and whether an attorney has administrative duties. Under workload standards, an attorney may be able to take on a higher number of cases when those cases are relatively simple and the attorney has support staff. On the other hand, an attorney would hit the workload target with fewer cases if those cases were more complicated felonies or the attorney did not have an investigator available to work on cases.

When a jurisdiction conducts a weighted caseload study, it tracks each attorney's work in detail over a period of time, including time spent on various case activities, case types, time spent on administrative or other non-case-related activities, and travel time.¹⁷⁶ Expert criminal defense practitioners then review the results of the attorney time data to determine a target attorney workload. Statewide public defender programs in Colorado, Minnesota, Tennessee, and Wisconsin are just a few of the defender programs that have undertaken weighted caseload studies.¹⁷⁷

NAC Standards¹⁷⁸
150 felony cases
400 misdemeanor cases
200 juvenile cases
25 appeals

Behind the Curve: Defender Caseloads are Practically Unknown in Texas

Because at the national level the issue of excessive defender caseloads has been defined as a public defender issue, Texas has not been identified as one of the states that have a particular problem with excessive caseloads. This is not because Texas doesn't have a caseloads problem; it's because currently there isn't enough data to even begin to understand the scope of the problem.

Texas has very few public defender offices, and the overwhelming majority of indigent defendants are represented by assigned counsel.¹⁷⁹ Assigned counsel are private attorneys who act as independent contractors, represent individual indigent clients based on case appointments, and are compensated with public funds.¹⁸⁰ These attorneys often receive appointments from more than one county at any given time, and also maintain private practices through which they represent non-indigent clients who can afford to pay their fee.

The county-based system of indigent defense in Texas, and the prevalence of the assigned counsel model, makes tracking caseloads difficult. Indigent defense in Texas is 254 different county systems, rather than one unified system. There currently is no statewide system to track the number of criminal defense cases assigned to individual lawyers, and few counties track this information at the local level. Counties certainly are not tracking the total caseload carried by attorneys who accept court appointments, which would include attorneys' retained cases and appointed cases from other counties.

Travis County's Appointment Management System

Travis County is unique in that it has developed a system for systematically tracking attorney appointments across all criminal courts and limiting the number of indigent defendants an appointed attorney can represent. Travis County's Appointment Management System provides an automated way for the county to track appointments and indigent defense expenses. The County's Indigent Defense Plan limits defense attorneys' appointed caseload to 90 pending felony cases or 100 pending misdemeanor cases. The Plan states that attorneys who go over their case limits are unable to receive further appointments until their caseloads decrease.

See *TCAMS-Frequently Asked Questions*, Travis County Courts, available at http://www.co.travis.tx.us/courts/criminal/tcams/tcams_faq.asp.

Unlike public defender offices, which generally rely on case management software, there is no common method to track cases in counties that use assigned counsel. Because most assigned counsel are solo practitioners and do not practice in firms with other lawyers, as a

group the assigned counsel in each county do not have shared case management system. As a result, in most Texas counties, nobody knows how many cases individual attorneys are handling at any given time or over the course of a year.

In contrast to assigned counsel systems, the public defender and managed assigned counsel offices in Texas do currently track cases and have established caseload standards. In fact, public defender systems¹⁸¹ and managed assigned counsel systems¹⁸² created after the Fair Defense Act in 2001 are required by statute to establish caseload standards for individual attorneys.

However, there is no statutory guidance for these systems as to how they should develop those caseload standards. Most public defenders and managed assigned counsel offices in Texas currently use the national standards. These standards do not, however, account for the complexity of different types of cases and they do not consider whether a particular office has support staff or whether an attorney will have to take on the support and investigative tasks for each case.¹⁸³ Further, managed assigned counsel offices generally do not track attorneys' retained cases or cases appointed in other counties. Finally, public defender offices and managed assigned counsel offices do not necessarily have enforcement systems in place to ensure compliance with existing caseload standards.

Due to the lack of systematic caseload data in Texas, we can't know how many poor people accused of crime are currently represented by defense attorneys who have so many cases that they can't provide effective representation. But, anecdotally, it is clear that Texas has a problem. For example, in 2011, in Harris County, two attorneys were appointed to over 900 cases each.¹⁸⁴ There also were at least 25 attorneys who each were appointed to 500 cases or more during that time.¹⁸⁵ These caseloads would surpass national standards if they only included misdemeanors, but many of these attorneys were appointed to misdemeanor and felony cases, which means these caseloads are closer to double the maximum number allowed by national standards. In Dallas County, in 2008, the Commission reported that public defenders that represented felony defendants were required to handle 480 new cases each year and public defenders representing misdemeanor defendants were required to take on 1200 new cases each year.¹⁸⁶

Caseloads in Harris County

With a population of 4,354,700, Harris County is the largest county in Texas and the third largest county in the country.¹⁸⁷ Harris County also has a significant criminal caseload. In fiscal year 2012, Harris County added about 128,000 criminal cases to its court dockets, about 71,600 of which involved poor people who were represented by appointed counsel or a public defender.¹⁸⁸ The Harris County Public Defender Office handles about 6% of the indigent defense cases in the county,¹⁸⁹ and private attorneys are appointed to represent indigent clients in more than 67,000 cases each year.

In 2012, the Texas Indigent Defense Commission examined Harris County's attorney payment records and tallied the total number of cases individual attorneys billed to Harris County in fiscal year 2011.¹⁹⁰ The Commission's review revealed some shockingly high caseload numbers, as well as significant disparity between the caseloads of different attorneys. For example, the attorney receiving the most appointments in that year was appointed to more than 900 cases.¹⁹¹ All told, there were 122 attorneys who received appointments that exceeded national caseload standards, and 26 of these attorneys received appointments in a number at least double national caseload standards. None of these caseloads counts takes into account appointments these attorneys may have had in other counties or their retained caseload.

The number of defendants in Harris County who were represented by attorneys with excessive caseloads is significant. In fiscal year 2011, nearly 45% of felony defendants were represented by attorneys whose Harris County appointed caseload exceeded national standards.¹⁹²

Excessive caseloads in Harris County are not the result of a shortage of attorneys willing to take court appointments. The problem is that Harris County has a flawed appointment process that results in a significant variation the number of appointments received by different lawyers. More than 400 attorneys received appointments in Harris County in a number that was less than half of the number of cases permitted by national caseload standards. There are dozens of attorneys who received only one appointment in the county that year.¹⁹³

The unequal distribution of appointments in Harris County and the resulting excessive caseloads has been a consistent problem.¹⁹⁴ Harris County caseloads received media coverage in 2009 when the 5th Circuit Court of Appeals criticized an appointed attorney for repeatedly missing filing deadlines in capital cases.¹⁹⁵ Under scrutiny, it came to light that this attorney represented an average of 360 felony clients each year in Harris County—more than double the nationally recommended caseload.¹⁹⁶ At that time, the *Houston Chronicle* reported that nearly one-third of the Harris County attorneys approved to take capital appointments carried appointed caseloads that surpassed national standards.¹⁹⁷

Failing to Limit Caseloads Fails all Texas Taxpayers

As discussed in the *Introduction* to this report, Texas taxpayers spent more than \$200 million dollars on indigent defense in fiscal year 2012.¹⁹⁸ This amount will only continue to increase. One projection estimates that in fiscal year 2021 Texas will have as many as 640,917 cases in which counsel must be appointed to represent poor people accused of crimes,¹⁹⁹ compared to the 459,000 people who received appointed counsel in fiscal year 2012.²⁰⁰ Improving the efficiency and efficacy of the indigent defense system will better ensure that those large sums of Texas taxpayer dollars are wisely spent.

There is currently no basis for statewide budgeting and planning for indigent defense spending in Texas because there is such a dearth of data. Texas has not gathered data to determine how many appointed defense attorneys are necessary to provide effective representation in cases that involve poor people accused of crime. There currently is no statewide data reflecting how much time an attorney needs in order to provide effective representation in different types of cases or at different stages of a case. The analysis of such data, if gathered, could determine how many attorney hours each county needs to meet the local demand for indigent defense services. The data also could help counties set appropriate fees for attorneys, based on the amount of time it generally takes to provide effective representation in a particular type of case. The data could support requests for additional funding in the Legislature or the reallocation of state grant funds to better correspond to counties' respective indigent defense needs.

Factors Driving Excessive Caseloads in Texas

Though Texas currently lacks sufficient statewide data to pinpoint caseload levels in all counties, those counties in which excessive caseloads have been documented are failing to fulfill the State's duty under *Gideon*. Even in counties where excessive caseloads have not been demonstrated, the following factors create a systemic risk of excessive caseloads in counties throughout the state.

- The current system for paying appointed defense attorneys creates inappropriate financial incentives for individual attorneys. Most Texas counties use flat fee compensation. These fees generally are far lower than what an attorney would receive from a retained client. For example, appointed attorneys who represent a defendant in Williamson County on a misdemeanor plea receive \$175,²⁰¹ while the median hourly rate for a criminal defense attorney in private practice in Texas is \$196.²⁰² An attorney in Williamson County is effectively losing money for every hour beyond the initial hour he spends on a case that ends with a misdemeanor plea. This payment system provides an incentive for attorneys to take on as many cases as possible, while doing as little work as possible on each case. This system also financially penalizes those attorneys who put in the necessary work for each case.

Attorneys who provide adequate representation often must do so at their own expense, because they will not be compensated for all of the time required to provide that representation.

