



***Report on:  
State of Indigent Defense***

***Criminal Justice Division-  
Office of the Governor***

**April 26, 2016  
Austin, TX**

# Long Road to Make Indigent Defense Meaningful

*Gideon vs. Wainwright*

Texas Fair Defense Act

1963

2001

2016

15 Years of  
Implementation

Struggle to translate at state level the “right to counsel” into a meaningful indigent defense system

# Pre-Fair Defense Act through Present

## Prior to 2002

No state funding or oversight

No reporting requirements on spending or caseloads

No uniformity in local indigent defense appointment practices

No consistent standards regarding attorney training and experience

Judges' discretion to select counsel, pay fees and determine who is indigent fueled appearance of cronyism

Inconsistent quality of death penalty representation

## Present

Key process standards implemented

State provides some funding to support indigent defense

Commission created to provide oversight

Counties now report indigent defense plan and expense information to Commission

Attorney caseload and practice-time reporting pursuant to HB 1318 (83<sup>rd</sup> Legislature)

Attorney training and qualification standards adopted

Death penalty appellate attorney qualifications established

# Current Strategic Challenges

- 1. RPDO governance structure and sustainability**
- 2. Develop effective funding strategy through LAR**
- 3. Excessive caseloads in some jurisdictions**
- 4. Access to counsel challenges**
- 5. Timing of appointment challenges**

# Strategic Challenge

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## RPDO Governance

# Lubbock RPDO Governance

## *Program Overview*

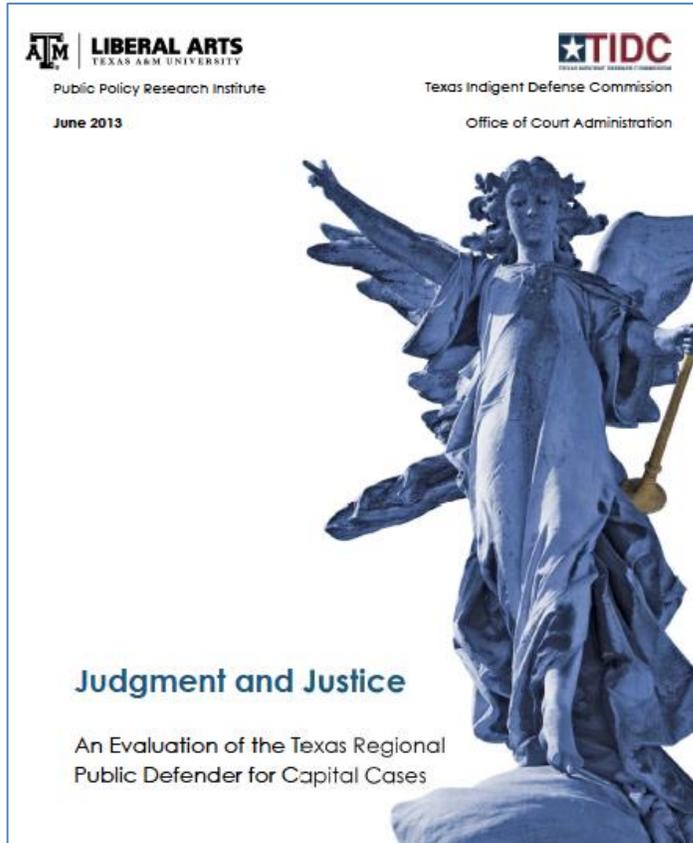
- *Serves all nine administrative judicial regions*
- *241 counties eligible to participate in program*
- *Inter-local agreements with 178 counties*
- *Offices in eight counties with 45 plus employees*
- *Appointed cases in 60 counties*

# Lubbock RPDO Governance

## *Successful Program*

- *Recognized by National Association of Counties Achievement Award*
- *Texas Association of Counties Best Practices Award*
- *2013 PPRI assessment of RPDO indicated it is successful*

# RPDO Evaluation Indicates Program is Successful



Meets State Bar Capital Defense Guidelines

Independence from Judicial Influence

More Prompt and More Frequent Capital Team Appointment

Better Non-Attorney Defense Team Services

Greater Investment in Mitigation to Increase Plea Rates to Non-Death Sentences

Fewer Cases Ending in a Death Sentence

Lower Average Cost-per-Case

Value for Member Counties

# RPDO Overview

## Appointments Since Inception

2008 – 13 (2)  
2009 – 8 (4)  
2010 – 4 (1)  
2011 – 15 (8)  
2012 – 20 (3)  
2013 – 24 (10)  
2014 – 19 (8)  
2015 – 13 (3)  
2016 – 15 (3)

- Appointments in **61 counties**
- Total appointments: **131 (42)**
- Total disposed cases: **56**
- Cases disposed with trial: **9**
- Cases with a sentence of death: **5**
- Open cases: **33**

(Number in red indicates cases handed off to local counsel when death penalty is waived.)

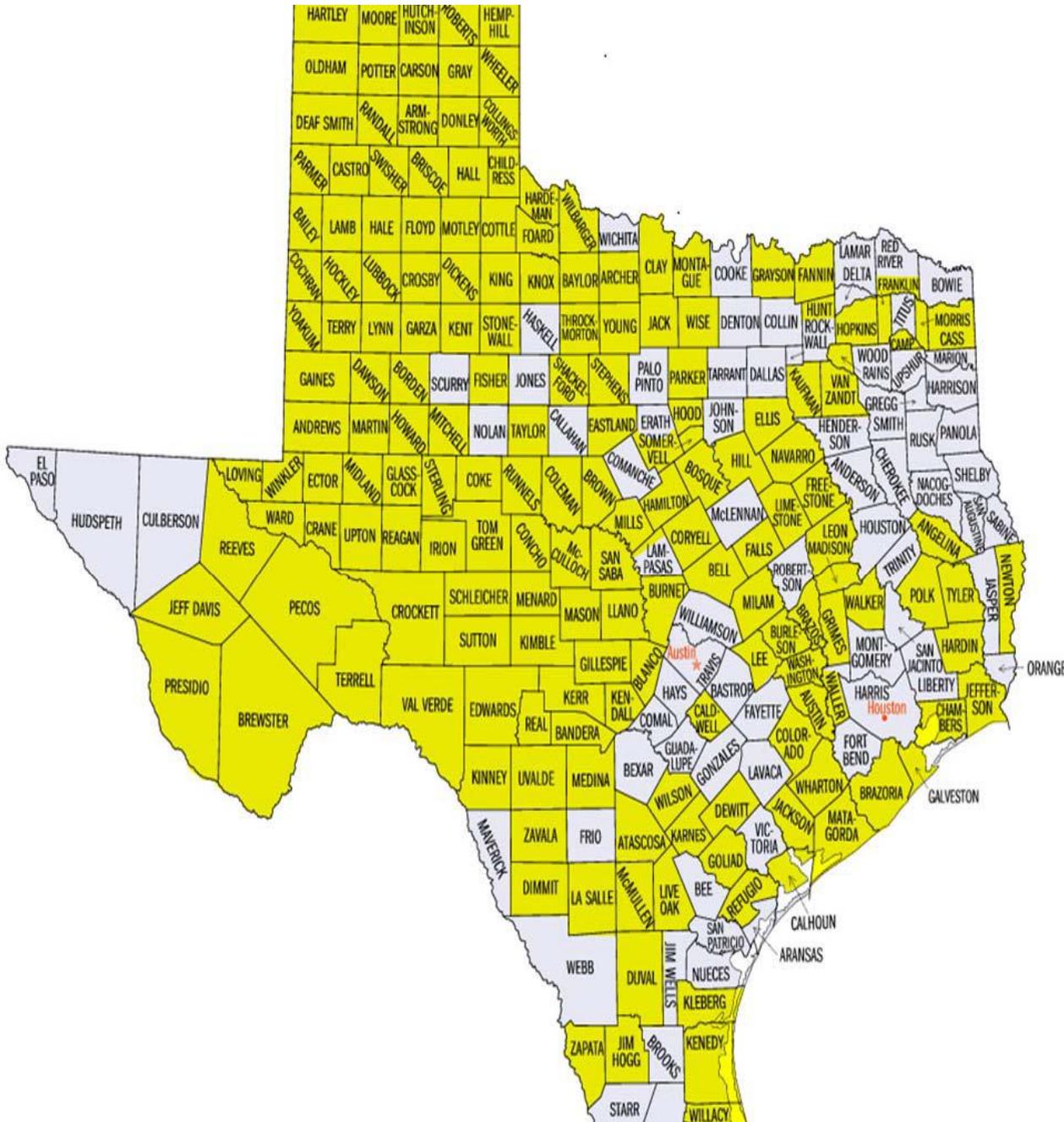
## RPDO Staffing and Office Locations

### Current staffing

- 15 attorneys (one open)
- 6 fact investigators (one open)
- 14 mitigators (one open)
- 6 legal assistants
- 4 administrative staff

