

Making a Case



for Itself



Capital Public Defender Office Expands and Expands and Expands

By Maria Sprow

WHEN 50-YEAR-OLD RANDALL LEE Stephens was indicted for the murders of a Reeves County couple in May 2008, he appeared to be perfect for prosecution: the murders had been brutal. He had confessed to stabbing two people to death. He was a sex offender. And, he seemed to want execution.

Like every capital murder, it was first and foremost a tragedy where justice needed to be served. But justice, especially when it results in execution, is expensive, and taxpayers must pay not only for the prosecution, but also for the defense and the appeal – something that could have cost Reeves County taxpayers hundreds of thousands of dollars.

Fortunately, Reeves County is located in the seventh judicial region, and its commissioners court had signed on to be a member of the West Texas Regional Public Defender for Capital Cases, which billed itself as a type of “murder insurance.” The idea, born in 2007 by Lubbock County and supported by the then-named Task Force on Indigent Defense, was to create a regional defense office for capital cases for the rural and mid-sized Panhandle and West Texas counties, where attorneys qualified to represent defendants in capital cases are hard to come by. The regional office would be funded first by a state grant and then by a cost-share plan between all the participating counties; the actual formula takes into consideration the county’s total population and 10-year history of capital cases. Counties across the two regions jumped on board, with 77 out of 85 eligible counties participating.

Because of the office and the payment formula established by Lubbock County, Reeves County knew how much the defense for a capital case would cost them, and had already budgeted for the expense. So Stephens’ team of attorneys, investigators and mitigation specialists had free rein to work tirelessly to keep him from the death penalty. They reviewed his history, his mental health, his motives.

“Stephens was really kind of a volunteer. He really kind of wanted the death penalty I think and had written a number of letters to the prosecuting attorney indicating that,” said Chief Public Defender Jack Stoffregen, who heads the Regional Public Defender for Capital Cases office, adding that when the office first took on the case, Stephens did not want to plea. “The people assigned to the case were able to spend a lot of face time with him, literally hundreds of hours sitting in a cell with him, talking to him, getting to know him,

“I think it’s been probably 20 years since we’ve had a capital case. We haven’t had one recently, but we’ve got about eight murder cases pending right now.”

getting to know what made him tick, until they were able, by the amount of time they spent, to develop a good trusting relationship with him. They made him feel that his life had some value, and it was really the first time he had ever felt that way in his entire life.”

In the end, Stephens plead guilty and received Life Without Parole for his crimes.

Spending so much time and resources convincing a confessed murderer that his life has value may not seem like justice to many, but Stoffregen believes the plea was justice in action. It served the State, the victims and the defendant, he said.

“Had we not been able to work that case out and had it gone to trial, had our client been sentenced to death, not only do you have the cost of the trial itself, but you also have the automatic appeal, which can be pretty expensive, and you had some additional costs. By working it out with a guilty plea, we waived our right to appeal, so there is no appeal, and the case is disposed of without the necessity of a trial, which is advantageous to everybody,” Stoffregen said. “(Stephens) was extremely happy with the outcome at the end of it, and I think the prosecutor was happy with it, and I know we were. I

think it was the advantage of having an office like this that got that case disposed of to everyone’s satisfaction.”

The Stephens case is not an anomaly for the Regional Public Defender for Capital Cases office. Since opening its doors four years ago, the office has been appointed to 40 cases from a total of 19 different counties and, as of Sept. 30, disposed of 29 cases. Only one of those cases resulted in a death sentence. Many of the others were resolved via guilty pleas, or when prosecutors withdrew the death penalty as a possible punishment, meaning that the Public Defender’s office was no longer responsible for the defense. One case resulted in a not guilty verdict by reason of insanity.

As of Sept. 30, the office had 11 cases still pending, and its successes have been hailed and noted across the state.

In fact, early on, the office raised the eyebrows of county judges and commissioners whose counties were outside of the Panhandle and West Texas and were therefore ineligible for the program.

