



**WRITTEN TESTIMONY**

**SUBMITTED BY ANA YÁÑEZ-CORREA, EXECUTIVE DIRECTOR  
TEXAS CRIMINAL JUSTICE COALITION**

**REGARDING INTERIM CHARGE 3**

**SENATE CRIMINAL JUSTICE COMMITTEE**

**MAY 13, 2010**

## TEXAS CRIMINAL JUSTICE COALITION

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The Texas Criminal Justice Coalition is committed to identifying and advancing real solutions to the problems facing Texas' juvenile and criminal justice systems. We provide policy research and analysis, form effective partnerships, and educate key stakeholders to promote effective management, accountability, and best practices that increase public safety and preserve human and civil rights.

### Contact Information

Ana Yáñez-Correa, Executive Director

Phone: (w) 512-441-8123, ext. 109; (m) 512-587-7010

[acorrea@criminaljusticecoalition.org](mailto:acorrea@criminaljusticecoalition.org)

[www.criminaljusticecoalition.org/public\\_policy\\_center/interim\\_charges](http://www.criminaljusticecoalition.org/public_policy_center/interim_charges)

Dear Members of the Committee,

My name is Ana Yáñez-Correa. I am the Executive Director of the Texas Criminal Justice Coalition. Thank you for allowing me this opportunity to present testimony on Charge 3: *“Review the performance of the Fair Defense Act and the Task Force on Indigent Defense. Study key outcomes of the law, including: appointment rates in felony and misdemeanor cases; state and county indigent defense expenditures; attorney caseloads; attorney compensation; access to investigators and experts; and overall quality of counsel for the indigent. Examine the Task Force on Indigent Defense’s effectiveness in monitoring and enforcing standards and design strategies to improve the delivery of services for indigent defense, including timing of the appointment of counsel, the use of the appointment wheel and the monitoring of workloads and performance of attorneys.”*

## **INTRODUCTION**

The concept and practice of ensuring indigent defense is a fundamental tenet of our criminal justice system, as envisioned by the framers of the Constitution,<sup>1</sup> established by the Supreme Court in *Gideon v. Wainwright*<sup>2</sup> and its progeny, and implemented in Texas through the Fair Defense Act (FDA) of 2001.<sup>3</sup> Through the commitment and vision of Senator Rodney Ellis and with the support of other leadership, Texas passed the FDA to establish a Task Force on Indigent Defense (Task Force). This body is responsible for setting basic standards for the provision and delivery of indigent defense services, while simultaneously allowing for flexibility among Texas’ 254 counties.

More specifically, the Task Force, as a standing committee of the Texas Judicial Council,<sup>4</sup> is charged with (a) developing statewide policies and standards for the provision of indigent defense, (b) distributing funds to supplement county indigent defense services, and (c) monitoring counties’ compliance with set policies and standards. The Task Force currently achieves its mandate with a 10-member staff overseen by the Office of Court Administration.<sup>5</sup> This team, under the dedicated leadership of Executive Director Jim Bethke, serves as an excellent example of government transparency and collaboration, achieving balance and trust in partnerships with advocates, policy-makers, county officials, and other diverse groups, and furthering open communication to improve the understanding and implementation of the goals of the FDA at the state and local levels.

Indeed, since its inception, the Task Force has committed to bringing various interests to the table to support reforms that have significantly changed the landscape of indigent defense. Prior to the FDA’s passage in 2001, only seven counties had some form of public defender office in operation. Now, there are 16 public defender offices – serving upwards of 90 counties and various specialized populations – that have either been awarded a grant or are in full operation in Texas. Throughout this time, the Task Force has also provided critical technical assistance to counties in need.

We applaud and strongly support the Task Force’s promotion of trust and consensus-building: it is a model for other agencies seeking to develop and implement policies that will strengthen communities and save taxpayers money. However, the Task Force can only do so much with the resources provided to it. The state must sufficiently support counties in their collective responsibility to offer adequate indigent defense services to Texans facing jail time without the means to afford an attorney. Equally important to the appointment and availability of an attorney is the need for zealous and meaningful representation. When defendants fail to receive the early appointment of well-qualified and independent counsel, the state and county incurs unnecessary expenses related to delayed case processing and pre-trial jail expenses, and we potentially overload

the criminal justice system with defendants awaiting hearings, poorly scrutinized plea deals, and wrongful convictions.

### **INDIGENT DEFENSE MODELS**

Although the overarching requirements for indigent defense are set by the state through the Task Force, individual counties can create their own indigent defense delivery plans that meet FDA requirements while preserving local interests and control. In a state as large and diverse as Texas, local administration is essential to ensuring the adequate provision of indigent defense, but the state must ensure that each model preserves the rights of Texans and protects justice in the courts.