### 8 office locations:

Amarillo, Burnet, Clute, Corpus Christi, Lubbock, Midland, Terrell, Wichita Falls



# RPDO Funding

**Total Program Budget: ~\$6.6 million**

## **FY16 Funding**

GR appropriation for RPDO: \$1.3 million  
TIDC Discretionary Grant: \$2.2 million  
Participating Counties: \$3.1 million

## **Projected FY17 Funding**

GR appropriation for RPDO: \$1.3 million  
TIDC Discretionary Grant: \$1.2 million (final year)  
Participating Counties: \$4.1 million

Over the 16/17 biennium, county contributions are funding 55%.

The Legislature appropriated an additional \$500,000 for the 16/17 biennium for capital public defender services in Cameron and Hidalgo Counties.

# Strategic Challenge: LAR Strategy

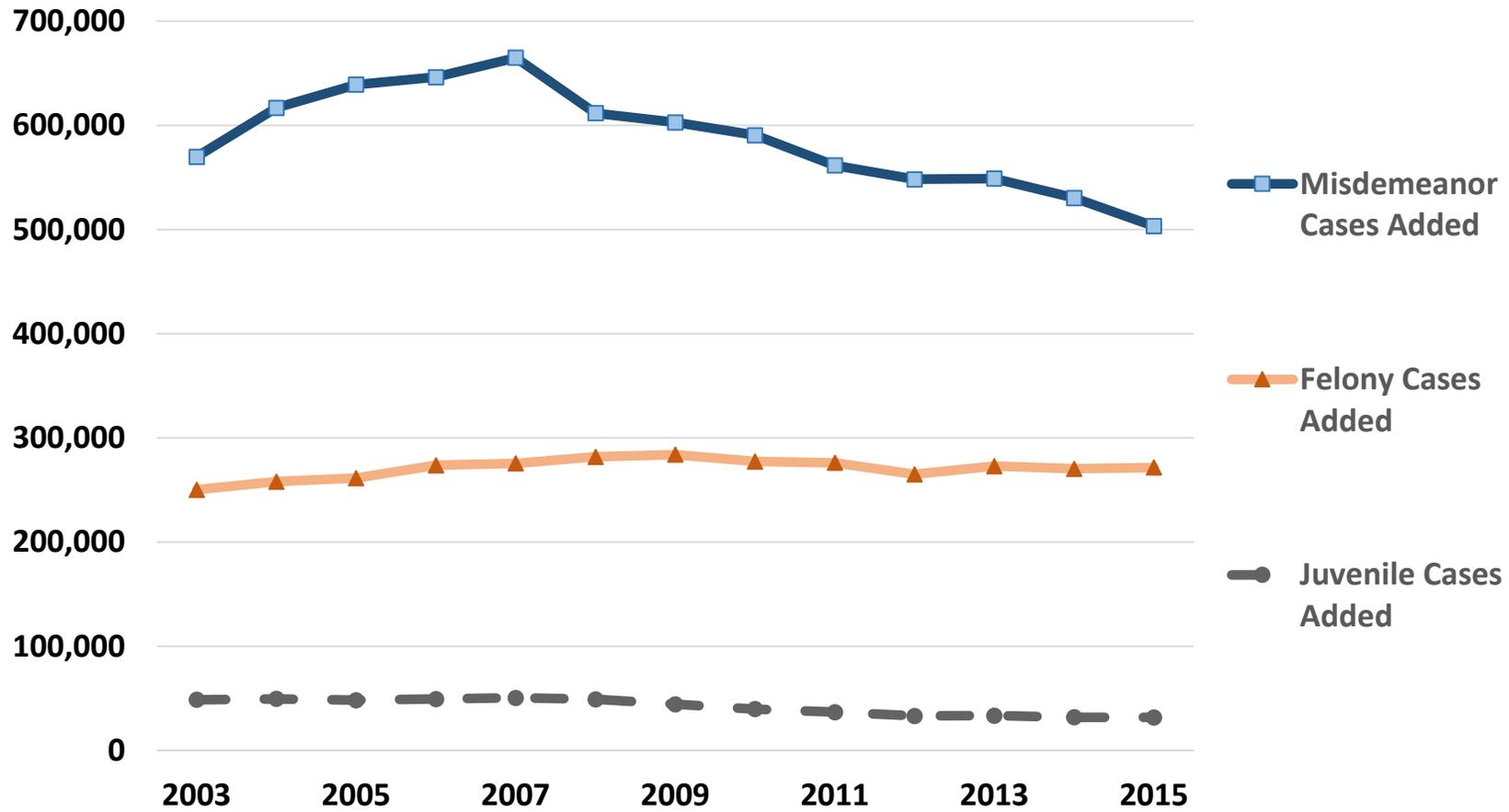
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## Including:

- Funding gap widening
- Revenue declining due to reduced filings
- Possible across the board cuts
- Innocence projects funding
- Office of Capital and Forensic Writs

# Case Filings Declining in Recent Years

From 2003 to 2007 case filings increased, but since 2007, total new cases have fallen by 19% (especially noticeable in misdemeanor cases).

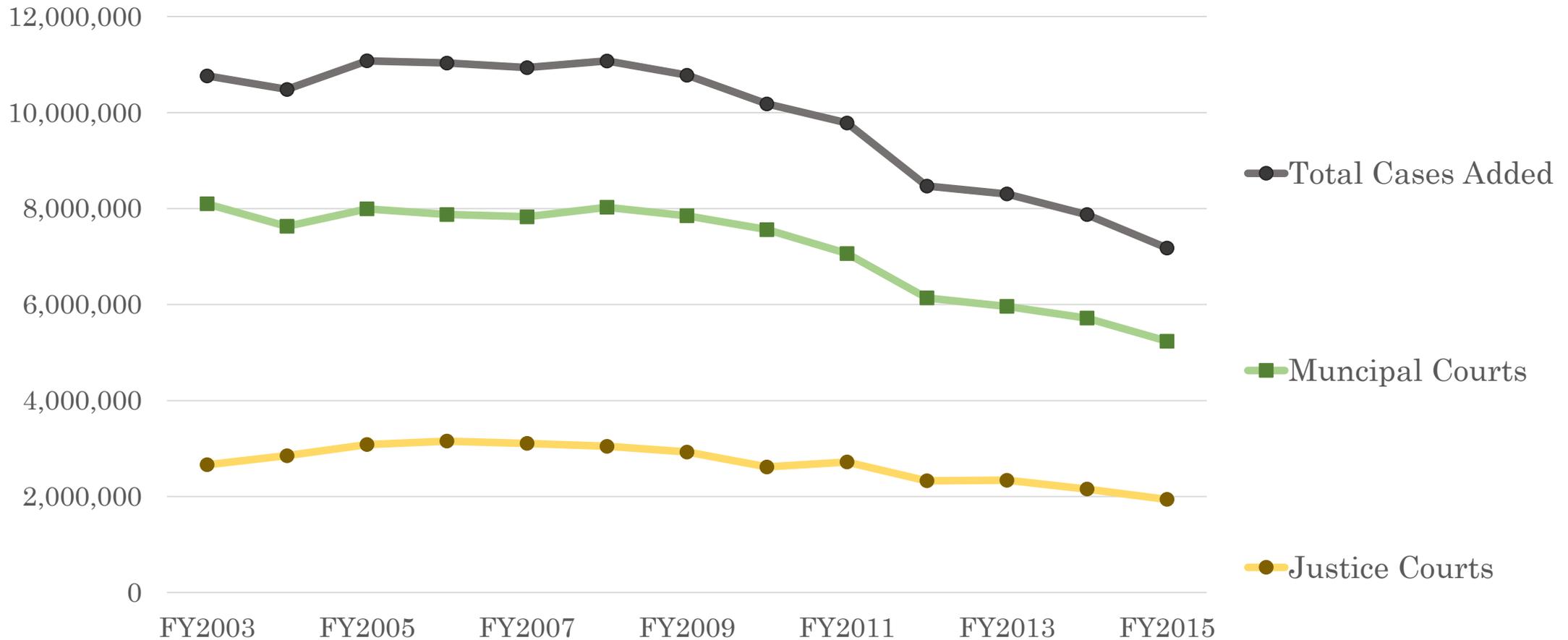


• TIDC Statistics.

