

Texas Indigent Defense Commission Asks State to Close the Indigent Defense Funding Gap



The start of 2013 will bring the 50th anniversary of *Gideon v. Wainwright*, the case in which the U.S. Supreme Court held that assistance of counsel is essential to justice and fair outcomes in our criminal justice system. “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.”

While many states took full financial responsibility for indigent defense in the decades following *Gideon*, Texas left its 254 counties to carry the entire financial burden of ensuring the protection of the constitutional right to counsel for indigent persons accused of a crime. In 2001, the Texas Legislature recognized the need to reform indigent defense and took action. By passing the Texas Fair Defense Act, the Legislature provided clarity and guidance to counties on the state and federal constitutional obligations as part of its effort to ensure fairness in Texas’s courts.

In addition to setting basic standards for county-level indigent defense systems, the Fair Defense Act (FDA) created a thirteen-member Texas Task Force on Indigent Defense (now called the Texas Indigent Defense Commission or TIDC) to provide technical assistance and funding support for county indigent defense program improvements. The Honorable Jon Burrows, Bell County judge, and the Honorable Glen Whitley, Tarrant County judge, were appointed by Governor Perry to serve on the commission.

As a result of the FDA, counties have improved their systems, but doing so has led to substantial county-level cost increases. State funding, which has been instrumental in improving the system, has increased from its initial levels, but it covers only about 15 percent of counties’ total indigent defense expenditures and only 30 percent of the increased costs incurred by counties since the passage of this law.

In an effort to continue the meaningful improve-

ments made by counties over the last decade, the commission’s pending legislative budget request seeks to close the funding gap, providing relief to counties through increased state funding roughly equal to the increased costs counties have incurred since the passage of the Fair Defense Act. Since 2001, counties’ indigent defense costs have increased almost 120 percent, requiring approximately \$77 million per year in new money to offset the underfunded mandate being shouldered by counties. By providing this funding, Texas will help bear more of the burden of the law’s mandates that have increasingly strained county budgets.

In addition to closing the funding gap, the commission has requested that the Legislature undo two funding changes that produced cuts in indigent defense funding to counties from FY2011 levels. The 82nd Legislature removed unexpended balance authority and capped the commission’s appropriation, resulting in considerably less funding for indigent defense. As a result, more than \$7.2 million sits in the Fair Defense Account that is not available to help counties meet their constitutional and statutory obligations to ensure counsel for indigent defendants. The Legislative Budget Board estimates the cuts to indigent defense over the biennium to total close to \$18 million. This reduction in funding inhibits the development, maintenance and expansion of innovative and cost-effective programs that help fulfill a constitutional duty at a time when indigent defense expenses are rising and compliance is improving.

The case for undoing the cuts to the indigent defense budget is strong because the funds were explicitly raised for this purpose. The entire state appropriation for indigent defense is derived from dedicated fees and court costs assessed on persons convicted of a criminal offense. The commission’s request asks that these funds be made available to serve the purpose for which they were raised.

It is important to remember that indigent

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defense is not a discretionary program that can be underfunded without significant degradation in the quality of justice our system provides. Moreover, the right to counsel is guaranteed by the constitutions of both Texas and the United States.