- Judges are not held accountable when they appoint attorneys outside the statutorily-mandated appointment wheel.²⁰³ Appointing attorneys using the wheel should lead to an even distribution of cases among assigned counsel, which should in turn keep caseloads reasonable.²⁰⁴ Currently, judges face no consequence for appointing attorneys outside the required wheel. It is common in some counties for judges to make appointments outside the wheel, which leads to uneven and excessive caseloads.²⁰⁵
- The systems currently in place in Texas to hold lawyers accountable for their representation—ineffective assistance of counsel claims²⁰⁶ and disciplinary rules²⁰⁷—are retrospective. They are both ineffective at curbing attorney behavior and insufficient to remedy the wrongs done to individual clients by poor representation.
- The prospective performance standards²⁰⁸ that do exist in Texas do not ensure accountability. Though the standards lay out clear obligations for attorneys who represent defendants in criminal cases, neither the State Bar nor any other organization disciplines attorneys if they fail to meet those obligations.

Recommendations to Address Excessive Caseloads in Texas

- Individual attorneys and counties must track the current caseloads of defense attorneys appointed to represent indigent defendants. Such reports should address an attorney's entire caseload, including retained cases and appointed cases from all counties where the attorney accepts appointments.
- Counties must be held accountable for tracking and reporting attorney caseloads.
- Texas must develop evidence-based workload standards. These standards should consider the complexity of and time required for different types of cases. They should generally consider the amount of time necessary to provide effective representation.
- Workload standards should be mandatory and counties should be required to comply with the standards in order to receive state grant funds for indigent defense.
- Attorneys should face consequences, such as removal from the public appointment list, if they accept cases in violation of the workload standards.

- Finally, judges must conform to workload standards as well. They should be prohibited from appointing attorneys to new cases when those attorneys have exceeded caseload limits.

HB 1318: The First Step to Tackling Excessive Caseloads in Texas

HB 1318²⁰⁹ requires the Texas Indigent Defense Commission to “conduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that ... allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.”²¹⁰ As part of this caseload study, researchers will track the amount of time attorneys spend on different tasks for different kinds of cases. The Commission will recruit defense attorneys who will track and categorize their time for twelve weeks using specialty case management software. Once the attorney time data is tallied, a team of experts will review the data and make recommendations on the time demands for particular types of cases.²¹¹ In this final stage of review, the experts will compare what attorneys are actually doing to what attorneys need to be doing to provide effective representation. The review team will adjust proposed caseload standards to reflect the amount of time defense attorneys need to provide effective representation. This final stage of review is necessary to ensure that new workload standards do not simply codify existing practices.

Tracking attorney time for this controlled study will allow the Commission to demonstrate in its future report how much time is necessary to provide effective representation. This data should also support future efforts to increase compensation for appointed defense attorneys in order to better reflect the amount of time effective representation requires.

HB 1318 also institutes some case tracking standards for counties and individual attorneys. The new law requires attorneys to report to each county in which they accept appointments what percentage of the attorney’s time that year was dedicated to work on appointed cases within that county.²¹² Counties, in turn, are required to submit that data to the Commission, as well as information on the number of court appointments each individual attorney received within the county in the reporting year.²¹³

Finally, HB 1318 will make it easier for public defender offices to enforce workload limits. In part, the law prohibits public defenders from accepting cases that would violate an office’s maximum workload caps.²¹⁴ Once a public defender’s office refuses an appointment, the chief public defender “shall file with the court a written statement that identifies any reason for refusing the appointment.”²¹⁵ The court then decides whether the chief public defender has demonstrated good cause. Additionally, the new law protects a chief public defender from termination or other sanction when the chief refuses an appointment in good faith.²¹⁶

Beyond HB 1318: Texas Needs To Increase Accountability to Fix Its Caseload Problem and Improve Representation for Indigent Defendants

While HB 1318 will lead to case tracking and evidence-based workload standards, these changes will not in and of themselves reduce the caseloads of defenders in Texas. However, HB 1318 will provide a platform for concrete reform.

With the new workload standards, advocates and policymakers will know how many cases attorneys can effectively handle. With the new tracking mechanisms, advocates and policymakers will know how many cases individual attorneys are actually handling. But, at this point, there's no mechanism to bridge the gap.

Making workload standards align with reality will require a system of accountability for all parties involved in the indigent defense system. Once Texas has a baseline standard for workloads in place, the state also will need a system to ensure that attorneys, judges, and counties comply with those standards.

First, counties must be held accountable for accurately tracking and reporting attorney cases. The Texas Indigent Defense Commission should condition its grant awards in part on whether counties comply with the case reporting requirements.

Attorneys also must be held accountable for complying with workload standards. One model is the model currently adopted in Travis County, and discussed previously in this chapter. Travis County tracks each attorney's cases and removes an attorney from the appointment list if the attorney is handling more than a set number of cases. To be truly effective, this model would have to track all of an attorney's cases, including retained and other appointed cases. A county could use an online portal to track this information. There also should be penalties for attorneys who do not track or report their cases to the county, such as being removed from the list of attorneys eligible to receive court appointments.

Finally, workload standards will only protect poor people accused of crime from overloaded defense attorneys if judges comply with them as well. Judges should be prohibited from appointing attorneys to new cases when those attorneys already have exceeded the limits. Additionally, there should be consequences for judges who appoint attorneys outside of the appointment wheel rotation because this practice can quickly lead to an uneven distribution of cases.

Establishing data-driven caseload standards and appropriate enforcement mechanisms will reduce attorney caseloads, which in turn should ensure that individual attorneys have the time they need to provide competent representation to each of their clients. The new

workload standards will also provide a basis for calculating how much money is actually needed to ensure effective representation for every individual entitled to a court-appointed attorney.

Closing the Gap: Improving the Quality of Defense Services and Realizing *Gideon's* Promise in Texas

Neither ending practices that deny poor people access to appointed counsel nor managing defender caseloads will resolve all of the problems that remain in Texas's indigent defense system 50 years after *Gideon* was decided.

Simply providing lawyers to poor people accused of criminal offenses, or even providing lawyers with reasonable caseloads, is not sufficient to ensure that indigent defendants will receive the effective representation to which they are entitled²¹⁷ or the meaningful defense on which our adversarial system of criminal justice depends.²¹⁸ The mere physical presence of counsel does not guarantee that a defense lawyer will have the time and resources to provide effective representation to all of his or her clients.²¹⁹ And even a lawyer with a reasonable caseload may lack a commitment to zealous advocacy, or may face structural barriers that interfere with quality representation.²²⁰

Moreover, the recommendations made in previous chapters for how to secure the right to counsel may exacerbate some of the pressures on Texas's indigent defense system. Particularly in some smaller counties that have few defense lawyers, the true demand for indigent services that would be revealed by these reforms may exceed the available supply. More broadly, if implemented in isolation from other criminal justice improvements, both increasing the number of indigent defendants who are represented by counsel and eliminating defense attorneys' ability to compensate for low per-case fees by carrying unreasonably high caseloads likely will increase the costs associated with providing counsel to poor people accused of crimes.

In the current fiscal climate, and with so much of the financial burden for providing indigent defense services borne by Texas counties,²²¹ the prospects are slim for a significant increase in public investment in indigent defense services. If securing this increased investment were the only path to improving access to counsel and the quality of representation, the obstacles to realizing *Gideon's* promise would be daunting indeed.

Thankfully, there is another way forward.

This path involves achieving increased accountability for current indigent defense expenditures, as well as a better understanding of the resources that would be required to close the gap between current practices and the goal of consistently delivering effective representation to indigent defendants, regardless of the county in which they are arrested.

It also calls for using an improved understanding of indigent defense needs to make informed choices about how to allocate limited criminal justice resources in a manner that protects both defendants' rights and public safety.

Finally, this path requires using available resources to make strategic investments in programs and structures that support effective representation and hold defense attorneys accountable for the quality of the services they provide to poor people accused of crime.

Increasing Accountability for Indigent Defense Expenditures

Texas and its counties collectively spend over \$207 million annually on indigent defense services.²²² This figure has more than doubled since the Fair Defense Act was passed in 2001.²²³

Despite the magnitude of this expenditure, Texas's indigent defense system includes very little oversight to ensure that these resources support county indigent defense systems that deliver quality representation to poor people accused of criminal offenses. For example, a county could receive its full allotment of state grant funds for years without bringing its actual indigent defense practices into compliance with the Fair Defense Act, constitutional provisions governing the right to counsel, or its own written indigent defense procedures.²²⁴ The current system absorbs an increasing amount of taxpayer dollars but fails to provide accountability.

The Texas Indigent Defense Commission, Texas Judicial Counsel, counties, and advocates have been united in calling for increased state funding for indigent defense.²²⁵ These requests have focused on the large percentage of indigent defense expenditures borne by Texas counties,²²⁶ but have not attempted to justify a specific level of total indigent defense funding.

It would be difficult to do so. That's because although the available evidence certainly demonstrates that at least some jurisdictions—for example, counties in which many defendants currently are denied counsel—need additional funding to meet their indigent defense needs, and that overall Texas spends too little on indigent defense,²²⁷ the evidence does not indicate what amount of funding would be required to enable counties to consistently provide effective representation to poor people in their courts.