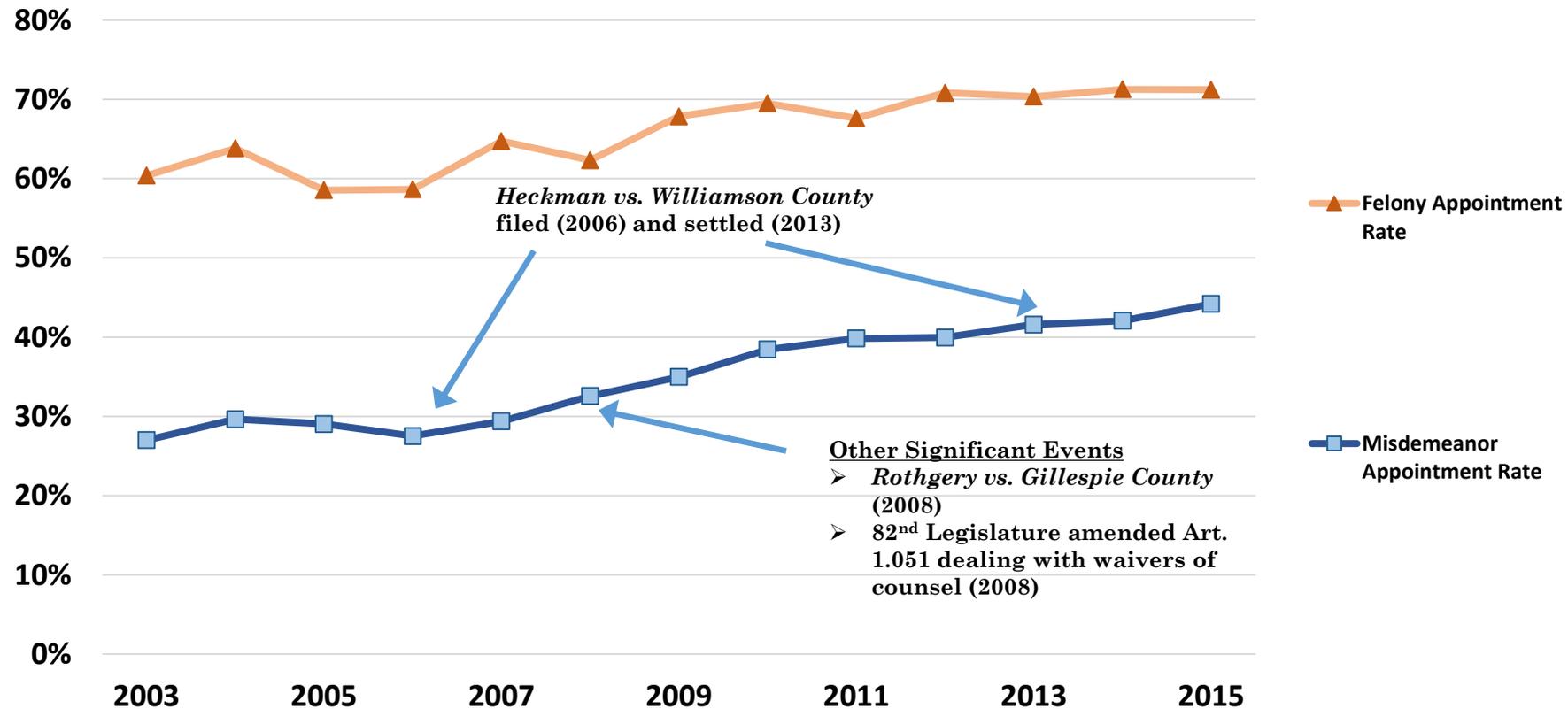
• According to national statistics, violent crime has been decreasing since 2000. ([http://www2.fbi.gov/ucr/cius2009/offenses/violent\\_crime/index.html](http://www2.fbi.gov/ucr/cius2009/offenses/violent_crime/index.html))

# Class C Case Filings Declining (2003 – 2015)

New Class C cases added have decreased 35% since 2008.



# While Case Filings Have Decreased, Appointment Rates Have Increased



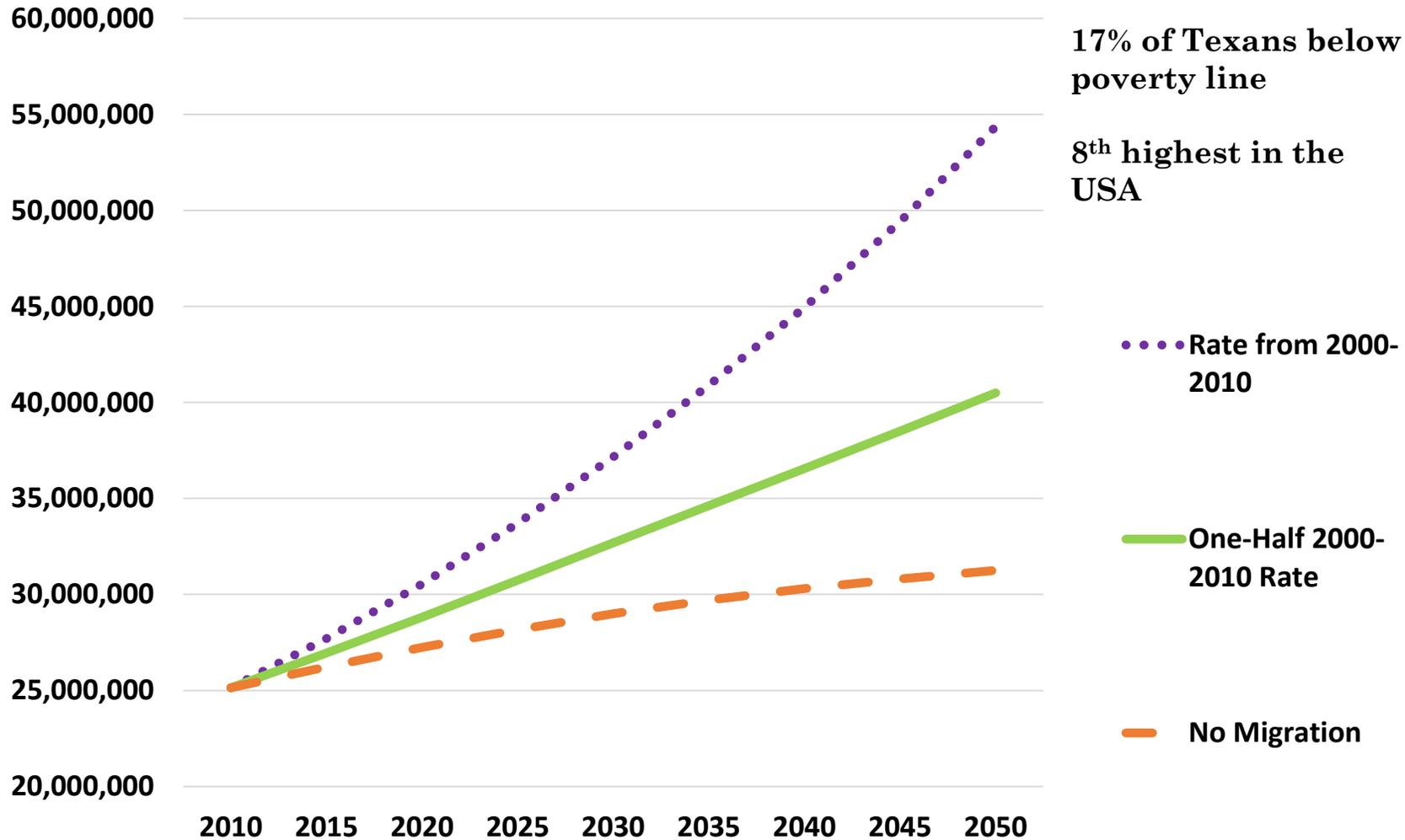
# Decreasing Rates of Pro Se Misdemeanor Defendants