#### **Rotational Assigned Counsel – “The Wheel”**

Nearly 90% of counties choose to provide indigent defense services through an assigned private counsel model, often known as the “wheel”, in which the assignment of attorneys must be rotated in a fair and impartial manner. Although this method of indigent defense delivery is often efficient, left alone and lacking an independently managed system to ensure (a) ethical caseloads, (b) performance standards, and (c) adequate access to investigative resources, “the wheel” can easily result in egregious cases of abuse and favoritism, as well as reliance on “assembly-line justice” to quickly dispose of unethically high caseloads. To prevent the common problems associated with “wheel” appointments, the American Bar Association recommends as its first of Ten Principles to ensure the just provision of indigent defense services (included in Mr. Jim Bethke’s testimony) that the administration of assigned counsel be independent from judicial influence.

As a model system, the Task Force recently helped Lubbock County establish a managed private defender program that incorporates oversight of the county’s mental health caseload and ensures that each private defense attorney accepting mental health cases has access to a case manager, social worker, investigator, and the experts necessary to provide an effective and meaningful defense. This type of wrap-around service reduces the likelihood of recidivism and improves community stability.<sup>6</sup> Additionally, this model provides oversight to ensure that every attorney is appropriately trained and qualified to handle such a specialized caseload and does not accept an excessive caseload that would compromise the quality of representation.

#### **Public Defender Offices**

As mentioned previously, Texas has 16 public defender offices providing indigent defense services to upwards of 90 counties (several public defender offices serve as regional offices), with some dedicated to handling a special population or specific type of caseload. Although, public defender offices may bring some financial savings through caseload efficiencies, the real savings to counties results from the collateral benefits of a well-functioning system. Public defender offices provide early assignment of counsel which significantly reduces the number of days between an individual’s arrest and trial, in turn (a) reducing the unnecessary and harmful collateral consequences of job and/or housing loss, (b) promoting family stability, (c) facilitating diversion into treatment programs as appropriate, and (d) reducing overcrowding and jail costs for counties. For example, in Kaufman County, the public defender office reduced the average jail population from 306 to 246 during its first year by clearing a backlog of cases.

Additionally, effective public defender offices provide an organizational structure for training, professional mentoring, and shared institutional knowledge in tandem with proper oversight and accountability mechanisms that are often unavailable through private appointment systems. Effective offices also have the necessary resources for investigation, case management, and administrative support, creating parity with the prosecution and increasing balance in the judicial process.<sup>7</sup> Furthermore, public defender offices serve as a valuable resource to the local criminal defense bar: they provide continuing legal education and legal assistance to private attorneys and function as an institutional “voice” for indigent defense issues, an important element often neglected in local stakeholder planning and decision-making.<sup>8</sup>

Harris County is beginning the process for establishing its first public defender office, intended to handle a segment of felony, mental health, juvenile, and appellate cases. As the Task Force will face increased pressure to adequately resource the office (\$4.4 million to Harris County alone), the state must ensure that the Task Force has sufficient funding to meet the demands of this and other public defender offices in their establishment and long-term needs, and their ultimate success.

Although public defender offices often provide an essential level of quality and efficiency in indigent defense services for urban areas, rural areas may also benefit from regional public defender offices, such as the Lubbock Capital Public Defender Office. This office currently serves 70 counties by providing specialized defense in costly capital cases at a reasonable and predictable expense shared among the counties – much like an insurance policy might provide coverage at a known rate for unexpected and potentially catastrophic events.

### **Contract Counsel**

A third indigent defense model is based on contract counsel and is occasionally used by counties to ensure indigent defense delivery where there may be a limited number of cases that can be delegated to a private office; often, contract counsel is intended to handle conflict of interest cases. Many counties using public defender or contract models incorporate a hybrid system, in which the county continues to rely on the “wheel” to provide the remaining indigent defense delivery services.

Although there is often criticism of rotational and contract methods of assigning counsel – including problems with inconsistent quality of representation, unfair denial of appointed counsel, and gaps in providing services which leave some (even innocent) defendants waiting extended periods in jail before being charged and/or released<sup>9</sup> – every model of indigent defense delivery should include important safeguards to ensure ethical caseloads and proper appointment of truly effective and accountable counsel.

*Note:* The Task Force provides funding and oversight for each of these methods of indigent defense delivery through various mechanisms, outlined in the section below.