“When I first took office, I was familiar with the program being out in West Texas, and I had talked to some judges around here about trying to start our own program,” said Limestone County Judge Daniel Burkeen, whose county is in the second administrative judicial region, which covers parts of East and Central Texas. “We had seen what it costs for a death penalty case that other counties had gone through. It’s a phenomenal cost and it’s one of those things that, for a rural county, there is no way you can really budget for that because it may not happen for 10 years. But you know it will happen eventually, and when it hits, you’ve got to pay for it. So it just makes sense to pool our money in a program like the Capital Public Defender’s program.”

Fortunately for the counties in want of the program, the office did start to expand, first in 2010 to the fourth, fifth and sixth administrative judicial regions covering South and Southwest Texas and then again in October to the second and third administrative judicial regions, which includes Limestone County. And the office has high hopes of opening its doors to the last regions standing, the first and eighth up in North and East Texas, by 2013.

Though counties are given a one-year trial-type period in which they are eligible for the services but do not have to agree to become a participating member, Limestone County signed its inter-local agreement for participation at the first opportunity, Burkeen said.

“I think it’s been probably 20 years since we’ve had a capital case. We haven’t had one recently, but we’ve got about eight murder cases pending right now, one or two of which may be death penalty cases, they haven’t made that decision yet, but we’ve just had a lot of murder cases, so it’s been worrisome for us not knowing when one might happen and it’s one of those things that you can’t control if something happens within your boundaries,” Burkeen said, adding that participation in the office will eventually cost the county around \$20,000 a year. “That’s good insurance for a good capital murder defense program.”

With inmate healthcare, the stakes are high.
We stack the chips in your favor.

Southern Health Partners is a leading provider of medical, dental and mental health services to inmates in small to medium-sized jail facilities. When it comes to your budget and reducing liability, all bets are off. We absorb county liability and ensure accountability by providing on-site treatment while improving the quality of care to inmates.

By choosing Southern Health Partners you can save money while feeling protected and secured - even if you are dealt a bad hand.

 **Southern Health Partners**
Your Partner In Affordable Inmate Healthcare
WWW.SOUTHERNHEALTHPARTNERS.COM

Contact us today to learn how we can help stretch your inmate healthcare budget. The consultation is free but the savings could be invaluable.
1-888-231-2890

Newly Re-named Texas Indigent Defense Commission celebrates Tenth Year

Symposium highlights successes, issues & future concerns in indigent defense

The Texas Indigent Defense Commission, formerly the Task Force on Indigent Defense, celebrated the monumental strides Texas has made in improving its indigent defense practices during the last 10 years during its 2011 Texas Indigent Defense Symposium, held in October. But the symposium wasn't all good news. Speakers and experts also testified to the challenges the issue of indigent defense will face in the future.

Speakers and moderators at the conference included high-profile names in Texas indigent defense, including Texas Court of Criminal Appeals and Texas Indigent Defense Commission chair Judge Sharon Keller, journalist and *Ordinary Injustice* author Amy Bach, Senator Rodney Ellis, and Tony Fabelo, the director of Research at the Justice Center of the Council of State Governments.

For the first time, the symposium was broadcast live on the Internet. The live footage will be archived on the Texas Indigent Defense Commission website at www.txcourts.gov/tidc. But for those interested in a brief run-down, *County* listened in on the first day's proceedings.

Keller spoke about the transformation Texas has undertaken with its indigent defense system, moving from a "hodge-podge" of programs to a "uniform system with standards" by achieving a balance between local control and unification. She promoted an upcoming mental health seminar by the Court of Criminal Appeals in May and a forensics seminar in June. The Court also received a grant to provide high-quality death penalty case training to attorneys, Keller said.