The recommendations included in previous chapters of this report will help clarify what level of public investment is required to provide effective representation to all poor people accused of criminal offenses who do not make a knowing and voluntary waiver of the right to counsel. Eliminating practices that deny counsel to indigent defendants will reveal the true level of demand for indigent defense services. And documenting how much time is required for a defense attorney to provide effective representation in different types of cases will expose how many attorney hours are required to meet the demand for services.

This information also will provide a basis for allocating state indigent defense grant funds among counties in a manner that better corresponds to their respective need for indigent defense services, and a stronger foundation for future requests to the Legislature for increased indigent defense funding.

Improving the Allocation of Limited Criminal Justice Resources

In recent years, Texas policymakers have increasingly balked at the growing cost of some of the state's criminal justice policies. For example, when confronted in 2007 with the need to build more than 17,000 new prison beds at a cost of over \$2 billion if policies then in existence remained unchanged, the Legislature instead increased alternatives to incarceration and reduced the state's incarceration rate.²²⁸

To date, decisions such as these about how to most effectively allocate limited criminal justice resources have not been influenced by the cost of providing indigent defense services. This is at least in part because the state pays a relatively small percentage of indigent defense costs.²²⁹ However, the limitations on existing data that make it difficult to determine what it would cost to meet the state's indigent defense obligations also have likely contributed to this situation.

The absence of indigent defense as a factor in decisions about criminal justice resource allocation almost certainly will change if the state and counties move toward greater accountability for indigent defense expenditures. Indigent defense will become a major issue in broader criminal justice resource debates once the true cost of meeting the demand for indigent defense services is no longer concealed by practices that violate defendants' right to counsel.

Officials cannot simply choose to ignore the right to counsel and otherwise proceed to prosecute cases in the usual manner—they certainly cannot do so and be in compliance with the law, and they increasingly cannot do so in practice.²³⁰ However, a number of commentators have suggested substantive criminal law reforms that could reduce the demand for, and the cost of providing, indigent defense services in a manner that is consistent with the right to counsel.

- **Reclassification:** Reclassification of low-level offenses that currently carry a sentence of imprisonment to civil infractions or fine-only criminal offenses would eliminate the need for appointment of counsel to individuals who are charged with the reclassified offenses.²³¹ Reclassification would allow indigent defense resources to be focused on individuals accused of higher-level offenses.²³² The U.S. Supreme Court itself has suggested reclassification as one way states can more effectively target the resources required to comply with *Gideon*.²³³

- **Diversion:** Diverting individuals charged with certain criminal offenses out of the criminal justice system and into treatment or some form of supervision also may reduce the demand for indigent defense services.²³⁴ In order to reduce the demand for indigent defense services, diversions must be available without entry of a plea so that an individual who fails to comply with the conditions of a diversion can obtain counsel and contest the validity of reinstated charges.²³⁵ This option for reducing indigent defense expenses also has been endorsed by the U.S. Supreme Court.²³⁶
- **Reduced Reliance on Financial Bail:** Existing pretrial release policies in many Texas counties cause many poor people accused of criminal offenses to remain in jail prior to trial simply because they can't afford to post financial bail.²³⁷ Although an individual who is released on bond may nevertheless be indigent and entitled to appointed counsel,²³⁸ that individual is in a much better position to maintain employment and either hire counsel or repay the cost of appointed counsel than a defendant who is detained pending trial.²³⁹ Counties spend approximately \$2 million per day on pretrial incarceration,²⁴⁰ and this reform would reduce both indigent defense and jail expenditures.²⁴¹

Including indigent defense expenditures in conversations about the allocation of criminal justice resources would do more than complement ongoing efforts to increase the use of alternatives to incarceration; it also would shift the conversation toward new alternatives and strengthen the case for alternatives that mitigate defendants' exposure to enmeshed civil penalties.

For example, in Texas, efforts to divert cases to court-supervised treatment have been more successful than efforts to reclassify offenses.²⁴² Moreover, most diversions occur only after a defendant enters a guilty plea. But post-plea diversions do not reduce indigent defense expenditures.²⁴³ Including these expenditures in the equation enhances the case for pre-plea diversion programs, or even reclassification. That is, it opens up possibilities for substantive criminal law improvements that would go further than recent reforms toward reducing the impact of the criminal justice system on low-income communities.

Investing in Improving the Quality of Representation

Resources saved by eliminating the total demand for indigent defense services will be available to be invested in improving the quality of representation in those cases that do remain in the indigent defense system.

These new investments should not simply be distributed across existing county indigent defense systems, which are subject to little oversight and fail to provide accountability for their indigent defense expenditures. Instead, new resources should be invested strategically in programs and structures that support effective representation and hold

defense attorneys accountable for the quality of the services they provide to poor people accused of crime.

- **Public Defender Programs:** Attorneys employed by most public defender programs in Texas work in offices that have caseload limits²⁴⁴ and that provide greater access to support services than what is commonly available to assigned counsel.²⁴⁵ Public defenders are paid based on the number of hours they work in defense of their clients, and, unlike defense counsel, public defenders are not paid less per hour the more hours they dedicate to a case.²⁴⁶ At least in part as a result of these structural safeguards, public defender offices in Texas have consistently been shown to achieve better outcomes for their clients than the outcomes obtained by assigned counsel.

For example, in Houston (Harris County), clients with mental health diagnoses are five times more likely to have the charges against them dismissed than similarly-situated defendants who are represented by assigned counsel.²⁴⁷ The Harris County Public Defender also obtains acquittals in felony cases at three times the rate of appointed and retained counsel.²⁴⁸ In Wichita County, poor people represented by the public defender are 23% more likely to have all charges against them dismissed than poor people represented by assigned counsel.²⁴⁹

- **Managed Assigned Counsel Programs:** Like public defender programs, managed assigned counsel programs operate under caseload limits.²⁵⁰

Managed assigned counsel programs also eliminate the potential conflict of interest that exists in traditional appointment systems. In those systems, judges screen individual attorneys for inclusion on the public appointment list,²⁵¹ select attorneys to represent specific defendants,²⁵² and approve all requests for attorney compensation and funding for defense investigators and experts.²⁵³ This conflict raises concerns that criminal defense lawyers face incentives to compromise their representation of indigent clients if actions that are in a client's best interest might antagonize the judge and harm the lawyer's own financial interests.²⁵⁴

Managed assigned counsel programs are able to provide much greater supervision to assigned counsel than are the judges who nominally are responsible for supervising the performance of defense counsel in traditional appointment systems.²⁵⁵ Unlike judges, defense attorney supervisors in managed assigned counsel programs can supervise attorney performance both in and out of court. The ability to supervise attorneys' out-of-court performance is increasingly important in light of recent U.S. Supreme Court case law that raises the threshold for attorney performance related to out-of-court activities such as plea negotiations and counseling clients about the consequences of a plea.²⁵⁶

Managed assigned counsel programs also provide a structure through which investigative and other support services can be provided to defense attorneys at a level similar to that which exists in public defender offices.²⁵⁷

- **Social Workers:** Several public defender and managed assigned counsel programs in Texas include social workers who serve as members of the defense team. Social workers often are used in offices or units that are dedicated to the representation of individuals with mental health issues. Social workers reduce the number of clients who reenter the criminal justice system by directing them to effective assessments and interventions.²⁵⁸ In Travis County, for example, the Travis County Mental Health Public Defender obtains dismissals in 42% of its cases and has decreased recidivism rates by 38%.²⁵⁹

Social workers also have been shown to improve the quality of representation—and to do so in a cost-effective manner—in other states. In Kentucky, social workers who work with public defenders have saved the state \$3.25 for every \$1 in salaries.²⁶⁰ In Rhode Island, social workers who work with public defenders have saved the state \$15 million.²⁶¹

Conclusion

The fairness of our justice system depends on the right to counsel. Although significant improvements have been made to Texas's indigent defense system since passage of the Fair Defense Act, continued problems remain. A substantial percentage of individuals accused of criminal offenses in Texas courts don't have access to counsel, particularly in misdemeanor cases. And Texas only recently has begun to take initial steps toward ensuring that defense attorneys do not have excessive caseloads that prevent them from providing effective assistance of counsel to their clients.

At the fiftieth anniversary of *Gideon v. Wainwright*, Texas should renew its commitment to meeting its obligation to deliver effective representation to individuals who are charged with crimes and cannot afford to hire an attorney. This effort must encompass the adoption of straightforward reforms that directly respond to the problems discussed in this report, as well as a broader discussion about how Texas allocates limited criminal justice resources that is informed by the true cost of meeting the demand for indigent defense services.

If Texas takes these steps, it can reduce the demand for indigent defense services in a manner that respects the right to counsel, and direct resources toward indigent defense programs that support effective representation and hold defense attorneys accountable for the quality of representation they provide to their clients.

Endnotes

¹ U.S. CONST. amend. VI.

² *Gideon v. Wainwright*, 372 U.S. 335, 343-345 (1963).

³ *Gideon*, 372 U.S. at 342.

⁴ *Gideon*, 372 U.S. at 344.

⁵ *Gideon*, 372 U.S. at 336.

⁶ *Gideon*, 372 U.S. at 337.

⁷ *Gideon*, 372 U.S. at 337.

⁸ NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 21 (2009) [hereinafter *JUSTICE DENIED*].

⁹ See The Honorable Wallace B. Jefferson, Chief Justice, Texas Supreme Court, State of the Judiciary Address presented to the 83rd Legislative Session (Mar. 6, 2013).

