

TEXAS FAIR DEFENSE PROJECT

February 18, 2015

Written Testimony regarding House Bill 1, Article IV – Judiciary
*Specifically, the Legislative Appropriations Request
Of the Texas Indigent Defense Commission*

To The House Committee on Appropriations, Subcommittee on Articles I, IV and V

Dear Mr. Chairman and Committee Members:

My name is Rebecca Bernhardt. I am the Executive Director of the Texas Fair Defense Project (TFDP). Thank you for this opportunity to provide written testimony before you today regarding the Legislative Appropriations Request of the Texas Indigent Defense Commission. TFDP works closely with the Texas Indigent Defense Commission as part of its mission to improve fairness in the criminal courts by strengthening the public defense system.

Exceptional Item #1

TFDP supports ongoing funding for the Regional Public Defender's Office (RPDO), as requested in Exceptional Item #1. The RPDO is a successful and effective program, stewarded by the Commission. The RPDO provides consistent, effective representation in capital cases in over 67 percent of Texas's rural counties. The RPDO is cost effective while shifting the burden of oversight for case staffing decisions away from local judges who often dread the task.

TFDP supports efforts to continue to fund and increase the stability and effectiveness of the RPDO as a central component to ensuring capital defendants in Texas receive effective, independent defense representation.

Exceptional Item #2

TFDP also supports funding for the Multi-County Indigent Defense Technology Grant Program. This exceptional item will enable the Commission to ensure that expansion these successful programs is to benefit the largest proportion of counties possible and avoids creating one-off technology tools that are not transferable outside of the initial set of users. TIDC is well positioned to coordinate the expansion of these technology resources to the benefit of county provision of indigent defense services.

Exceptional Item #3

TFDP supports the Indigent Defense Commission's request for \$196.8 million in additional state funding for county indigent defense services. In spite of improvements, major gaps in Texas's county-based indigent defense system persist. These inadequacies include the failure to appoint counsel under circumstances where it is constitutionally required,¹ as well as the failure to provide effective representation.

Excessive caseloads are one of the biggest impediments to providing effective representation to indigent defendants in Texas. This is due largely to how much it would cost counties to pay appointed attorneys to handle reasonable caseloads. However, it was not until the implementation of HB 1318, enacted 2013, that Texas began compiling state-wide caseload data for attorneys who represent indigent defendants.

Data compiled by the Commission indicates that some attorneys representing indigent defendants have caseloads that are five to six times higher² than the caseload guidelines recently published by the Commission.³ Defense attorneys appointed to represent indigent defendants in Texas's five most populous counties had caseloads during fiscal year 2013-2014 that were more than double the recommended caseload limit. In Dallas County alone more than 50 attorneys appointed to represent indigent defendants carried caseloads at least twice the recommended limit.

The status quo leaves counties vulnerable to potentially expensive legal liability. In 2013 a federal judge in Seattle found two Washington State municipalities liable for depriving indigent defendants of their fundamental right to assistance of counsel where the attorneys who contracted with the municipalities carried caseloads ranging from 500 to 1000 cases per lawyer.⁴ In October 2014, New York State settled seven-year-old litigation regarding the failur

¹ In many Texas counties more than 50 percent of misdemeanor defendants proceed through their criminal case without a lawyer. John R. Emshwiller and Gary Fields, "Justice Is Swift as Petty Crimes Clog Courts," Wall Street Journal, Nov. 30, 2014, <http://online.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782>. There are Texas counties where attorneys are appointed in misdemeanors in fewer than 10 percent of cases. Counties reporting appointment of counsel in fewer than 10 percent of misdemeanor cases in 2014 include several of Texas's smallest counties but also the more populous counties of Jefferson and Smith Counties.

² Based upon data collected by the Commission, six Dallas County defense attorneys carried between 1141 and 1240 misdemeanor cases each during fiscal year 2013-2014.

³ In January 2015, the Commission released a landmark study and guidelines for recommended caseloads for appointed criminal defense lawyers in Texas entitled, "Guidelines for Indigent Defense Caseloads," http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf. The study concluded that a criminal defense attorney with expertise and training should handle no more than 226 misdemeanor cases or 128 felony cases during one calendar year.

⁴ "Federal Court Finds Public Defense System Violates Constitutional Rights of Indigent Defendants," American Civil Liberties Union, Dec. 5, 2013, <https://www.aclu.org/criminal-law-reform/federal-court-finds-public-defense-system-violates-constitutional-rights>.

to provide adequate legal representation in criminal cases in five counties. In addition to committing millions of dollars to improving the indigent defense system in the counties, New York agreed to pay eight million dollars in attorney fees to the plaintiffs' lawyers.⁵

County expenditures for indigent defense have grown dramatically since 2001 because of several factors including Texas population growth, prosecution trends and changes in appointment practices resulting from implementation of the Fair Defense Act. At a most basic level, taking into account all of these factors, Texas counties have not historically expended the resources necessary to provide effective legal representation to all indigent defendants entitled to appointed counsel.

Without sufficient resources to pay lawyers a living wage for a reasonable caseload, counties will be unable to ensure effective representation is provided to those accused of a criminal offense. The counties will be at risk of expensive litigation, wrongful convictions will persist and counties will unknowingly expend jail resources on individuals who do not belong in jail.

TFDP supports increased state funding to help counties afford quality indigent defense services. TFDP encourages the committee to incorporate accountability metrics to ensure that state resources are used to increase the quality of indigent defense services. For example, the budget could incorporate a metric that requires counties to show that they are ensuring that the attorney caseloads in their jurisdiction are consistent with the requirement that each attorney have sufficient time to provide diligent representation in every case. Another useful metric of improved indigent defense services would be a showing that the county's reimbursement rates are sufficient for qualified and well-trained criminal defense attorneys to receive fair compensation for their services while handling the number of cases recommended in the Commission's caseload guidelines.

Thank you for your consideration of this testimony. Please feel free to contact me at 512-637-5222 or rbernhardt@fairdefense.org with further questions.

Yours,

/s/

Rebecca Bernhardt
Executive Director

⁵ Glenn Blain, "New York settles lawsuit with NYCLU over indigent legal services," New York Daily News, Oct. 21, 2014, <http://nydn.us/1raDgs3>.