Carl Reynolds, the administrative director of the Office of Court Administration, followed briefly, speaking about the challenges ahead in getting state indigent defense funding. He indicated that indigent defense is a tough sell when it comes to legislative dollars, stating that other civil legal services programs, aimed at helping everyone from domestic violence victims to the elderly, may have more compelling stories and are dramatically underfunded already. Indigent defense is also still a fairly new issue, he said, speaking of the 143 years it took from the signing of the Bill of Rights to the U.S. Supreme Court decision that stated criminal indigent defendants have the right to court-appointed counsel. "The edifice that we have built here is not to be taken for granted," Reynolds said.



Speakers pose for a photo during the 2011 Texas Indigent Defense Symposium. Photos courtesy of the Texas Indigent Defense Commission.

The good news is that the name change of the Texas Indigent Defense Commission is significant, said Christopher Burnett, the executive director of the Governor's Criminal Justice Office, adding that legislators often see task forces as dealing with defined, short-term problems that do not need to receive long-term attention, while

commissions are ongoing and necessary.

Sen. Rodney Ellis spoke about the political and legislative history of indigent defense in Texas, including the 2001 Texas Fair Defense Act and the creation of the Timothy Cole Advisory Panel in 2009, which resulted in the passing of a bill related to eyewitness identification standards and best practices.

Tony Fabelo continued the history lesson but followed by talking about the future and the challenges indigent defense advocates are expecting in the next 10 years.

One issue going forward will be accountability, Fabelo said. How do you know whether an indigent defense program is successful or not, how do you improve outcomes and how do you know you've improved? Those are good questions that Harris County is attempting to help answer via the creation of its Harris County Public Defender Office, which is serving as a national learning center for how to set up a large public defender's office and how to evaluate the effectiveness of such an office.

A second issue is the development of caseload standards, a controversial and costly issue because many programs would have to hire additional attorneys to meet the standards. That's an especially tough issue, Fabelo said, because he believes indigent defense funding may be cut or remain stagnant, while need for the service rises.

One improvement going forward will be the ability for counties to develop managed assigned counsel programs, hopefully complete with a set of standards for those programs. Lubbock County is currently working on those improvements by setting up the first managed assigned counsel program in the state.

Journalist and author Amy Bach reported on the work she did while writing *Ordinary Injustice*, during which time she visited various criminal justice systems and courts to see how justice was reached in each court. The idea of *Ordinary Injustice*, she said, was to find systemic problems in the criminal justice system and create an index to gauge how well the courts are performing. From the book, she created a list of “measures for justice,” which courts can use to see how well they are performing.



Ordinary Injustice author Amy Bach

Bach said she believes many problematic courtrooms are simply not aware that there is a problem. For instance, in one courtroom Bach visited in Georgia, she said she saw one public defender tell all his clients to plead guilty, without offering an explanation for what the consequences would be. “People were acting in ways that had a devastating impact on the people they were supposed to be helping, but they weren’t seeing their mistakes,” she said, adding that the public defender believed in his heart that a guilty plea was the best course of action for the defendants. In another courtroom in Mississippi, she said she discovered one area where the prosecutor was only presenting five out of every 50 cases to a grand jury; the prosecutor hadn’t prosecuted a

domestic violence case in more than 20 years, but nobody had noticed the trend.

In her research, she often noticed that citizens in the gallery couldn’t hear many of the courtroom proceedings, which created an adversarial but hidden system of justice. Other courts struggled with taking the collateral damage of its decisions under consideration, she said.

She added that she believes that indigent defense must be strong in order for courts to have a strong system of

justice.

“The huddle became the focus of the book, the controversial triangle. Everyone is checking each other’s work but when it doesn’t work, one part falls and so do the others and it becomes an arrow shooting toward something else besides justice,” she said.

Following Bach, Bell County Judge Jon Burrows helped lead a panel discussion about Bell County’s new Indigent Defense Web Portal project, which the county started to create more transparency and help measure the performance of its pro-

The one-year trial period means that counties in the fourth, fifth and sixth judicial regions had until Sept. 30 to sign on to the program, though there is no official deadline for participation. Counties can sign on at any time, but they must pay dues for any years missed. Counties who are not in the one-year trial program and have not yet made a decision about signing on carry the risk that a capital murder case is filed without the public defender program’s insurance.