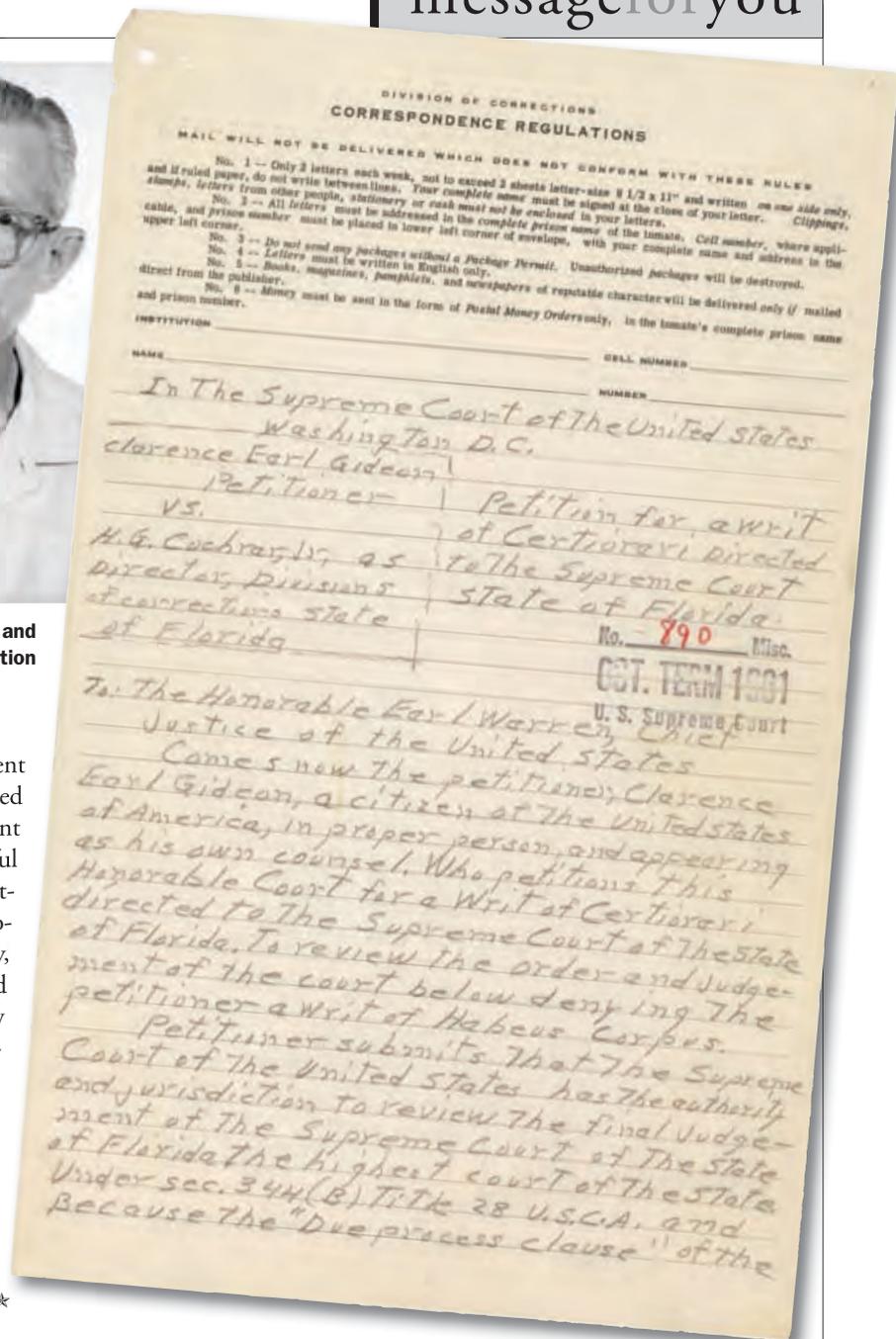
Underfunding indigent defense could also invite costly litigation. At least two Texas counties have been embroiled in lawsuits in recent years based on claims of indigent defense failures that violate the Constitution. The funding and technical support the commission provided to counties helps meet constitutional obligations and could help counties avoid these costly lawsuits.

While Texas still ranks near the bottom nationally in per capita funding for indigent defense, its investments in indigent defense have provided important results. Since Texas began investing in indigent defense in 2001, the commission has built a successful track record of working with counties to promote a better justice system across the state. The state funding provided through the commission has increased transparency, enhanced accountability, and improved compliance and innovation among counties. Thousands more Texans now receive constitutionally guaranteed defense representation as a result of more effective indigent defense delivery systems.

Fifty years after *Gideon*, justice and fairness still require access to counsel. With the support of the 83rd Legislature, the commission is poised to build on the improvements made by counties by taking on a more equitable share of the costs associated with honoring our constitutional duty to ensure fairness in our courts. ★



Clarence Earl Gideon and his hand-written petition for certiorari.