- Since 2011, when OCA began tracking the number of retained cases, the percentage of pro se misdemeanor cases has decreased every year

<b>% of Pro Se Misdemeanor Dispositions</b>	<b>FY 11</b>	<b>FY 12</b>	<b>FY 13</b>	<b>FY14</b>	<b>FY15</b>
Statewide	33.2%	28.8%	27.5%	25.4%	23.8%
Counties Under 50k Pop.	68.7%	66.3%	66.4%	63.5%	61.7%
Counties Between 50k & 250k Pop.	56.9%	50.8%	48.4%	46.6%	42.5%
Counties Over 250k Pop.	19.6%	15.2%	13.3%	11.6%	11.3%

- The number of pro se dispositions can be estimated by the following formula:
  - **Pro Se Dispositions =**  
**Total Dispositions – Total Retained Cases – Total Cases in Which Attorneys were Paid**

# Texas Population Projected to Continue to Increase



# 2015 Commission Revenue Sources

**\$32,459,944**

1/3 of the \$15 Surety Bond Fee goes to the Fair Defense Account.

**Court Costs**

**\$28,093,087**

**86.6%**

Court costs are paid by a defendant upon convictions in cases ranging from fine-only misdemeanors to felonies.

**State Bar Fees**

**\$2,339,688**

**7.2%**

1/2 of \$65 fee assessed by SBOT as part of bar dues goes to the Fair Defense Account.

**Surety Bond Fees**

**\$2,027,169**

**6.2%**

# FY16/17 Appropriation

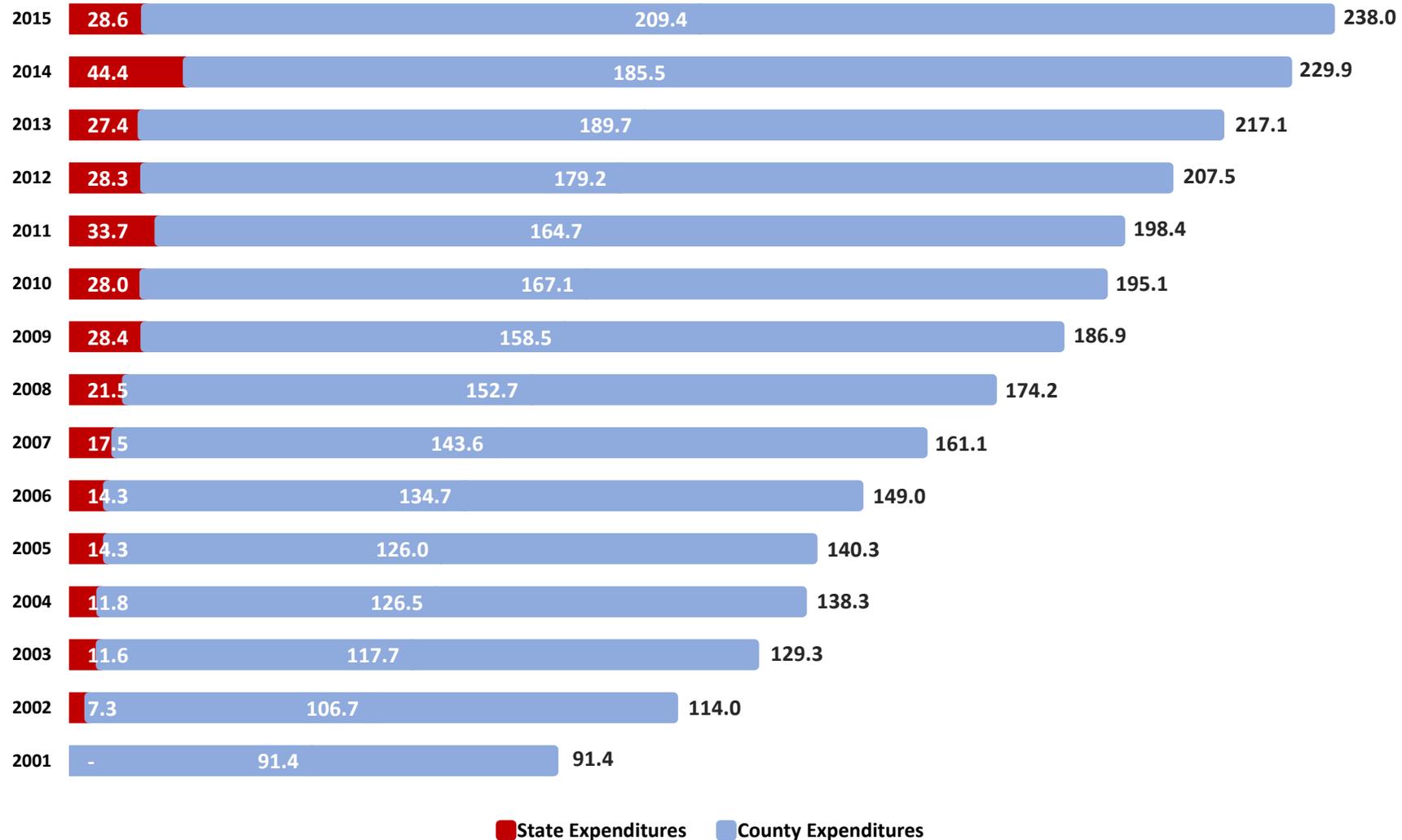
~\$64 million in General Revenue-Dedicated FDA

\$7.5 million in General Revenue (GR)

- \$2.6 million the Lubbock-based Regional Public Defender Office for Capital Cases (RPDO);
- \$500,000 for capital public defender services in Cameron and Hidalgo Counties for the biennium; and
- \$4.4 million towards closing the Fair Defense Act funding gap.

In short, the Conference Committee split the difference of the \$15 million GR approved by the House and \$0 approved by the Senate. This is the FIRST time that General Revenue has ever been appropriated for indigent defense in Texas.

# Texas Indigent Defense Expenditures (in millions) by Fiscal Year

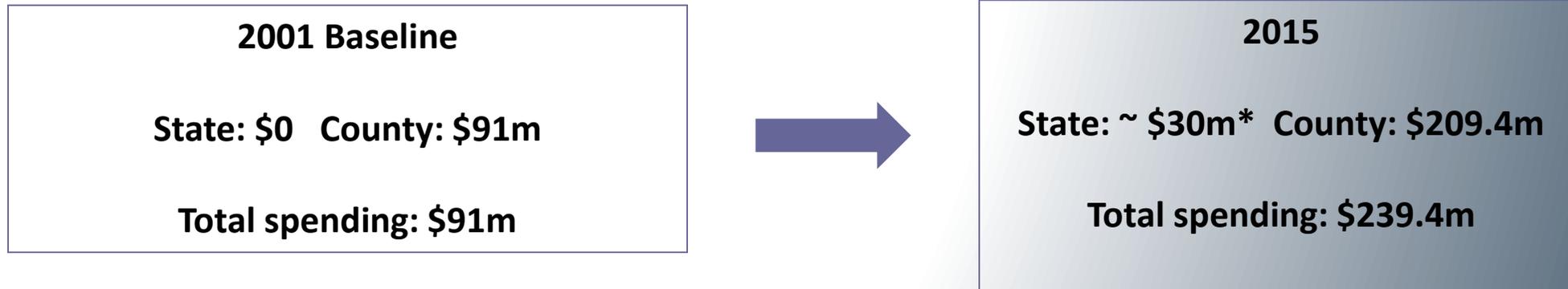


# Average Attorney Fees Per Case

<b>FY11</b>	<b>Assigned Counsel</b>	<b>Public Defender</b>
<b>Non-Capital Felony</b>	<b>\$540</b>	<b>\$407</b>
<b>Misdemeanor</b>	<b>\$182</b>	<b>\$142</b>