“The only provision is that if a county joins after a period of time has lapsed, they have to pay all of the back premiums, for lack of a better term. Their fees to participate are not waived, so they have to go back and make a lump sum payment of all the years that they have missed,” Stoffregen said. “If they were to pick up a case before they had paid and signed the inter-local agreement, we would not cover that case, and that has happened in a number of instances.”

As of the Sept. 30 deadline, 34 of the eligible 52 counties in the fourth, fifth and sixth regions had signed inter-local agreements, Stoffregen said, leaving 18 counties vulnerable.

Counties in the second and third regions have until Sept. 30, 2012 to sign their inter-local agreements. If a capital case happens before that date and before the inter-local agreement has been signed, the regional office will take the case on as long as the county signs the agreement. There are 55 eligible counties in

those regions, and already, 18 counties have signed inter-local agreements, Stoffregen said, adding that he believes those numbers show a lot of faith in the office and its necessity.

“It’s a really good number. We’ve never had a county sign an inter-local agreement prior to the start date before, but as we have traveled around the state, the word has spread,” Stoffregen said. “The first year is free, so all 55 counties are in the program right now and need to know that, and obviously if they were to pick up a capital case

Looking for Savings? Pre-funding OPEB with PARS has 3 key advantages:

1. Lower liabilities and reduced ARC
2. Better balance sheet with new assets
3. Potential for better credit rating and lower borrowing costs

Contact Mitch Barker with PARS today!

800.540.6369 x 116
mbarker@pars.org

www.pars.org

PARS
PUBLIC AGENCY RETIREMENT SERVICES
Making retirement work for you.

© 2011 Public Agency Retirement Services (PARS). All rights reserved.

gram. During the process of creating the portal, the county moved its pre-trial services into the jail and combined its indigent defense interview with the pre-trial services bond interview. They also did an assessment of the county's indigent defense program and found that its funding, procedures and services reached every department in the court system in one way or another. The county identified time delays within its process and made its local defense attorneys re-qualify for its indigent defense wheel. Judges reviewed every single application and now track caseloads according to how quickly attorneys visit the county jail upon receiving a new case and how responsive attorneys are if they are late in making that visit. If an attorney is deemed too busy for one court, he or she is put on hold for all courts. Judges also now meet monthly to discuss indigent defense problems and solutions. They are also developing a mentoring program for new defense attorneys.



Bell County Judge Jon Burrows

The symposium also highlighted the new Harris County Public Defender Office, which is serving as a national learning site for the Justice Center.

Following lunch, the afternoon offered information on several topics that may highlight the indigent defense conversation in coming years, including the new state bar performance guidelines, pre-trial bonds and caseload amounts.

The state bar guidelines discussion featured defense attorneys Jeff Blackburn and Andrea Marsh and Seventh Court of Appeals Chief Justice Brian Quinn. Blackburn is known for representing the family of Timothy Cole and securing Cole's posthumous exoneration. Marsh is the executive director of the Texas Fair Defense Project. Both discussed how the guidelines could wind up impacting county budgets.

The guidelines, they said, provide defense attorneys with a 23-page checklist of best practices and reminders to think about during a case, beginning with a client's arrest through the criminal appeal. The list is geared toward new attorneys starting up small private practices and is meant to help lawyers think about how they should approach a case, Marsh

now, we would cover it as soon as they sign an inter-local agreement, so they haven't waived anything by not signing at this point, but if they wanted us to handle one, they would have to sign up and agree to participate in the program as we go down the road."

While many other counties have bought in to the office, Lubbock County has maintained its leadership over the office.