Texas Indigent Defense Commission Members

Officers:

Chair: Sharon Keller, Court of Criminal Appeals presiding judge
Vice-chair: Olen Underwood, 2nd Administrative Judicial Region of Texas presiding judge

Ex-Officio Members:

Sharon Keller, Austin, Court of Criminal Appeals presiding judge
 Wallace B. Jefferson, Austin, Texas Supreme Court chief justice
 Roberto Alonzo, Dallas, state representative
 Pete Gallego, Alpine, state representative
 Jeff Wentworth, San Antonio, state senator
 John Whitmire, Houston, state senator

Members appointed by the Governor:

Jon Burrows, Temple, Bell County judge
 Knox Fitzpatrick, Dallas, attorney with Fitzpatrick, Hagood, Smith & Uhl
 Anthony Odiorne, Burnet, assistant public defender with the Regional Public Defender Office for Capital Cases
 Sherry Radack, Houston, First Court of Appeals chief justice
 Olen Underwood, Conroe, 2nd Administrative Judicial Region of Texas presiding judge
 Laura Weiser, Victoria, county court at law #1
 B. Glen Whitley, Hurst, Tarrant County judge

STATE OF TEXAS RESOLUTION of the TEXAS JUDICIAL COUNCIL Additional State Funding for Indigent Defense

WHEREAS, the Texas Judicial Council is the policymaking body for the Texas Judicial Branch, created under Chapter 71, Texas Government Code;

WHEREAS, the Texas Indigent Defense Commission (Commission) is a permanent standing committee of the Texas Judicial Council, created under Chapter 79, Texas Government Code; and,

WHEREAS, the Commission is charged with promoting compliance by counties with the requirements of state law related to indigent defense pursuant to the *Fair Defense Act of 2001*; and,

WHEREAS, the Commission provides State funds through grants to counties that demonstrate a commitment to comply with the requirements of state law relating to indigent defense; and,

WHEREAS, the right to counsel is also guaranteed in both the Texas Constitution and the United States Constitution; and,

WHEREAS, the State funding through the Commission has directly led to improved compliance and innovations that enhance quality and effectiveness of indigent defense representation; and,

WHEREAS, ten people in Texas have been exonerated through Commission-funded innocence projects at the state's public law schools; and,

WHEREAS, thousands more Texans are now receiving constitutionally guaranteed defense representation as a result of more effective indigent defense delivery systems; and

WHEREAS, the overwhelming share of the increased indigent defense costs since the passage of *Fair Defense Act of 2001* has fallen upon counties; and,

WHEREAS, the overall costs expended by counties has increased by almost 120 percent; and,

WHEREAS, the underfunding of indigent defense can invite costly litigation; and,

WHEREAS, the Commission's Legislative Appropriation Request is directly related to closing the funding gap of the increased county costs not covered by Commission grants; and,

WHEREAS, population growth has exacerbated the funding gap and without new funding the State's share of indigent defense costs will continue to erode; and,

WHEREAS, the 82nd Legislature removed the Commission's estimated appropriation authority and unexpended balance authority between the biennia; and,

WHEREAS, more than \$7 million dollars sits in the Fair Defense Account, unavailable to help counties meet constitutional and statutory obligations to ensure access to counsel for indigent defendants; and,

WHEREAS, more than \$77 million per year in new money is needed to close the funding gap incurred by counties due to the mandates of the *Fair Defense Act of 2001*;

NOW THEREFORE, BE IT RESOLVED that the Texas Judicial Council recommends that the Texas Legislature:

- 1) Restore access to all dedicated funds for indigent defense by reinstating estimated appropriation authority and by reestablishing unexpended balance authority between biennia to the Commission; and,
- 2) Close the "unfunded" gap that is being borne by counties for the additional indigent defense costs that they have incurred due to the mandates of the *Fair Defense Act of 2001*.

Honorable Wallace B. Jefferson
Chief Justice, Supreme Court of Texas
Chairman, Texas Judicial Council
Friday, Nov. 9, 2012