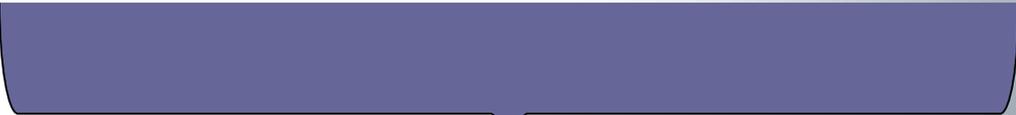
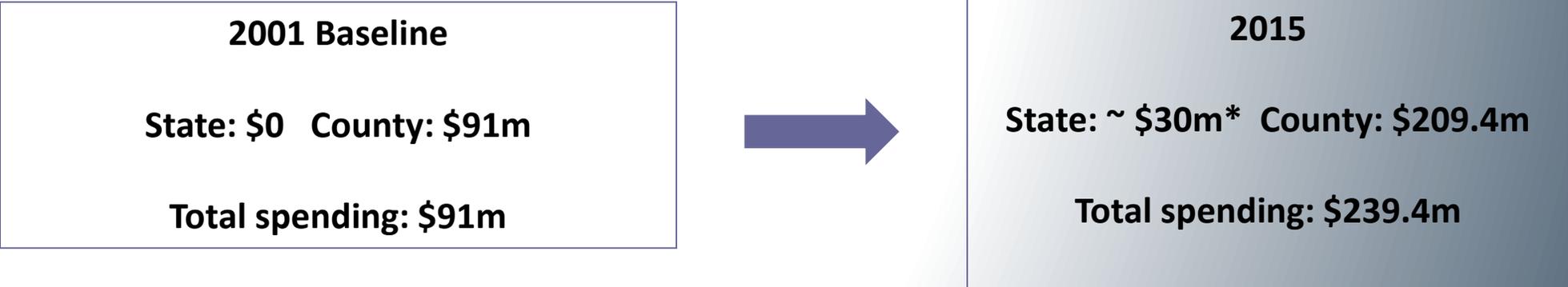
<b>FY15</b>	<b>Assigned Counsel</b>	<b>Public Defender</b>
<b>Non-Capital Felony</b>	<b>\$651</b>	<b>\$515</b>
<b>Misdemeanor</b>	<b>\$208</b>	<b>\$209</b>

# The Funding Gap Growing



\* Including pending FY15 grant obligations

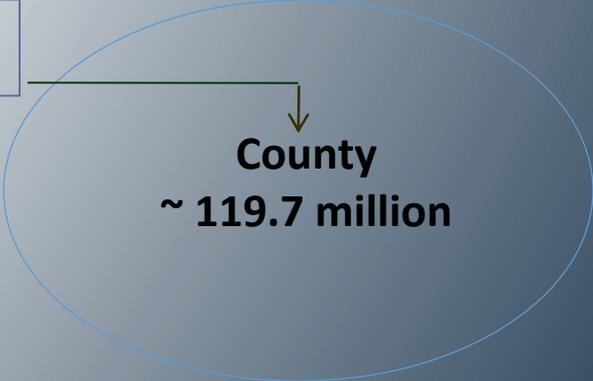
# To Close the Funding Gap & Share Costs Equally



## To Share Equally

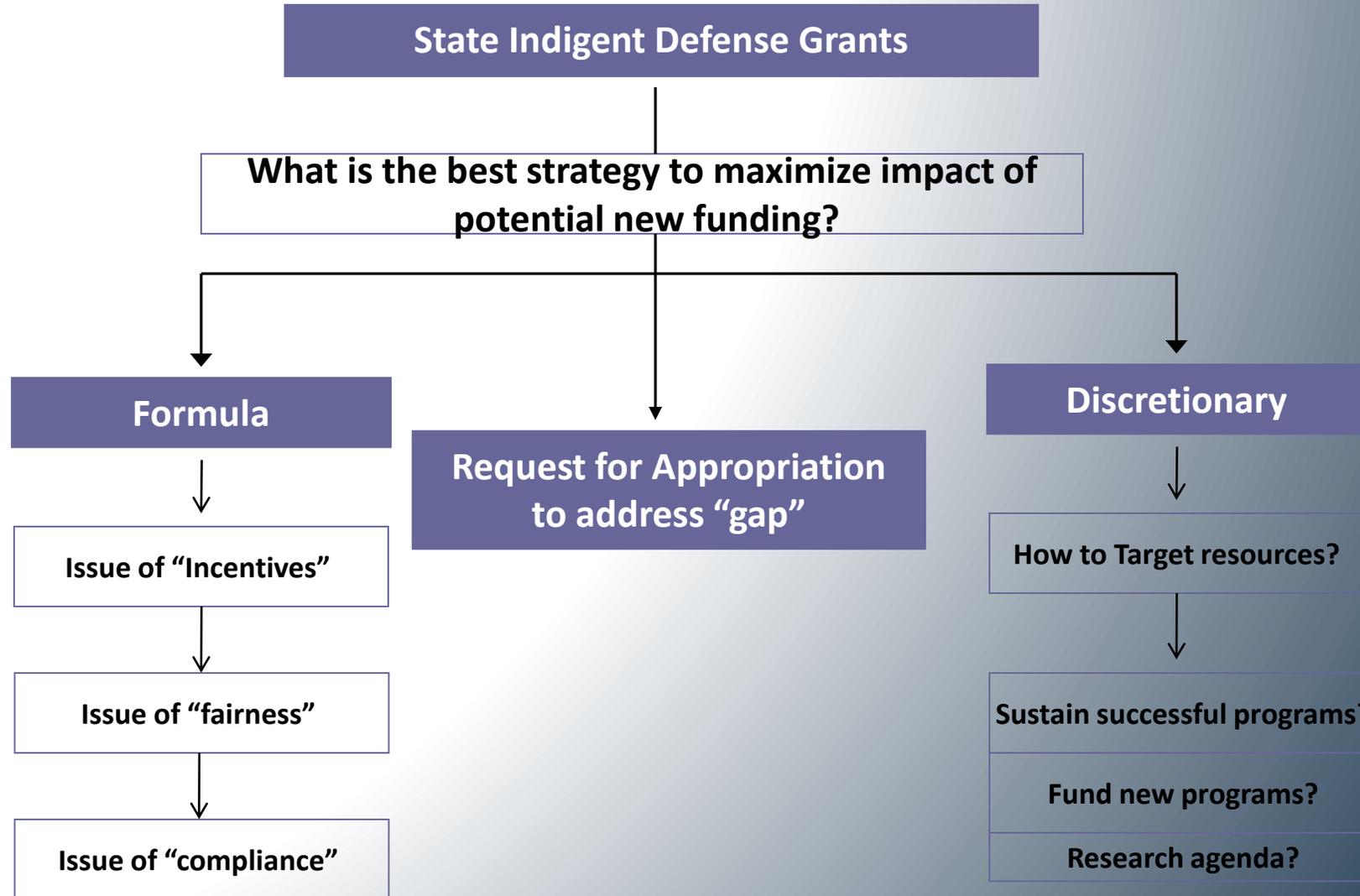
State

\$119.7 million  
 Less ~ \$30.0 million TIDC grants  
 Equals ~\$89.7 million needed to close the gap (2015)  
 ~\$93.6\*\* million needed to close the gap (2016)  
 ~\$98.6\*\* million needed to close the gap (2017)  
 ~\$103.6\*\* million needed to close the gap (2018)  
 ~\$108.6\*\* million needed to close the gap (2019)



