



Written Testimony
Texas Indigent Defense Commission
House Criminal Jurisprudence Committee – Interim Charge 3

Interim Charge 3

Review the overall state of indigent defense and delivery of services to indigent defendants in Texas under the Fair Defense Act and other applicable laws. Examine the procedures for the appointment of counsel, including public defender options for rural communities, the monitoring of workloads and performance of attorneys, and the funding of those services. Examine counsel options for indigent defendants during magistrate proceedings and the administration and funding of county indigent defense systems. (Joint charge with the House Committee on County Affairs)

Texas is midway through decades of indigent defense improvement. We've inched steadily toward indigent defense worthy of Texas—indigent defense capable of effectively safeguarding Texans' liberties, lives, and livelihoods. But we are not there yet.

Here, the Texas Indigent Defense Commission (TIDC) will discuss three things:

- I. How we got here
- II. Where we are today
- III. Where we go from here

TIDC thanks the House Criminal Jurisprudence Committee for its focus on public defense. We stand ready to assist you as you report to the Legislature and determine appropriate legislative action.

I. How we got here

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that, under the Sixth Amendment to the United States Constitution, states must provide an attorney in a criminal case if a defendant cannot afford one.

Although every state must ensure the Sixth Amendment right to counsel, states have taken different paths to make good on that right. In *Gideon's* wake, some states—like New Mexico, Colorado, Kentucky, and Missouri—created statewide public defender offices.

Texas joined others—like California, New York, Illinois, and Pennsylvania—that relied wholly on their counties to provide public defense. Through the '60s, '70s, '80s, and '90s, the State of Texas did not fund, oversee, or provide counsel to indigent defendants. Rather, that duty fell to Texas's 254 counties. Results varied greatly.

In 2000, Texas's indigent defense system was studied for the first time. [The Spangenberg Report](#)'s 65 findings can be distilled into four categories:

- (1) Data Collection
- (2) Funding
- (3) Access to Counsel
- (4) Quality of Counsel

The Report led, in 2001, to passage of the Texas Fair Defense Act and the creation of TIDC.

TIDC was created by the Texas Legislature, in part, to remedy the deficiencies detailed in the Spangenberg Report. The Legislature charged TIDC with funding, overseeing, and improving indigent defense in each of Texas's 254 counties. Specifically, TIDC monitors indigent defense in all 254 counties through data collection and in-person audits; funds all 254 counties to help ensure constitutional and statutory compliance; and creates more efficient and effective indigent defense systems through training, mentoring, publications, presentations, technical assistance, policies, and standards. Ultimately, TIDC safeguards liberty by ensuring that Texas and its 254 counties provide the right to counsel guaranteed by the United States and Texas Constitutions.

II. Where We Are Today

Texas indigent defense is better than it was 20 years ago. State funding, new public defender offices, and greater oversight and accountability have helped make the right to the effective assistance of counsel a reality for thousands of Texans.

Still, we have much work to do. The experience of persons charged in a criminal case varies across the State. Whether an attorney investigates the facts of a case, researches the law, files motions, visits their clients—indeed, whether a person gets an attorney at all—often depends on where in Texas you find yourself.

Using the Spangenberg Report's findings as a framework, this section looks at where Texas has made progress and where we can and should improve.

A. Texas has made progress.

Texas has made progress on many of the measures in the Spangenberg Report. Our State has made particularly good gains in Data Collection and Access to Counsel:

Data Collection

- TIDC runs one of the nation's largest public defense data websites.

- Each Texas county’s indigent defense plan, attorney fees, expenditures, appointment rates, and cases disposed are available to the public.
- TIDC has monitored 145 Texas counties for compliance with the Fair Defense Act (policy monitoring).
- TIDC has monitored 120 Texas counties for fiscal compliance (fiscal monitoring).

Funding

- State funding for public defense has risen slowly, but steadily, in the past 20 years.
- TIDC regularly funds a portion of public defense costs in all 254 counties.
- Texas counties compete for Improvement Grant funding to build a public defender office, managed assigned counsel system, or indigent defense coordinator program, or to fund other indigent defense improvements.

Access to Counsel

- About 3/4 of felony defendants are appointed counsel—near the national average.
- About 46% of misdemeanor defendants are appointed counsel, up from 27% when TIDC started.
- TIDC trains judges and magistrates on access to counsel issues.