¹⁰ *Douglas v. California*, 372 U.S. 353 (1963); see also *Halbert v. Michigan*, 545 U.S. 605 (2005) (right to appointed counsel on appeal includes appeals following a guilty plea).

¹¹ *In re Gault*, 387 U.S. 1 (1967).

¹² *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹³ *Alabama v. Shelton*, 535 U.S. 654 (2002).

¹⁴ *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

¹⁵ *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

¹⁶ *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

¹⁷ *Lafler v. Cooper*, 132 S. Ct. 1376 (2011); *Missouri v. Frye*, 132 S. Ct. 1399 (2011).

¹⁸ Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2486-87 (2013) [hereinafter *Gideon's Shadow*].

¹⁹ *Gideon's Shadow* at 2495-96; see also *Williams v. State*, 252 S.W. 3d 353, 357 (Tex. Crim. App. 2008) ("When the right to trial counsel has been violated, prejudice is presumed because the trial has been rendered inherently unfair and unreliable.").

²⁰ *Chapman v. California*, 386 U.S. 18, 22 (1967).

²¹ See *United States v. Vasquez*, 7 F.3d 81, 85 (5th Cir. 1993) ("[I]t is difficult to accurately assess whether it was harmless error to deny counsel on the basis of a record developed . . . in the absence of that counsel. One can only speculate on what the record might have been had counsel been provided").

²² *Powell*, 287 U.S. at 68-69 (quoted in *Gideon*, 372 U.S. at 344-45).

²³ See *Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("[I]t is through counsel that all other rights of the accused are protected.")

²⁴ See Presiding Judge Sharon Keller & Jim Bethke, *Justice for All*, 76 TEX. B.J. 189, 190 (2013) (Texas had "no system" for providing counsel) [hereinafter *Justice for All*].

²⁵ *Justice for All* at 189 (citing Acts of June 1, 1959, 56th Leg., R.S. Ch. 484, §1 and John F. Onion, Jr., *A Texas Judge Looks at the Right to Counsel*, 28 TEX. B.J. 357 (1965)).

²⁶ *Justice for All* at 189 (citing TEX. CODE CRIM. PROC. art. 26.04 (Vernon 1965) and *Argersinger*, 407 U.S. 25 (1972)).

²⁷ Compare TEX. CODE CRIM. PROC. art. 1.051(c) (defendant has right to counsel if proceeding may result in punishment by confinement) and *Argersinger*, 407 U.S. at 37-38 (defendant has right to counsel if sentence of confinement actually imposed).

²⁸ TEXAS APPLESEED, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 44-45 (2000) [hereinafter *Fair Defense Report*].

²⁹ FAIR DEFENSE REPORT at 43; *Justice for All* at 190.

³⁰ FAIR DEFENSE REPORT at 43.

³¹ FAIR DEFENSE REPORT at 43, 46-49.

³² See *Gideon*, 372 U.S. at 340-41 (Sixth Amendment right to counsel is made obligatory upon the States by the Fourteenth Amendment).

³³ FAIR DEFENSE REPORT at 43, *Justice for All* at 190.

³⁴ FAIR DEFENSE REPORT at 47-48.

³⁵ *Justice for All* at 189.

³⁶ The “Fair Defense Act” is the popular name for all of the 2001 revisions to state statutes governing indigent defense. Texas Fair Defense Act, 77th Leg., R.S., ch. 906.

³⁷ TEX. CODE CRIM. PROC. art. 26.04(a).

³⁸ Judges must adopt countywide procedures that are “consistent with” articles 1.051, 15.17, 26.05, and 26.052 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 26.04(a). Articles 1.051 and 15.17 contain specific, mandatory time limits for the process of informing defendants of the right to appointed counsel and transferring and ruling upon counsel requests. Article 26.05 addresses compensation of appointed counsel and funding for support services in non-capital cases, while Article 26.052 addresses attorney qualifications and funding for support services in capital cases.

³⁹ Countywide procedures must provide for selection of counsel using one or more of the following methods: a system of rotation, a public defender’s office, a managed assigned counsel program, an alternative program, or a regional appointment method. TEX. CODE CRIM. PROC. arts. 26.04(a), (f), (f-1), (h), and (i). Regardless of what selection method is chosen, county procedures must ensure that appointments are allocated among qualified attorneys in a manner that is “fair, neutral, and nondiscriminatory.” TEX. CODE CRIM. PROC. art. 26.04(b)(6).

⁴⁰ TEX. CODE CRIM. PROC. art. 26.04(l). State law does not mandate any specific financial standard for determining whether a defendant is indigent. A county has wide discretion in establishing a local financial standard for this purpose.

⁴¹ TEX. CODE CRIM. PROC. art. 26.04(e), (g)(2)(A)(i), (g)(2)(B)(i). State statute does not mandate any specific qualification standards for attorneys who represent indigent defendants in criminal cases. A county has wide discretion in setting local qualification standards. However, the Texas Indigent Defense Commission has adopted regulations requiring attorneys to complete a minimum of six hours of continuing legal education in criminal or juvenile law in order to obtain appointments in, respectively, adult criminal and juvenile delinquency cases. 1 TEX. ADMIN. CODE §§ 174.1-174.2. Local attorney qualification standards must incorporate this requirement.

⁴² TEX. CODE CRIM. PROC. art. 26.05(b). State law does not mandate any specific compensation rate for attorneys who represent indigent defendants. A county has wide discretion in setting a local schedule of fees for these attorneys.

⁴³ For example, district and county courts in Travis County consider an individual to be indigent for purposes of appointing counsel if the individual’s household income does not exceed 150% of the federal poverty guidelines and the difference between the individual’s net income and reasonable necessary expenditures is less than \$500. Travis District and County Courts Plan § 2, *available at*

<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=31>. In contrast, Bexar County courts appoint counsel to

individuals whose net monthly income is less than \$970.50. Bexar District Courts Plan, *available at*

<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=26>; Bexar County Courts Plan, *available at*

<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=177>.

⁴⁴ TEX. GOV’T CODE § 79.036(a). The Fair Defense Act created the Texas Task Force on Indigent Defense, which was renamed the Texas Indigent Defense Commission in 2012. TEXAS CRIMINAL JUSTICE COALITION, TEXAS INDIGENT DEFENSE COMMISSION: HELPING COUNTIES IMPLEMENT WHAT WORKS FOR SYSTEM-WIDE COST SAVINGS 1 (2013) [hereinafter TIDC: HELPING COUNTIES].

⁴⁵ TEX. GOV’T CODE §§ 79.036(a-1), (e).

⁴⁶ See <http://tidc.tamu.edu/public.net/>.

⁴⁷ See TEX. GOV’T CODE § 79.037 (For example, the Commission shall provide technical assistance to “assist *counties* in improving *their* indigent defense systems” and “promote *compliance by counties* with the requirements of state law relating to indigent defense.”) (emphasis added).

⁴⁸ TEX. GOV’T CODE § 79.037(b).

⁴⁹ TIDC: HELPING COUNTIES at 56.

⁵⁰ Texas has 254 counties. TEXAS STATE HISTORICAL ASSOCIATION, TEXAS ALMANAC, *available at* <http://www.texasalmanac.com/topics/facts-profile>.

⁵¹ For example, Lubbock County spearheaded the creation of the Regional Public Defender for Capital Cases that has expanded to cover 155 counties and created a new managed assigned counsel program in order to increase the independence of defense counsel in non-capital cases. *Justice for All* at 190 n.10; *see also* Lubbock County Dashboard, *available at* <http://tidc.tamu.edu/public.net/Pages/CountyDashboard.aspx?cid=152> (showing information on discretionary grants awarded by the Commission to support these programs).

⁵² *See* Alba Morales, *Too Little Justice: Misdemeanor Defendants in the U.S.*, JURIST, (Mar. 22, 2013), <http://jurist.org/hotline/2013/03/alba-morales-misdemeanor-defense.php> [hereinafter *Too Little Justice*] (describing mass waivers of the right to counsel in misdemeanor proceedings in Midland County).

⁵³ TIDC: HELPING COUNTIES at 5.

⁵⁴ *See Quick stats 2012, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/>. In contrast, most other states provide 90% or more of total funding for indigent defense at the state level. JUSTICE DENIED at 53-54.

⁵⁵ JUSTICE DENIED at 54-55.

⁵⁶ Texas ranks 48th among all states in per capita funding for indigent defense. TIDC: HELPING COUNTIES at 5.

⁵⁷ TIDC: HELPING COUNTIES at 11.

⁵⁸ 1 TEX. ADMIN. CODE §§ 173.310; 174.28(d)(5).

⁵⁹ The fact that the Commission's grant funds only cover a small percentage of most counties' indigent defense expenditures increases the likelihood that it may cost a county more to correct noncompliance than to lose state grant funds. *See* TIDC: HELPING COUNTIES at 6 (State grant funds cover less than 20% of total county indigent defense expenditures).

⁶⁰ *See Too Little Justice* (describing mass waivers of the right to counsel); *see also* FAIR DEFENSE REPORT at 28-29 (describing similar practices prior to passage of the Fair Defense Act).

⁶¹ *See* TIDC: HELPING COUNTIES at 3 (describing some of the human costs of failures to provide competent counsel to poor individuals accused of crimes).