\* Including pending FY15 grant obligations / \*\*adding \$3.9 in 2016 and \$5 million in 2017th/ 2019 for projected cost increases

# Strategic Policy Issue



## Other Funding Issues

### **Legislature funds two other programs out of the GR-Dedicated Fair Defense Account**

- 1. Office of Capital and Forensic Writs**
- 2. Innocence Projects at 6 Public Law Schools (\$600,000/year)**

# Office of Capital and Forensic Writs

- 1. Program funded in whole since its inception out of the GR-Dedicated Fair Defense Account**
  - \$1,423,146 (FY16)
  - \$1,328,863 (FY17)
- 2. Program expanded in last session to handle non-capital habeas writs based on flawed forensic science (SB 1743)**
- 3. Budget impact of the expansion currently being studied but Fiscal Note to SB 1743 estimated additional funding of:**
  - \$187,952 (FY18)
  - \$266,541 (FY19)

# Indigent Defense and Innocence

House Criminal Jurisprudence Committee (3/21/16)

## Interim Charge:

*Study the constitutional requirements and local practices for the appointment of counsel to indigent defendants and the operation of innocence projects at the state's six public law schools. Compare different indigent defense plans and the innocence projects across the state and identify best practices for system management, including appointment methods and timing, cost effectiveness, timeliness of case disposition, compensation of counsel, quality of representation, and protection of procedural rights. Consider the effectiveness of each of the programs currently funded and the funding strategy as a whole.*

# House Criminal Jurisprudence Committee

## March 21<sup>st</sup> Hearing on Charge:

- **TIDC provided overview of Indigent Defense & Innocence Projects**
- **Concern about sharp county spending increases**
- **Innocence Project of Texas proposal to increase funding for staff attorney(s) to litigate cases / manage volunteer attorneys (see letter in meeting book)**
- **Unclear direction of potential Committee recommendations**

**Strategic Challenge**

**Excessive Caseloads**

## ***Wilbur v. City of Mt. Vernon, 989 F.Supp.2d 1122 (2013)***

***Footnote #5 “. . . Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. Without reasonable caseloads, even the most dedicated lawyers cannot do a consistently effective job for their clients. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.”***

# *United States v. Cronin* 466 U.S. 648 (1984)

*“ . . . the constitutional right to effective assistance of counsel is the right of the defendant to require that the government’s case survive the **crucible of meaningful adversarial testing.**”*

# Attorney Caseload Study & Guidelines

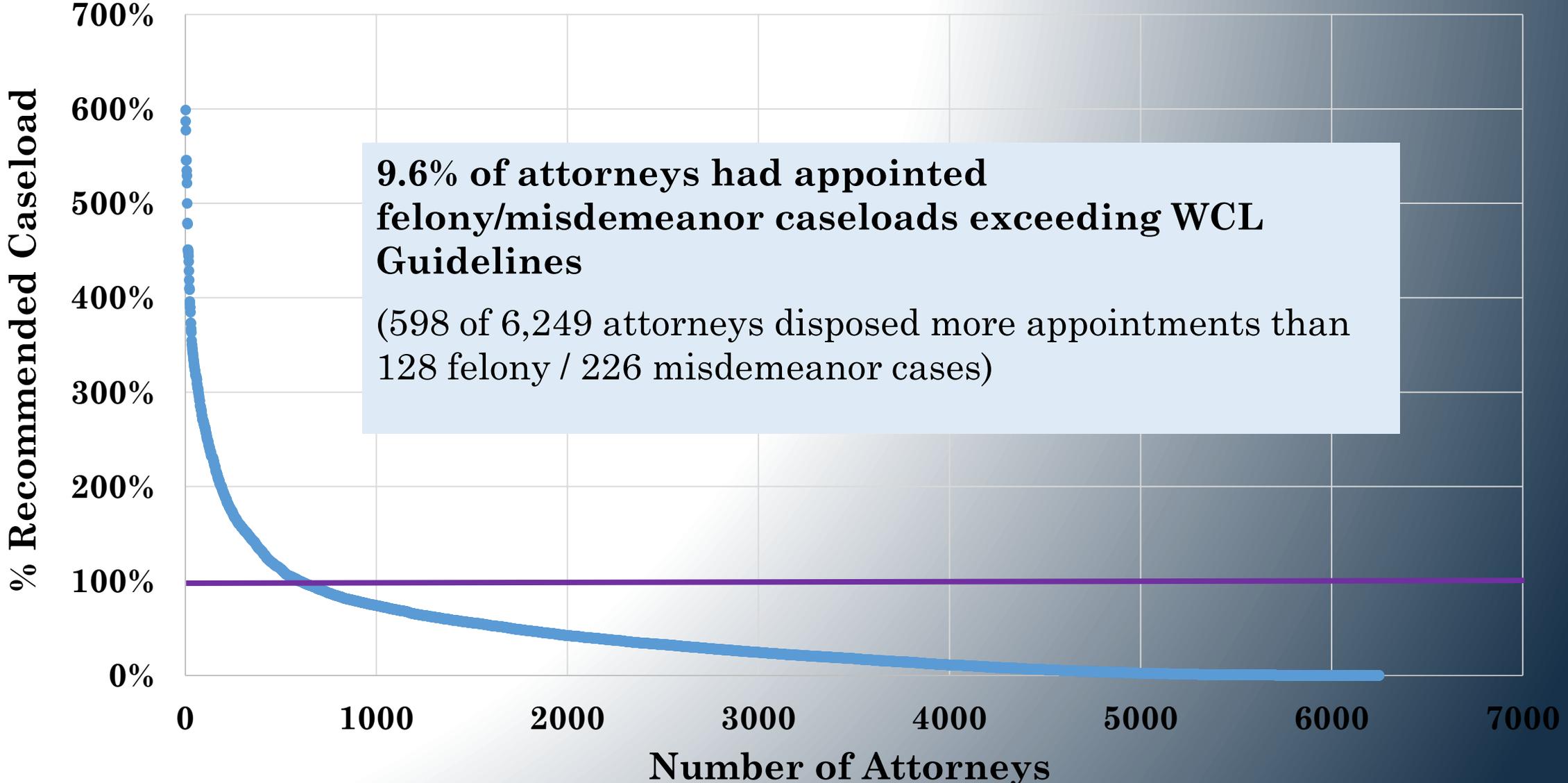
➤ TIDC published PPRI study “Guidelines for Indigent Defense Caseloads” in January 2015 as required by HB 1318 from 83<sup>rd</sup> Legislature:

*“Not later than January 1, 2015, the Texas Indigent Defense Commission SHALL 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.”*

# Attorney Caseload Study & Guidelines

- **Recommended Maximum Caseloads:**
  - **Felony Trial-level cases: 128 Cases per year**
  - **Misdemeanor Trial-level cases: 226 Cases per year**
- **PPRI finalizing follow-up study to determine appropriate maximum caseload guidelines for:**
  - **Felony Appellate Representation; and**
  - **Juvenile Delinquency Representation**

# Statewide Appointed Counsel Caseloads -- FY2015



# Attorney Caseloads Monitored

**Caseload Guidelines are currently being used in:**

- **Travis County Managed Assigned Counsel Program (CAPDS)**
- **Lubbock County Managed Assigned Counsel Program**
- **Harris County Public Defender Office**
- **El Paso County Public Defender Office**
- **Caprock Regional Public Defender Office**
- **Bee, Live Oak, McMullen Regional Public Defender Office**

**What other steps should TIDC should take to promote their use?**

## Strategic Challenge

# Access to Counsel

*Some counties still have extremely low appointment rates compared to state averages, especially in misdemeanors. Pro se rates are much higher in smaller counties.*

# Decreasing Rates of Pro Se Misdemeanor Defendants

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# External Consequences

***Heckman v. Williamson County*, 369 S.W.3d 137, 159 (Tex. 2012).**

**Class action suit brought by Fair Defense Project against Williamson County alleging:**

- **County failed to inform accused persons of their right to counsel**
- **County provided inaccurate information to accused persons about their ability to qualify for appointed counsel**
- **County failed to provide counsel to indigent defendants who had requested counsel**
- **County permitted prosecutors to confront uncounseled accused persons regarding the merits of their cases without allowing them to request appointment of counsel**

## External Consequences

***Heckman v. Williamson County*** cont'd.

➤ Texas Supreme Court allowed the class action suit to go forward

***“A criminal defendant's right to counsel—enshrined in both the United States and Texas Constitutions—ranks among the most important and fundamental rights in a free society. The plaintiffs in this civil action assert that they, and other similarly situated indigent criminal defendants, have been deprived of that right. . . . We reverse the court of appeals' judgment and remand to the trial court for further proceedings.”***

➤ Parties later reached a settlement agreement.