"This is the only program in the country that is structured like this," said Jim Bethke, the executive director of the Texas Indigent

Defense Commission, which has helped fund the office and its expansion. "This is the only program that I am aware of that is locally controlled and locally run. We tried to expand it in a thoughtful and meaningful manner without delay or high levels of bureaucracy and by working with what staff we have and working with Lubbock County. This really would not have happened but for the leadership of the Lubbock County commissioners court."

The Regional Public Defender attorneys, investigators and mitigation specialists work in satellite offices set up in the state's different regions, but its budget does not include funding for rent or utilities. Still, in its original seventh and ninth districts, Stoffregen said counties were competing to house one of its satellite offices, and they easily grabbed space in Lubbock, Midland and Amarillo. When it opened in the fourth, fifth and sixth regions, Uvalde and Kleberg counties both offered up space for offices. But in the second and third regions, the office is still looking for room.

"Any cases that come up in that region right now, we will be staffing those cases from exist-

Hill Country Software & Support

www.hillcountrysoftware.com

DEVELOPING APPLICATION SOFTWARE FOR
COUNTY, MUNICIPAL & INDIAN TRIBAL GOVERNMENT
SINCE 1980

GASB Compliant Computer Software Specializing in:

- Budgetary Accounting System
- Child Support Accounting System
- Vehicle Inventory Tax System
- Consulting & System Design
- Instrument Indexing System
- Integrated Court Management System
- Hot Check Processing System
- Early Voters Processing System

► New: Law Enforcement Systems ◀

State of Texas Qualified Information Systems Vendor (QISV) #11-74-3402559-600

4 Green Cedar Road • Boerne, TX 78006-7929

Toll Free: 800-422-1982 • Email: Jim@hillcountrysoftware.com

ing offices and working at a fairly long distance until we can get open,” Stoffregen said. Though the office still hasn’t determined exactly how much staff it will need to hire for the new regions and won’t know until inter-local agreements have been signed, the office has budgeted a payroll of \$362,000 for about six employees. “We’re bringing up to six families into the community that will hopefully buy homes, pay taxes and spend their money there and go to school there and be good citizens. So that is really a pretty good benefit.”

Even when the office goes statewide, not all counties will be eligible to join the program, and some that are eligible have actively opted out. The 14 counties that had a population of more than 300,000 when the office was created in 2007 are ineligible, mostly because those counties generally have a pool of qualified defense attorneys who are interested in capital cases, but also because opening its doors to large counties would have presented too much of a burden on the office, Stoffregen said.

Counties that have opted out have generally done so because the county doesn’t have a history of having any capital cases and commissioners do not believe they will need the office.

But some counties have found the office too expensive, due in part to the formula used to generate each county’s premium. The formula takes into account each county’s 10-year history of death penalty cases, and some counties just became eligible for the office too late.

That’s the case in Burleson County, said County Judge Mike Sutherland. Burleson County is located in the state’s second judicial region, meaning that it just became eligible to participate in October. But the county had just gone through two costly capital murder cases in which it had spent a devastating \$300,000 on special prosecution and defense costs, and the two cases skewed the county’s participation costs to four times the premiums required for other similar-sized counties, Sutherland said, adding that he considers the two recent capital cases an anomaly, and not a trend.

One case was the retrial of the exonerated Anthony Graves, who was sentenced to death in 1994 for killing six Somerville residents, including five minors. A federal judge overturned the conviction in 2006 after co-defendant Robert Carter changed his testimony against Graves prior to his own execution. Carter said he acted alone. In the end, the county wound up paying for a special prosecutor for the case. The prosecutor eventually decided not to retry the case, but only after the county had spent hundreds of thousands of dollars gearing up for a trial. The other case was that of Myron Phillips, who plead guilty in June 2010 to shooting his stepchildren’s grandfather and father, 62-year-old David Weichert and his 35-year-old son, DJ, outside their home in 2008. Phillips received Life Without Parole as part of his plea.