⁶² For example, the Texas Legislature passed House Bill 1318 during the 2013 legislative session, which requires prompt appointment of counsel in juvenile delinquency cases and addresses the issue of defender caseloads in a manner that is discussed in detail within this report. Acts 2013, 83rd R.S., ch. 912; *see also* TEXAS CRIMINAL JUSTICE COALITION AND TEXAS FAIR DEFENSE PROJECT, HB 1318, 83RD LEGISLATIVE SESSION, IMPLEMENTATION GUIDE (2013), *available at* [http://www.texascjc.org/sites/default/files/uploads/HB%201318%20Implementation%20Guide%20\(Appointment%20of%20Counsel%20and%20Indigent%20Defense\).pdf](http://www.texascjc.org/sites/default/files/uploads/HB%201318%20Implementation%20Guide%20(Appointment%20of%20Counsel%20and%20Indigent%20Defense).pdf).

⁶³ For example, the Harris County Commissioners Court created a new public defender's office in 2010 that has improved case outcomes for poor people accused of criminal offenses. *See generally* TONY FABELO ET AL., COUNCIL OF ST. GOV'TS JUST. CENTER, IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER (2013) [hereinafter EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER].

⁶⁴ For example, the Lubbock County Criminal Defense Lawyers Association partnered with Lubbock County officials to create the Lubbock Private Defender Office. *See* Adam D. Young, *Commissioners Create Oversight Committee, Adjust Budget for Private Defender Office*, LUBBOCK AVALANCHE-JOURNAL, June 10, 2013.

⁶⁵ *See* STATE BAR OF TEXAS, PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION (2011) [hereinafter SBOT PERFORMANCE GUIDELINES]; STATE BAR OF TEXAS, GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL (2006).

⁶⁶ *See Heckman v. Williamson County*, 369 S.W.3d 137 (2012) (civil rights action filed by TFDP on behalf of a proposed class of misdemeanor defendants denied access to counsel).

⁶⁷ For example, in every year since 2003 the Texas Indigent Defense Commission hosted an indigent defense workshop. These workshops continue to attract 75 to 100 attendees from Texas counties each year, who come together to learn about ways to improve local indigent defense programs. *See* TEXAS INDIGENT DEFENSE COMMISSION, PRESS RELEASE: GOVERNOR'S CRIMINAL JUSTICE DIVISION AWARDS GRANT TO TEXAS INDIGENT DEFENSE COMMISSION, Oct. 23, 2013, *available at* <http://www.txcourts.gov/tidc/pdf/PressRelease.pdf>.

⁶⁸ See FAIR DEFENSE REPORT at 28-29, 45.

⁶⁹ See Acts 2013, 83rd R.S., ch. 912

⁷⁰ FAIR DEFENSE REPORT at 25-31.

⁷¹ This data is discussed in detail later in this chapter.

⁷² See, e.g., *Heckman*, 369 S.W.3d 137 (proposed class action alleging systematic denial of counsel in misdemeanor cases); *Rothgery*, 554 U.S. 191 (§ 1983 suit filed by individual denied counsel pursuant to county policy denying access to counsel prior to indictment to defendants released on bond); *Williams*, 252 S.W. 3d 353 (appeal by defendant convicted at trial after being denied appointed counsel).

⁷³ Information about the distribution of appointment rates across Texas counties is provided in the data analysis that appears later in this chapter.

⁷⁴ See, e.g., FAIR DEFENSE REPORT at 27 (interview with judge who says only 1 out of 150 misdemeanor defendants are represented by counsel); *Argersinger*, 407 U.S. at 34 (expressing concern that the volume of misdemeanor cases may produce “an obsession with speedy dispositions, regardless of the fairness of the result.”).

⁷⁵ *Penson*, 488 U.S. at 84 (internal quotations omitted).

⁷⁶ See *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012); Nancy Leong, *Gideon’s Law-Protective Function*, 122 YALE L.J. 2460, 2468-69 (2013) [hereinafter *Gideon’s Law-Protective Function*].

⁷⁷ See, e.g., *Martinez*, 132 S. Ct. at 1317.

⁷⁸ *Gideon*, 372 U.S. at 344.

⁷⁹ *Gideon’s Law-Protective Function* at 2469.

⁸⁰ See *Powell*, 287 U.S. at 68-69; *Martinez*, 132 S. Ct. at 1317; see also GIDEON’S LAW-PROTECTIVE FUNCTION at 2471 (proceedings without counsel are skewed toward the better advocate, not the better argument); SBOT PERFORMANCE GUIDELINES 8.1 (defense counsel’s duties include presenting mitigating evidence and seeking least restrictive sentencing alternative).

⁸¹ *State Initiatives: Texas*, RIGHTONCRIME.COM, <http://www.rightoncrime.com/reform-in-action/state-initiatives/texas/> [hereinafter RIGHTONCRIME.COM].

⁸² TEXAS CRIMINAL JUSTICE COALITION, EFFECTIVE APPROACHES TO DRUG CRIMES IN TEXAS: STRATEGIES TO REDUCE CRIME, SAVE MONEY, AND TREAT ADDICTION 9-10 (2013) [hereinafter EFFECTIVE APPROACHES TO DRUG CRIMES IN TEXAS].

⁸³ Defendants without counsel may be barred from participating in diversion programs due to an explicit rule or as a practical consequence of screening mechanisms that depend on defense counsel to identify good candidates for diversion and to affirmatively request that a defendant be considered for a diversion program. The fact that a defendant pleaded guilty to another crime without the assistance of counsel in the past also may prevent indigent defendants from having equal access to diversion programs. See ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIM. D. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 13 (2009) [hereinafter MINOR CRIMES, MASSIVE WASTE].

⁸⁴ Class A misdemeanor offenses are punishable by a fine not to exceed \$4,000 and a term of imprisonment not to exceed one year. TEX. PEN. CODE § 12.21. Class B misdemeanor offenses are punishable by a fine not to exceed \$2,000 and a term of imprisonment not to exceed six months. TEX. PEN. CODE § 12.22. Class C misdemeanors are punishable by a fine not to exceed \$500. TEX. PEN. CODE § 12.23. Indigent defendants in Texas are entitled to appointment of counsel in Class A and B misdemeanor cases because conviction for those offenses may result in punishment by confinement. TEX. CODE CRIM. PROC. art. 1.051(c). In this report, “misdemeanor” and “misdemeanors” are used to refer to Class A and B misdemeanors.

⁸⁵ MINOR CRIMES, MASSIVE WASTE at 12-13.

⁸⁶ JUSTICE DENIED at 72.

⁸⁷ SBOT PERFORMANCE GUIDELINES at 6.2(B); MINOR CRIMES, MASSIVE WASTE at 20.

⁸⁸ In Texas, trial court judges must inform defendants who are pleading guilty if they will be required to register as a sex offender. TEX. CODE CRIM. PROC. art. 26.13(a)(5). Trial court judges also must advise a defendant who is pleading guilty that the conviction *may* have immigration consequences if the defendant is not a U.S. citizen. TEX. CODE CRIM. PROC. art. 26.13(a)(4) (emphasis added). Unlike defense counsel, trial court judges are not required to give defendants specific advice about the immigration consequences of a criminal conviction. See

Padilla v. Kentucky, 559 U.S. 356 (2010). Trial court judges are not required to give defendants information about any other enmeshed penalties.

⁸⁹ MINOR CRIMES, MASSIVE WASTE at 20. For example, a defendant could choose to reject an otherwise tempting plea offer for time served in order to challenge charges that could result in loss of immigration status, or a defendant could try to negotiate a plea that does not trigger a particular licensing consequence that would impair the defendant's employment.

⁹⁰ See *Justice for All* at 190 (“The public’s perception of the judicial system is formed by what it hears or reads about criminal law cases rather than civil law cases. Therefore, it behooves the bench and bar to provide adequate counsel and fairness to indigent defendants in criminal cases.”) (quoting John F. Onion, *A Texas Judge Looks at the Right to Counsel*, 28 TEX. B.J. 357 (1965)).

⁹¹ Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants’ Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2572-73 (2013) [hereinafter *Fear of Adversariness*].

⁹² *Gideon’s Law-Protective Function* at 2468.

⁹³ *Fear of Adversariness* at 2572-73.

⁹⁴ See RIGHTONCRIME.COM.

⁹⁵ See, e.g., RIGHTONCRIME.COM (touting that alternatives to incarceration had saved Texas taxpayers more than \$2 billion in incarceration costs); EFFECTIVE APPROACHES TO DRUG CRIMES IN TEXAS AT 3-4, 10 (emphasizing cost savings that result from diversion programs).

⁹⁶ The difficulties that defendants without counsel face in entering diversion programs are discussed earlier in this chapter.

⁹⁷ See *Alabama v. Shelton*, 535 U.S. 654, 666-67, 671-72.

⁹⁸ For example, for immigration purposes a defendant is deemed to be convicted of an offense if he or she “has admitted sufficient facts to warrant a finding of guilt” and “the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” 8 U.S.C. § 1101(a)(48)(A)(i)-(ii).

⁹⁹ FAIR DEFENSE REPORT at 28-29.

¹⁰⁰ On the Commission’s website, the data sheet for every county shows the statewide appointment rate in misdemeanor cases for fiscal year 2012. See, e.g., Anderson County Data Sheet, Texas Indigent Defense Commission, <http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=1>.

¹⁰¹ On the Commission’s website, the data sheet for every county shows the statewide appointment rate in felony cases for fiscal year 2012. See, e.g., Anderson County Data Sheet, Texas Indigent Defense Commission, <http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=1>.