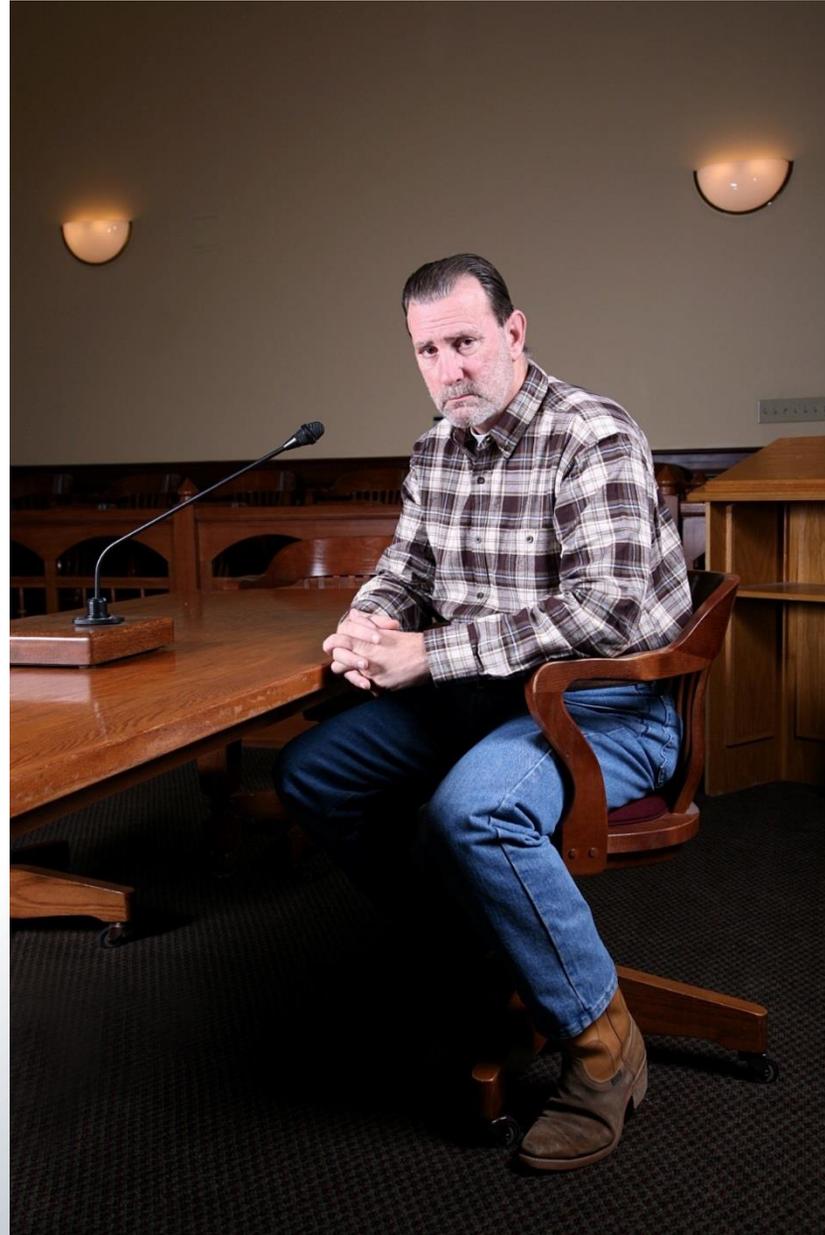
# Strategic Challenge: *Timing of Appointment*

Appointment often not consistent with statute in light of *Rothgery* decision.

***Rothgery v. Gillespie  
County***

128 S. Ct. 2578

Decided June 23, 2008



# Questions Answered by the Supreme Court in *Rothgery*

■ Does an Article 15.17 hearing (magistration) in Texas mark the initiation of adversary judicial proceedings, “with the consequent state obligation to appoint counsel within a reasonable time after a request for assistance is made”?

■ Answer: **Yes**

(128 S. Ct. at 2583-84)

**“[A] criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”**

**(128 S. Ct. at 2592)**

# **After the Article 15.17 Hearing, When Must the Court Appoint Counsel for an Indigent Defendant?**

## Under Federal Constitutional Law?

■ “[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”

*(Rothgery, 128 S. Ct. at 2591)*

■ Defendants are entitled to counsel to help them prepare for critical-stage proceedings, and to decide whether to undergo optional/voluntary critical-stage proceedings.

*(Estelle v. Smith, 451 U.S. 454, 471 (1981))*

# Example of Critical-Stage Proceedings

- **Interrogations after the Art. 15.17 Hearing**
- **Line-Ups after the Art. 15.17 Hearing**
- **Examining Trials**
- **Psychiatric Exams**
- **Plea Negotiations**
- **Arraignment**
- **Pre-Trial Hearings**
- **Trial**

# Under the State Law?

## *If the Defendant is in Custody:*

“[I]f an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, the appointing authority **shall** appoint counsel as soon as possible,” but not later than **1 to 3 working days** (depending on county size) . . .

(Texas Code of Criminal Procedure art. 1.051(c))

# Under State Law?

*If the Defendant is Released on Bond:*

**“Notwithstanding any other provision of this section, if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant’s first court appearance or when adversarial judicial proceedings are initiated, **whichever comes first.**”**

(Texas Code of Criminal Procedure art. 1.051(j))

# On the Horizon

- **Using data to drive continued improvement: Smart Defense Portal**
- **Summer Legislative Workgroup**

# Smart Defense Initiative

- **\$400,000 federal grant to PPRI for two years, partnering with the American Bar Association & TIDC**
- **Develop a web portal to:**
  - **Create Dashboard with overview of each county's indigent defense system**
  - **Create quality indicators using currently collected data & additional data**
  - **Guide and encourage counties in improving data collection and application**
  - **Educate stakeholders about important aspects of indigent defense system**



# SMART DEFENSE PORTAL



# Data Portal Objectives

- Educate stakeholders
- Convert available statewide data into quality indicator system
- Improve collection and use of data locally
- Offer a snapshot of indigent defense wellbeing, challenges, and opportunities



# Data Portal Objectives, cont.

Assess quality and promote:

- Compliance with state law and locally promulgated rules;
- System-wide transparency;
- Enhanced accountability and better representation; and
- Operational efficiency and cost-effectiveness

# DATA: Currently Collected Statewide

## County Expenditure & Case Data

- ✓ by Court
- ✓ by Type of Counsel
- ✓ By Expenditure Type



## Grant Awards

- ✓ Formula
- ✓ Discretionary



## County Indigent Defense Plans

## Attorney Caseload Data

- ✓ % of practice that is appointed
- ✓ Total # appointments
- ✓ Total \$ payments



# Public Transparency: <http://tidc.tamu.edu/public.net/>



## INDIGENT DEFENSE DATA FOR TEXAS

Welcome to the Texas Indigent Defense Commission's clearinghouse of information on indigent defense. The purpose of this website is to provide information to the public and to serve Texas counties.