Prior to those two cases, Sutherland said it had been “a century” since the county had last seen a capital murder case.

“They were calculating the cost based on the fact that we’ve had two capital cases, even though you look at every other county that has the population size of ours and their cost was going to be one-fourth the cost of what ours was going to be,” Sutherland said, adding that the county probably would have made a different decision if it was getting the same



Attorney Andrea Marsh and Chief Justice Brian Quinn



Attorney Jeff Blackburn

bargain as other counties. “If it had been down in the same neighborhood as the other counties, then I could see it being worth it. But the auditor and myself, we sat down and added it all up and it was going to get back up close to \$100,000 (over the course of four years). ... Economically, when you put the pencil to it, it just didn’t add up.”

Of course, Burleson County has until next September to make its final decision.

“If I get hit with another one this year, right off the bat, then, maybe so,” Sutherland said. ★

**SPECIALISTS IN CLASSIFICATION,
JOB EVALUATION AND COMPENSATION**



**PUBLIC
SECTOR
PERSONNEL
CONSULTANTS**

3571 Far West Blvd #219, Austin, Texas 78731 • 1-888-522-7772 • www.compensationconsulting.com
Offices in various major cities

said, adding that she wants the guidelines to change the way defense lawyers conduct business in counties and that counties may start to see more requests for expert witnesses and more motions filed by defense attorneys, something that could impact efficiency of the court system. The guidelines also focus on how to improve the handoff of cases from trial counsel to appellate counsel and on caseload amounts and compensation.

Following that, Tim Murray, the executive director of the Pretrial Justice Institute, spoke about the importance of fair pre-trial bond programs, stating that inability to pay bond is the number one cause of incarceration in many jails. He also said that a person's pre-trial detention status has a direct impact on the outcome of a case; a person who does not post bond is six times more likely to receive a sentence that requires incarceration than a person who does post bond, he said.

Indiana University School of Law professor Norm Lefstein spoke about the importance of making sure indigent defense attorneys have "reasonable" caseloads. He said too many defense attorneys take on such large caseloads that it is impossible for them to do their jobs effectively, and that such attorneys are vulnerable to a variety of risks, including disciplinary sanctions and malpractice lawsuits. However, defense attorneys often work in a culture that encourages large caseloads. He believes current caseload standards for attorneys, such as not having more than 150 felony cases, were based more on speculation than evidence-based theory. He said most public defender programs need the support of local private defense attorneys to

succeed because public defender programs become overwhelmed if they cannot rely on their private counterparts to take on overflow cases.

Lefstein also offered a number of policy changes that he believes will improve indigent defense, including allowing indigent clients in counties without public defender programs to select their own counsel from a county's indigent defense attorney wheel and having a certification process for private lawyers who accept indigent defense cases. Both reforms would help align the interests of attorneys more with the interest of their clients, Lefstein said.

To close the day, Jonathan Rapping, the founder of the Southern Public Defender Training Center, talked about the workplace culture (poetically defined as "the undercurrent that grabs hold of everyone in the system and pulls them along") of some indigent defense programs, which he believes needs to realign itself with the core values of the defense system, such as client advocacy, complete preparation and good communications. He encouraged the creation of values-based mentoring programs.

To summarize, Fabelo said he hopes the symposium offered a variety of voices about the indigent defense system and possible future reforms.

"You need the involvement of different people with different ways of looking at reality to make things happen," Fabelo said. ★

Your Municipal Specialists

awarded HGAC, TXMAS and Buyboard contracts



GRANDE TRUCK CENTER

Call us today!

Michael King
General Sales Manager
mking@grandetruck.com
1-800-779-7672 x120

Rocky Shoffstall
rshoffstall@grandetruck.com
1-800-779-7672 x112
Ford, Autocar, Western Star, Volvo

Terry Anderson
tanderson@grandetruck.com
1-800-779-7672 x133
Mack

4562 IH-10 East
San Antonio, TX 78219