¹⁰² UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 6 (2000) (57% of interviewed defendants represented by appointed counsel).

¹⁰³ On the Commission’s website, the data sheet shows the underlying data for the statewide appointment rates in misdemeanor and felony cases for fiscal year 2012. This underlying data consists of the number of each category of case that was added and the number of each category of case that was paid. See, e.g., Anderson County Data Sheet, Texas Indigent Defense Commission, <http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=1>.

¹⁰⁴ Additional information about county indigent defense policies in the context of the Fair Defense Act can be found in the Introduction.

¹⁰⁵ Data provided by county officials to the Texas Office of Court Administration regarding the number of cases disposed and data provided by county officials to the Texas Indigent Defense Commission regarding the number of cases in which appointed counsel was paid was used to calculate the percentage of cases in which defendants are provided with court-appointed counsel in each of Texas’s 254 counties. Appointment rates were calculated for the fiscal years 2003 to 2012 using a fiscal year spanning from October 1 through September 30. Researchers used four variables: (1) the number of district court cases in which each county paid for a court-appointed attorney (“Felony Cases Paid”), (2) the number of county court cases in which each county paid for a court-appointed attorney (“Misdemeanor Cases Paid”), (3) the total number of felony cases disposed in district court in each county (“felony cases disposed”), and (4) the total number of Class A and B misdemeanor cases disposed in county court in each county (“misdemeanor cases disposed”). These figures were then used to

determine: (a) the ratio of felony cases paid to the total number of felony cases disposed, and (b) the ratio of misdemeanor cases paid to total number of misdemeanor cases disposed.

In some instances, counties reported appointment rates well over 200%. For example, Sherman County reported a misdemeanor appointment rate of 1,400% in fiscal year 2010. In order to prevent these reporting errors from skewing the calculation of average county appointment rates, county appointment rates were capped at 200%. By case type (felony or misdemeanor), this cap affected no more than 3 counties in each fiscal year.

¹⁰⁶ See Acts 2007, 80th R.S., ch. 463.

¹⁰⁷ The Commission calculates the statewide appointment rate by comparing cases added to the number of cases in which appointed counsel was paid. In preparing this report, TFDP used cases disposed rather than cases added to calculate appointment rates because cases generally are paid at the time they are disposed.

This specific difference in the methodology used by the Commission and this report results in only small differences in appointment rates. In felony cases, the biggest swing in statewide appointment rates calculated using cases added vs. cases disposed is 3.3% (2006). In misdemeanor cases, the biggest difference is 1.7% (2004).

¹⁰⁸ Plaintiffs' Second Amended Class Action Petition, *Heckman v. Williamson County*, 369 S.W. 3d 137 (Tex. 2012) (No. 10-0671).

¹⁰⁹ *Heckman*, 369 S.W. 3d at 168.

¹¹⁰ *Heckman*, 369 S.W. 3d at 143-44.

¹¹¹ Settlement Agreement and Release, *Heckman v. Williamson County*, Cause No. 06-453-277 (Jan 14, 2013) (277th District Court, Williamson County, Texas).

¹¹² See Williamson County Data Sheet, Texas Indigent Defense Commission, <http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=246>.

¹¹³ Reliable data on how many defendants are represented by retained counsel in misdemeanor cases is not available. Without this information, it is not possible to determine with specificity how many defendants who do not have appointed counsel appear without counsel and how many appear with retained counsel.

¹¹⁴ Counties in which TFDP has conducted onsite observations of misdemeanor court proceedings include Bandera, Brazoria, Eastland, Garza, Hutchinson, Hays, Jefferson, Maverick, Midland, Nueces, Van Zandt, and Williamson.

¹¹⁵ TFDP receives over 300 requests for assistance through its intake system each year.

¹¹⁶ This practice violates Article 15.17 of the Texas Code of Criminal Procedure, which requires magistrates to inform defendants of the right to counsel at the initial magistrate hearing, and "ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person *at the same time.*" TEX. CODE CRIM. PROC. art. 15.17(a) (emphasis added).

¹¹⁷ This practice violates Articles 15.17 and 1.051 of the Texas Code of Criminal Procedure. Texas magistrates are required to transfer all requests for counsel to the appointing authority in the county no later than 24 hours after the person requests counsel, and there is no exception to this requirement for cases involving defendants who post bond. TEX. CODE CRIM. PROC. art. 15.17(a). Upon receipt of a request for counsel from a defendant released on bond, the appointing authority must appoint counsel at the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first. TEX. CODE CRIM. PROC. art. 1.051(j). Adversary judicial proceedings are initiated at a defendant's initial hearing before a magistrate conducted pursuant to Article 15.17. *Rothgery*, 554 U.S. at 213.

¹¹⁸ This practice violates Article 26.04 of the Texas Code of Criminal Procedure, which provides that indigent defendants must be provided an opportunity to confer with appointed counsel before the commencement of judicial proceedings. TEX. CODE CRIM. PROC. art. 26.04(b)(3).

¹¹⁹ Prosecutors cannot communicate with a defendant who has a pending request for counsel. TEX. CODE OF CRIM. PROC. art. 1.051(f-1)(2). Courts may not direct or encourage a defendant with a pending request for counsel to talk to the prosecutor. TEX. CODE CRIM. PROC. art. 1.051(f-2).

¹²⁰ This practice also is documented in MINOR CRIMES, MASSIVE WASTE at 16-17 (describing prosecutors' communications with unrepresented defendants in Hays County, Texas).

- ¹²¹ See *Gideon's Law-Protective Function* at 2470 (“[C]onsciously or unconsciously, courts use the presence of a lawyer as proxy for how seriously to take a case.”)
- ¹²² TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c).
- ¹²³ See, e.g., TEXAS FAIR DEFENSE PROJECT, H.B. 1178 INFO SHEET: ALL DEFENDANTS MUST MAKE AN INFORMED DECISION ABOUT WHETHER TO SEEK THE ASSISTANCE OF COUNSEL (Feb. 27, 2007) (“It also is not unusual for prosecutors or judges to encourage a defendant to enter into uncounseled plea negotiations even after the defendant has requested counsel, in clear violation of constitutional law.”) (on file with authors). One prosecutor testified against the bill when it was considered in the House Committee on Criminal Jurisprudence because it prohibited practices that officials in his county relied on to resolve cases. *Hearing on H.B. 1178 Before the H. Comm. on Crim. Jur.*, 2007 Leg., 80th R.S. (Tex. Feb. 27, 2007) (statement of D. Ryan Locker, Brown County Attorney's Office).
- ¹²⁴ H.B. 1178, Acts 2007, 80th R.S., ch. 463, added TEX. CODE CRIM. PROC. art. 1.051(f-1)(1).
- ¹²⁵ H.B. 1178, Acts 2007, 80th R.S., ch. 463, added TEX. CODE CRIM. PROC. art. 1.051(f-1)(2).
- ¹²⁶ H.B. 1178, Acts 2007, 80th R.S., ch. 463, added TEX. CODE CRIM. PROC. art. 1.051(f-2).
- ¹²⁷ H.B. 1178, Acts 2007, 80th R.S., ch. 463, amended TEX. CODE CRIM. PROC. art. 1.051(f).
- ¹²⁸ *Iowa v. Tovar*, 541 U.S. 77 (2004).
- ¹²⁹ *Iowa v. Tovar*, 541 U.S. 77 (2004).
- ¹³⁰ See, e.g., *Laffler*, 132 S. Ct. 1376 (2011) (plea negotiations are critical stage of the proceedings).
- ¹³¹ MINOR CRIMES, MASSIVE WASTE at 19; ERICA HASHIMOTO, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF, ASSESSING THE INDIGENT SYSTEM 10 (2013) [hereinafter ASSESSING THE INDIGENT DEFENSE SYSTEM].
- ¹³² TEX. CODE CRIM. PROC. art. 26.05(g).
- ¹³³ MINOR CRIMES, MASSIVE WASTE at 18.
- ¹³⁴ *Powell v. Alabama*, 287 U.S. 45; see also ASSESSING THE INDIGENT DEFENSE SYSTEM at 18.
- ¹³⁵ Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 341 (2013) [hereinafter *Prescriptions for Ethical Blindness*].
- ¹³⁶ See SBOT PERFORMANCE GUIDELINES 4.1; *Prescriptions for Ethical Blindness* at 341.
- ¹³⁷ See, e.g., *Rothgery*, 554 U.S. 191 (lawsuit filed by TFDP on behalf of felony defendant who was denied counsel until case was indicted six months after arrest).
- ¹³⁸ FAIR DEFENSE REPORT at 30.
- ¹³⁹ *Rothgery*, 554 U.S. at 194.
- ¹⁴⁰ *Rothgery*, 554 U.S. at 196.
- ¹⁴¹ *Rothgery*, 554 U.S. at 196.
- ¹⁴² *Rothgery*, 554 U.S. at 196.
- ¹⁴³ *Rothgery*, 554 U.S. at 196-197; Original Complaint, *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (No. 07-440) at 4-5.
- ¹⁴⁴ See *Rothgery*, 554 U.S. at 208-10.
- ¹⁴⁵ *Rothgery*, 554 U.S. at 213.
- ¹⁴⁶ *Rothgery*, 554 U.S. at 207 (internal quotations omitted).
- ¹⁴⁷ For example, Texas counties with populations of 250,000 or more have high rates of appointment in felony and misdemeanor cases, as discussed in the section of this chapter that describes our analysis of county appointment rates.
- ¹⁴⁸ *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984) (internal quotation omitted).
- ¹⁴⁹ 466 U.S. 668, 686 (1984).
- ¹⁵⁰ MINOR CRIMES, MASSIVE WASTE at 21.
- ¹⁵¹ See SBOT PERFORMANCE GUIDELINES; TEX. INDIGENT DEF. COMM'N, REVIEW OF DALLAS COUNTY PUBLIC DEFENDER: APPELLATE DIVISION AND CASELOAD STANDARDS 7 (2008) [hereinafter REVIEW OF DALLAS COUNTY PUBLIC DEFENDER]; JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 13 (July 2011) [hereinafter SYSTEM OVERLOAD].
- ¹⁵² JUSTICE DENIED at 2.
- ¹⁵³ SYSTEM OVERLOAD at 20.
- ¹⁵⁴ SYSTEM OVERLOAD at 20.
- ¹⁵⁵ *Wilbur v. City of Mt. Vernon*, 2013 U.S. Dist. LEXIS 171187, 2013 WL 6275319 *15 (W.D. Wash. Dec. 4, 2013)