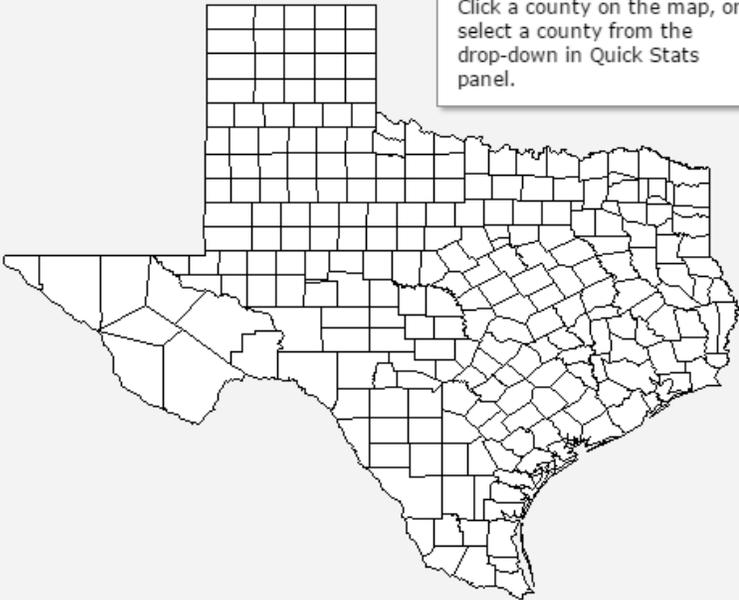


[Home](#) | [County ID Plans](#) | [County ID Expenditures & Cases](#) | [TIDC Grants and Funding](#) | [County Dashboard](#)

### Quick Links

- ▶ TIDC Home Page
- ▶ Summary of Funding
- ▶ County Indigent Defense Plan
- ▶ **County Datasheet**
- ▶ County Dashboard
- ▶ List of Public Defender and Managed Assigned Counsel Offices
- ▶ Out of County Arrest Contacts for Counsel Requests
- ▶ Attorney Caseload Report
- ▶ Download the Caseload Calculator
- ▶ Login

## Texas Counties



Getting Started:

Click a county on the map, or select a county from the drop-down in Quick Stats panel.

### Quick Stats FY 2015

Texas

2014 Population Estimate	26,642,612
Total Indigent Defense Costs	\$238,029,838.13
Formula-Based Grant Amount	\$23,931,689.00
Discretionary Grant Amount	\$4,653,880.40
Non-Capital Felony Trial-Level Cases Paid	193,122
Misd. Trial-Level Cases Paid	222,408
Juvenile Trial-Level Cases Paid	41,068
Appeals Cases Paid	2,889
Capital Cases Paid	438

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# Harris County (Houston) Data Sheet

Category	Texas 2015	2015	2014	2013
Population (Non-Census years are estimates)			4,365,601	4,279,430
Felony Charges Added (from OCA report)	271,744	41,070	42,646	43,811
Felony Cases Paid	193,560	27,237	28,745	27,887
% Felony Charges Defended with Appointed Counsel	71.23%	66.32%	67.40%	63.65%
Felony Trial Court-Attorney Fees	\$110,036,404.81	\$17,003,911.95	\$16,381,417.74	\$14,123,612.76
Total Felony Court Expenditures	\$126,091,674.15	\$19,834,964.47	\$20,163,265.92	\$15,837,793.35
Misdemeanor Charges Added (from OCA report)	503,299	67,284	68,527	71,588
Misdemeanor Cases Paid	222,408	35,972	36,024	36,900
% Misdemeanor Charges Defended with Appointed Counsel	44.19%	53.46%	52.57%	51.54%
Misdemeanor Trial Court Attorney Fees	\$39,141,724.30	\$3,353,274.35	\$3,311,278.17	\$3,098,551.64
Total Misdemeanor Court Expenditures	\$40,061,131.36	\$3,367,197.85	\$3,370,670.69	\$3,118,143.99
Juvenile Charges Added (from OCA report)	31,813	8,415	8,344	8,206
Juvenile Cases Paid	41,068	6,225	6,438	6,646
Juvenile Attorney Fees	\$11,072,433.54	\$2,479,487.25	\$2,317,832.75	\$2,278,071.25
Total Juvenile Expenditures	\$11,747,908.28	\$2,654,578.77	\$2,456,660.27	\$2,381,774.92
Total Attorney Fees	\$165,942,107.75	\$23,554,977.39	\$22,618,271.36	\$20,061,920.11
Total ID Expenditures	\$238,029,838.13	\$36,018,641.93	\$35,425,780.97	\$31,654,468.03
Increase In Total Expenditures over Baseline	168.32%	227.51%	222.12%	187.83%
Total ID Expenditures per Population			\$8.11	\$7.40
Commission Formula Grant Disbursement	\$23,931,689.00	\$3,611,531.00	\$5,522,894.00	\$2,720,662.00
Commission Equalization Grant Award				

# Basic Data Elements

- **Basic Data Elements Required to Fill Buckets:**



- Includes essential data elements required to calculate quality measures:

- Statutory Dates
- Attorney Appointment
- Eligibility Standards
- Bond
- First Contact
- Charges
- Disposition
- Access to Special Assistance
- Voucher

# Bucket #1



- **Access to Counsel:**

- Indicators of compliance with statutory and administrative requirements:

- Timeliness of Appointment
- Defendants Screened for Eligibility
- Vertical Representation
- Attorney Client Communication

# Bucket #2



- **Competence:**

- Indicators of quality representation:

- % of Type of Disposition
- Intensity of Attorney Client Communication
- Prevalence of Special Assistance
- Training
- Attorney Workloads

# Bucket #3

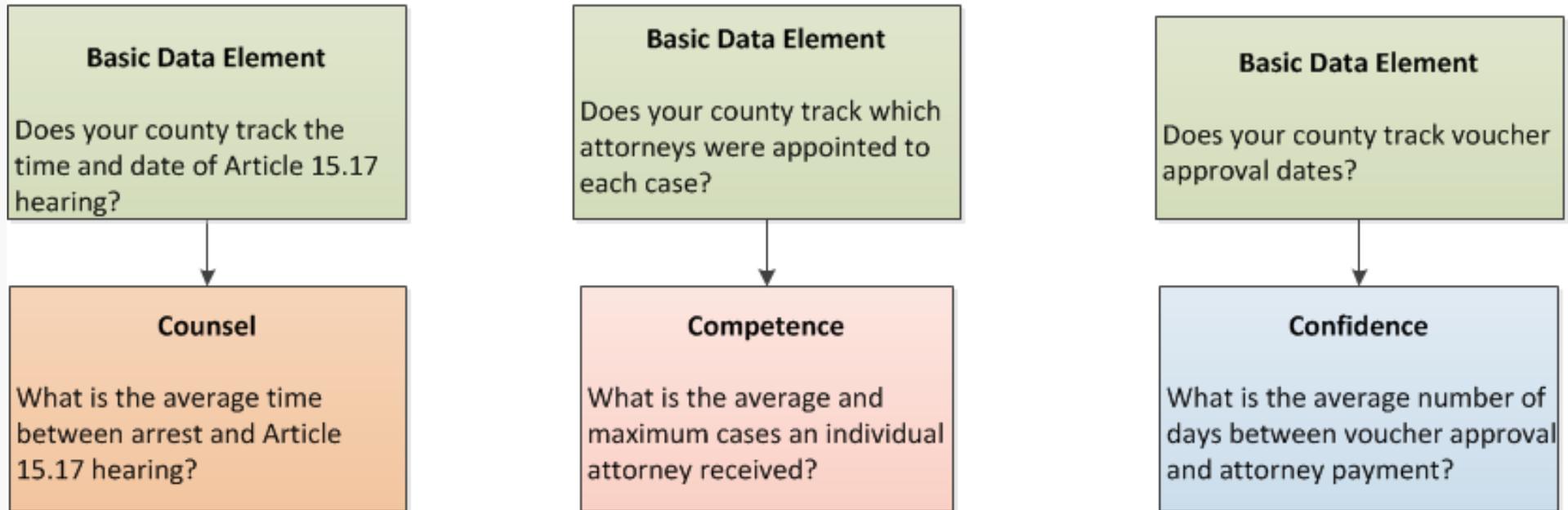


- **Confidence:**

- Indicators of system reliability, efficiency, and cost-effectiveness

- Cost of Special Assistance
- Average Payment Time
- Other Fees
- Average Payment Per Case

# Data Elements and Quality Indicators



**End**