Quality of Counsel

- TIDC has helped plan and fund public defender offices covering 40 Texas counties, including 10 new counties in FY20.
- TIDC has helped plan and fund managed assigned counsel programs in 5 counties, including 1 new county in FY20.
- TIDC helped plan and fund the Regional Public Defender Office for Capital Cases (RPDO), which provides death penalty representation in over 180 counties.
- TIDC has created contract defender rules, minimum CLE requirements, and caseload guidelines.

B. We still have work to do.

Although Texas had made gains, we still have work to do. Progress on Funding and Quality of Counsel have been slower than progress on Data Collection and Access to Counsel. Yet there are opportunities to improve Texas indigent defense in each of the four areas.

Data Collection

- TIDC collects no case level data.
- TIDC’s policy monitoring team is on a 22-year monitoring cycle to get to every Texas county.

Funding

- The State of Texas reimburses just 10% of indigent defense costs—Texas counties pay for the remaining 90%, and expenditures vary greatly.

- The national average per capita public defense expenditure is \$17. Texas averages \$10 per capita (less than 60% of the national average). Some Texas counties spend less than \$1 per capita (less than 6% of the national average).
- TIDC Improvement Grant funding is insufficient to meet the demand for new public defender offices, managed assigned counsel systems, and indigent defense coordinator programs.

Access to Counsel

- Less than 1/2 of misdemeanor defendants statewide are appointed counsel—far below the national average.
- Although defendants have a constitutional right to counsel in Class A and B misdemeanors, more than 1/2 of rural misdemeanor defendants proceed without an attorney of any kind.
- Some Texas counties regularly fail to appoint an attorney to any misdemeanor defendant (0% appointment rate).

Quality of Counsel

- While professional standards require investigation of the facts in each case, 52% of counties report no investigative expenditures.
- Half of Texas indigent defendants are represented by an attorney with a caseload that exceeds TIDC caseload guidelines.
- Over 200 Texas counties have no public defender or managed assigned counsel program. (This figure does not include the Regional Public Defender Office for Capital Cases, which provides only death penalty representation in over 180 counties.)
- TIDC's policy monitoring team has never found a Texas county in compliance with the Fair Defense Act on its first visit.

III. Where we go from here

Indigent defense worthy of Texas is achievable. While we can still improve Data Collection and Access to Counsel, the biggest opportunities for improvement can be found in Funding and Quality of Counsel.

Data Collection

TIDC's data collection is good. Three improvements could help make it great:

- (1) Data collection automation, so that TIDC staff are free to focus on monitoring.
- (2) Case-level data collection, so that Texas may have greater clarity regarding its indigent defense system.
- (3) In-house research capacity to help guide TIDC's data collection and research efforts.

Access to Counsel

Access to counsel in felony cases is roughly in line with other states. But misdemeanor appointment rates, particularly in rural areas, lag. Four improvements could help:

- (1) Public defender offices and managed assigned counsel systems, which have been shown to improve appointment rates.
- (2) Indigent defense coordinators, who create more efficient and effective eligibility screening and appointment processes.
- (3) Increased policy monitoring, which helps identify and remedy weaknesses in counties' appointment processes.
- (4) Increased training for magistrates and judges involved in the appointment process.

Funding

Funding and Quality of Counsel offer the greatest opportunities for improving Texas indigent defense. While not identical, Funding and Quality of Counsel are inextricable: so long as counties shoulder the burden of indigent defense funding, quality of counsel will vary considerably.

- (1) Increase state indigent defense investment incrementally over the next several sessions, moving toward majority state funding (\$150 - \$250 million annually) for Texas indigent defense.
- (2) Focus state dollars on programs that we know work, including public defender offices, managed assigned counsel systems, and indigent defense coordinators.

Quality of Counsel

Funding and Quality of Counsel go hand-in-hand:

- (1) Build public defender and managed assigned counsel systems, which have been shown to provide higher quality, greater accountability, and possibly lower costs.
- (2) Consider creating and funding an opt-in statewide rural public defender office and an opt-in statewide appellate defender office.
- (3) Invest in investigators, social workers, and *Padilla* attorneys—core defense team members often missing in parts of Texas.
- (4) Increase training for indigent defense to guarantee constitutional and statutory compliance.

IV. Conclusion

Texas has improved its indigent defense system over the past 20 years. But there is still work to be done. TIDC is grateful for the House Criminal Jurisprudence Committee's focus on indigent defense. We are happy to work with you to improve Texas indigent defense.