- ¹⁵⁶ Amy E. Hirsch, *Introduction* in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 7-8 (Community Legal Services, Inc. and Center for Law and Social Policy) (2002).
- ¹⁵⁷ Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 UC DAVIS LAW REV 277, 299 (2011).
- ¹⁵⁸ See, e.g. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2013)
- ¹⁵⁹ See NORMAN LEFSTEIN, AM. BAR. ASSOC. STANDING COMM. ON LEGAL AID AND INDIGENT DEF., SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE at 12-19 (2011) [hereinafter SECURING REASONABLE CASELOADS]; JUSTICE DENIED at 66-70.
- ¹⁶⁰ Bennet H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 108 (2009).
- ¹⁶¹ See JUSTICE DENIED at 70, 72-73.
- ¹⁶² See, e.g., SECURING REASONABLE CASELOADS at 20; Chris Dandurand, *Walking Out on the Check: How Missouri abandoned Its Public Defenders and Left the Poor to Foot the Bill*, 76 MO. L. REV. 185 (2011) (chronicling the impact of decreased funding amidst increased case filings in Missouri).
- ¹⁶³ See, e.g., Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 J. L. & POL'Y 205, 208-209 (2011) [hereinafter *Rationing Justice*] For example, six attorneys in Florida in 2006 handled more than 10,000 misdemeanor cases.
- ¹⁶⁴ SECURING REASONABLE CASELOADS at 23.
- ¹⁶⁵ See, e.g., JUSTICE JEOPARDIZED: A REPORT OF THE PUBLIC ADVOCACY COMMISSION ON KENTUCKY PUBLIC DEFENDER CASELOADS (2005).
- ¹⁶⁶ *Rationing Justice* at 208.
- ¹⁶⁷ See, e.g., SECURING REASONABLE CASELOADS; AM. BAR ASSOC. EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE CASELOADS (2009).
- ¹⁶⁸ SECURING REASONABLE CASELOADS at 140-145.
- ¹⁶⁹ SECURING REASONABLE CASELOADS at 140-145; see also MAREA BEEMAN, JUSTICE MGMT INST, USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 14 (August 31, 2012) [hereinafter USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS].
- ¹⁷⁰ DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES 8 (2007).
- ¹⁷¹ See, e.g., *Flora v. Luzerne County*, No. 04517 (not. of appeal filed Nov. 20, 2013 Court of Common Pleas Luzerne County, Pa.); *Public Defender, Eleventh Judicial District v. State of Florida*, Nos. SC09-1181, SC10-1349 (Fla. May 23, 2013).
- ¹⁷² See *Hurrell-Harring v. New York*, 2010 NY Int. 83 (N.Y. Court of Appeals 2010).
- ¹⁷³ SECURING REASONABLE CASELOADS at 43-45.
- ¹⁷⁴ See TEX. TASK FORCE ON INDIGENT DEFENSE, BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS 18 (2004) [hereinafter BLUEPRINT]; see also HARRIS COUNTY PUBLIC DEFENDER'S OFFICE ACTIVITIES AND ACCOMPLISHMENTS (2011-2012) at 2 (2012), available at <http://tidc.tamu.edu/DGReportDocuments/212-12-D03%20PDO-Annual%20Report%202012.pdf>.
- ¹⁷⁵ SECURING REASONABLE CASELOADS at 140-148.
- ¹⁷⁶ See, e.g., EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER at 20-24.
- ¹⁷⁷ USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS at 14.
- ¹⁷⁸ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973).
- ¹⁷⁹ BLUEPRINT at 3; see also Jim Bethke, *Rich or Poor: The Right to a Fair Trial Requires a Good Lawyer*, 69 TEX. B.J. 238, 240 (2006).
- ¹⁸⁰ TEX. GOV'T CODE § 79.001(1)
- ¹⁸¹ TEX. CODE CRIM. PROC. art. 26.04(c)(3). There are a handful of public defender offices that were created before the Fair Defense Act. These public defender offices, including the offices in Dallas County, El Paso County, and Webb County, are not required to comply with the Fair Defense Act's requirements for public defender offices, including the requirement that the office set maximum allowable caseload standards. Dallas County public

defenders, in particular, historically have had extremely high caseloads, which has limited the effectiveness of the Dallas County office.

¹⁸² TEX. CODE CRIM. PROC. art. 26.047(c)(3).

¹⁸³ SECURING REASONABLE CASELOADS at 140-148.

¹⁸⁴ HARRIS COUNTY APPT CASELOADS – 2011, *available at*

<https://docs.google.com/file/d/0By1E7SWXmpKnRUvYdEw3Um1zUW8/edit> or on request or on file with author [hereinafter HARRIS COUNTY APPT CASELOADS].

¹⁸⁵ HARRIS COUNTY APPT CASELOADS.

¹⁸⁶ REVIEW OF DALLAS COUNTY PUBLIC DEFENDER.

¹⁸⁷ U.S. CENSUS BUREAU: STATE AND COUNTY QUICK FACTS, *available at*

<http://quickfacts.census.gov/qfd/states/48000.html>.

¹⁸⁸ Harris County Data Sheet, 2012 *available at* <http://tidc.tamu.edu/public.net/> (last visited October 17, 2013).

According to the Data Sheet, Harris County added 44,053 felonies, 73,970 misdemeanors, and 9,722 juvenile cases for a total of 127,745 added cases in fiscal year 2012. The courts paid appointed counsel in 71,559 of those cases.

¹⁸⁹ EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER OFFICE at 16.

¹⁹⁰ HARRIS COUNTY APPT CASELOADS.

¹⁹¹ HARRIS COUNTY APPT CASELOADS.

¹⁹² EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER OFFICE at 12.

¹⁹³ HARRIS COUNTY APPT CASELOADS.

¹⁹⁴ A Houston news station reported that a review of case data from 2002-2009 revealed that the attorneys who received the most money from court appointments during those years all had received appointments in numbers that far exceeded the NAC standards. Mark Greenblatt, *Experts: Harris Co. taking risks with lawyer appointment system*, KHOU11, (May 19, 2009) *available at* <http://www.khou.com/news/local/66161012.html>.

¹⁹⁵ Lise Olsen, *Attorneys overworked in Harris County death-row cases*, HOUS. CHRON. (May 25, 2009) [hereinafter *Attorneys overworked in Harris County death-row cases*].

¹⁹⁶ *Attorneys overworked in Harris County death-row cases*.

¹⁹⁷ *Attorneys overworked in Harris County death-row cases*.

¹⁹⁸ TEX. INDIGENT DEF. COMM'N, FY12 ANNUAL AND EXPENDITURE REPORT 1 (January 2013) [hereinafter TIDC FY 12 ANNUAL REPORT].

¹⁹⁹ TONY FABELO, COUNCIL OF STATE GOV'TS JUSTICE CTR., Presentation at the Indigent Defense Symposium, *Taking Gideon's Pulse: Impacts of the Texas Fair Defense Act 10 Years Later* 20 (October 27, 2011) *available at* www.txcourts.gov/tidc/ebookhousecrim051310/ppthouse051310.ppsx [hereinafter *Taking Gideon's Pulse*].

²⁰⁰ TIDC FY 12 ANNUAL REPORT at 1.

²⁰¹ WILLIAMSON COUNTY DISTRICT AND COUNTY COURT MISDEMEANOR ATTORNEY FEE SCHEDULE, *available at* <http://tidc.tamu.edu/IDPlanDocuments/Williamson%5CWilliamson%20District%20and%20County%20Court%20Misdemeanor%20Attorney%20Fee%20Schedule.pdf>, last viewed November 12, 2013.

²⁰² STATE BAR OF TEX. DEPT OF RESEARCH AND ANALYSIS, 2011 HOURLY FACT SHEET, *available at* http://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=20499 [hereinafter 2011 HOURLY FACT SHEET].

²⁰³ Under Article 26.04(a) of the Code of Criminal Procedure, courts in counties without a public defender office, managed assigned counsel office, or an alternate public defense system are required to use a rotation system for appointing attorneys from a list of attorneys that have been approved to take court appointments. TEX. CODE CRIM. PROC. art. 26.04(a).

²⁰⁴ *See, e.g.* TEX. INDIGENT DEF. COMM'N, FOLLOW-UP REVIEW OF BEXAR COUNTY'S INDIGENT SYSTEMS, 13-14, 16 (July 30, 2012) (Bexar County saw a decrease in the number of appointed defenders who carried caseloads that exceeded national standards after the County instituted an appointment wheel).

²⁰⁵ The high caseloads for Harris County appointed defenders generally have been attributed to the judicial practice of appointing attorneys outside of the established wheel. *See, e.g.*, Patricia Kilday Hart, *A Public Defender Needs No Cronies*, HOUS. CHRON., (April 30, 2012); Mark Greenblatt, *Experts: Harris County Taking Risks with Lawyer*

Appointment System, KHOU-TV (May 19, 2009) available at <http://www.khou.com/news/local/66161012.html>; Sarah Viren, *A Select Few Get the Cases, and the Cash*, HOUS. CHRON. (April 20, 2008) available at: <http://www.chron.com/news/houston-texas/article/Lawyers-picked-for-juveniles-give-campaigns-cash-1759443.php>.

²⁰⁶ The standard established under *Strickland v. Washington* for demonstrating ineffective assistance of counsel is a nearly impossible burden to meet. 466 U.S. 668 (1984). In one study of 2,500 defendants pursuing ineffective assistance of counsel claims, only 4% were successful. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 203 (2009).

²⁰⁷ See SECURING REASONABLE CASELOADS at 68-70; Laurence Benner, AMERICAN CONSTITUTION SOCIETY FOR LAW & POLICY: ISSUE BRIEF: WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE, at 2 (March 2011).

²⁰⁸ SBOT PERFORMANCE GUIDELINES 1.1.

²⁰⁹ Acts 2013, 83rd R.S., ch. 912.

²¹⁰ H.B. 1318, Acts 2013, 83rd Leg., R.S. (2013), § 8.

²¹¹ Jim Bethke, *Improving Indigent Defense Through Research & Data*, VOICE FOR THE DEFENSE 20 (Nov. 6, 2013). The Harris County Public Defender Office has undertaken a weighted caseload study for its office. See EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER OFFICE.

²¹² H.B. 1318, Acts 2013, 83rd R.S. (2013), amended TEX. CODE CRIM. PROC. 26.04(j)(4).

²¹³ H.B. 1318, Acts 2013, 83rd R.S. (2013), amended TEX. GOV'T. CODE 79.036 (a-1).

²¹⁴ H.B. 1318, Acts 2013, 83rd R.S. (2013), amended TEX. CODE CRIM. PROC. 26.044(j)(4).

²¹⁵ H.B. 1318, Acts 2013, 83rd R.S. (2013), amended TEX. CODE CRIM. PROC. 26.044(j-1).

²¹⁶ H.B. 1318, Acts 2013, 83rd R.S. (2013), amended TEX. CODE CRIM. PROC. 26.044(j-2).

²¹⁷ *Strickland*, 466 U.S. at 686.

²¹⁸ *Strickland*, 466 U.S. at 685.

²¹⁹ Further discussion of this issue is available in the chapter concerning defender caseloads.

²²⁰ Carol S. Steiker, Keynote Address at the Yale Law Journal Symposium on the 50th Anniversary of *Gideon v. Wainwright*, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013).

²²¹ Texas counties pay 86% of the total cost of providing indigent defense services in Texas. See *Quick Stats 2012, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/>.

²²² See *Quick stats 2012, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/>.

²²³ TIDC: HELPING COUNTIES at 13.

²²⁴ Letter from Texas Fair Defense Project Executive Director Andrea Marsh to Texas Indigent Defense Commission Chair The Hon. Sharon Keller (Oct. 2, 2012) (on file with author); see also TIDC: HELPING COUNTIES at 11 (Commission only has resources to conduct a very small number of reviews of actual county practices).

²²⁵ See TIDC: HELPING COUNTIES at 13-14.

²²⁶ See TIDC: HELPING COUNTIES at 13-14.

²²⁷ Texas ranks 48th among all states in per capita funding for indigent defense. TIDC: HELPING COUNTIES at 5.

²²⁸ RIGHTONCRIME.COM.

²²⁹ Texas counties pay 86% of the total cost of providing indigent defense services in Texas. See *Quick Stats 2012, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/>.

²³⁰ See, e.g., *Heckman*, 369 S.W.3d 137 (proposed class action alleging systematic denial of counsel in misdemeanor cases); *Rothgery*, 554 U.S. 191 (§ 1983 suit filed by individual denied counsel pursuant to county policy denying access to counsel prior to indictment to defendants released on bond). But see M. Clara Hernandez & Carole J. Powell, *Valuing Gideon's Gold: How Much Justice Can We Afford*, 122 YALE L.J. 2358, 2362 (2013) ("States have doggedly refused either to pay the full price of justice or lower the cost by reducing prosecutions.")

²³¹ MINOR CRIMES, MASSIVE WASTE at 7; THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CENTER FOR JUST., *GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL* 8 (2013) [hereinafter THREE REFORMS]; VIKRANT P. REDDY, TEXAS PUB. POL'Y

FOUND. CENTER FOR EFFECTIVE JUST., IMPROVING INDIGENT DEFENSE IN TEXAS 4-5 (2012) [hereinafter TPPF: IMPROVING INDIGENT DEFENSE].

²³² TPPF: IMPROVING INDIGENT DEFENSE AT 4.

²³³ *Argersinger*, 407 U.S. at 38 n.9.

²³⁴ TPPF: IMPROVING INDIGENT DEFENSE AT 5.

²³⁵ *See Shelton*, 535 U.S. at 666-67, 671-72.

²³⁶ *See Shelton*, 535 U.S. at 666-67, 671-72.

²³⁷ *See, e.g.*, Robert Fickman, *Harris County Texas: Where the Innocent Must Plead Guilty to Obtain Their Liberty*, THE "MEANING" OF AMERICA (Nov. 27, 2013), <http://blog.fickmanlaw.com/2013/11/harris-county-texas-where-the-innocent-must-plead-guilty-to-regain-their-liberty/>.

²³⁸ TEX. CODE CRIM. PROC. art. 26.04(m).

²³⁹ *See* TEX. CODE CRIM. PROC. art. 26.05(g) (a defendant can be ordered to repay the costs of appointed counsel if court finds defendant has ability to pay).

²⁴⁰ TIDC: HELPING COUNTIES at 4.

²⁴¹ LAURENCE A. BENNER, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF, WHEN EXCESSIVE PUBLIC DEFENDER CASELOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 15 (2011).

²⁴² For example, compare the fate of House Bill 1417, 83rd R.S. (proposal to reclassify possession of a small amount of a controlled substance from a state jail felony to a Class A misdemeanor; did not pass) with Senate Bill 484, 83rd R.S. (proposal to create prostitution diversion program; passed). While Texas has created a number of new diversion programs in recent years, few, if any, criminal offenses have been reclassified as lesser offenses.

²⁴³ *See Shelton*, 535 U.S. at 666-67, 671-72.

²⁴⁴ Public defender offices that were established subsequent to passage of the Fair Defense Act are required to have a plan of operation that includes the maximum allowable caseload for each attorney employed by the office. TEX. CODE CRIM. PROC. art. 26.044(c-1)(3).

²⁴⁵ *See, e.g.*, EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER at 2.

²⁴⁶ Flat rate compensation schemes such as those that exist in most Texas counties financially penalize assigned counsel for putting more work into a case. *See Prescriptions for Ethical Blindness* at 349 ("[A]ny activity that diverts attention away from the quick disposition of cases . . . is discouraged by the nature of the [compensation].").

²⁴⁷ EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER at 30.

²⁴⁸ EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER at 32.

²⁴⁹ DOTTIE CARMICHAEL & MINER P. MARCHBANKS III, PUB. POL'Y RES. INST., WICHITA COUNTY PUBLIC DEFENDER OFFICE: AN EVALUATION OF CASE PROCESSING, CLIENT OUTCOMES, AND COSTS 66 (2012).

²⁵⁰ Managed assigned counsel programs are required to have a plan of operation that includes the maximum allowable caseload for each attorney appointed by the program. TEX. CODE CRIM. PROC. art. 26.047(c)(3).

²⁵¹ TEX. CODE CRIM. PROC. art. 26.04(d), (e), (g), (h).

²⁵² TEX. CODE CRIM. PROC. art. 26.04(b)(1).

²⁵³ TEX. CODE CRIM. PROC. art. 26.05(c), (d).

²⁵⁴ FAIR DEFENSE REPORT at 22.

²⁵⁵ For examples of mechanisms to supervise attorneys and monitor the quality of representation that exist in managed assigned counsel programs, see the discussion of the Massachusetts Committee for Public Counsel Services and the San Mateo Private Defender that is contained in Chapter 8 of SECURING REASONABLE CASELOADS.

²⁵⁶ *Lafler v. Cooper*, 132 S. Ct. 1376 (2011); *Missouri v. Frye*, 132 S. Ct. 1399 (2011); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²⁵⁷ *See* SECURING REASONABLE CASELOADS at ch. 8.

²⁵⁸ THREE REFORMS at 9.

²⁵⁹ TIDC: HELPING COUNTIES at 7.

²⁶⁰ THREE REFORMS at 9.

²⁶¹ THREE REFORMS at 9.