### **INDIGENT DEFENSE FUNDING**

In the first year of the FDA, the state – through the leadership and determination of Senator Rodney Ellis – appropriated \$7 million (taken from court costs on convictions) to the Task Force for distribution among Texas counties to supplement local indigent defense delivery. In ensuing years, the Legislature has authorized the collection of additional fees<sup>10</sup> to increase the funding that the Task Force distributes to counties for indigent defense programs (now at over \$28 million).

Although state funding through the Task Force (again, \$28 million) provides for nearly half of the increase in indigent defense expenditures since the implementation of the FDA (approximately \$61 million), that funding comprises only 15% of the current total indigent defense expenditures by counties (approximately \$186 million).<sup>11</sup>

**Formula Grants (\$11,663,872 distributed in FY 2009):**

The primary mechanism to distribute funds from the Task Force is through a formula grant. These are calculated and distributed annually based on each county's population and the amount of increase in indigent defense spending above the 2001-established baseline.

**Equalization Disbursements (\$12,000,000 distributed in FY 2009):**

Although Formula Grant funding allows for the uniform distribution of funds based on population and provides an incentive for counties to invest in the provision of indigent defense services, this strategy may unfairly penalizes some counties (such as El Paso and Dallas) that had better funded systems prior to 2001. Equalization disbursements provide additional funding to supplement indigent defense delivery in counties having the lowest percentage of reimbursements through their formula grants when compared to their overall increases in indigent defense costs.

**Direct Disbursements (\$131,523 distributed in FY 2009):**

Direct disbursements provide a funding stream for smaller counties that do not meet the \$5,000 floor in indigent defense expenditures to receive a formula grant, but that exceed their own baseline indigent defense expenditures during the year. Often, counties may have low crime rates or sporadic caseloads with few attorneys or geographic barriers that limit indigent defense expenditures. These counties may be better served through the implementation of a regional program that could ensure adequate defense services only as needed.

**Extraordinary Grants (\$570,003 distributed in FY 2009):**

The establishment of an extraordinary grant stream was intended to address unique circumstances that significantly threaten a county's ability to provide full indigent defense services. Counties must demonstrate a current financial hardship relative to its previous expenditures to qualify for consideration by the Task Force for an extraordinary grant. The requests ranged from \$30,000 to \$270,000 in 2009 and have been evaluated on a case-by-case basis; historically, the maximum amount awarded to counties requesting this assistance has been no more than \$100,000. One concern about extraordinary grants is that they may adversely encourage counties to consider extraordinary grants as potential funding streams they could use to offset budgetary deficits, rather than using the funds to move forward with substantive system improvements.

**Discretionary Grants (\$3,017,497 distributed in FY 2009):**

Discretionary grants are awarded through a competitive application process. Since the Task Force initiated its discretionary grant process, about 10% of the total funds awarded to counties have been distributed as discretionary grants. County requests for discretionary grant funding have increased to over \$13 million for the FY 2011 Discretionary Grant cycle that is currently under consideration.

Depending on the specific programs that are awarded funding by the Task Force board, this would represent over 40% of the grant funds likely to be distributed by the Task Force for FY 2011, marking a significant increase compared to previous years. To date, \$18 million in discretionary grant funds have been awarded in total since 2003.<sup>12</sup> Single-year discretionary grants may be used for special process and/or technology improvements that will significantly impact the day-to-day indigent defense operations in a county. Larger multi-year grants are used for implementation of specialized programs that provide direct services to indigent defendants.

For example, the Task Force provides funding for public defender offices through discretionary grants. The initial start-up cost of a public defender office can be significant and may present an overwhelming barrier to counties otherwise inclined to transition to this system. Common start-up costs include hiring staff, purchasing office equipment, leasing or buying office space, establishing internal office practices and procedures, and modifying the existing indigent defense system. To minimize start-up costs and help support the longevity of a public defender office, the Task Force provides multi-year discretionary grants that support an office in graduated amounts: 80% of the county's public defender costs for the first year, 60% in the second year, 40% in the third year and, finally, 20% in the fourth year.

Discretionary grants have been shown to create a great return on the initial investment. Specialized programs target unique needs by county and facilitate localized defense services to address particular populations. These types of grants are the most productive method to ensure efficiencies and innovation that support best practices and effective representation. However, recipients of discretionary grants only account for a small portion of the Task Force's overall grant awardees, and they are the most vulnerable to loss due to funding expiration.

## **POLICY RECOMMENDATIONS**

As Texas continues to actively implement the principles of the Fair Defense Act, gaining national, positive recognition for these efforts, our policy-makers must ensure that despite our current budget shortfall, the momentum gained by the tremendous work of the Task Force is protected and enhanced. This is even more imperative as the state continues its efforts to ensure a level playing field between (a) the policies and practices that push Texans into jails and prisons, leaving them with an arrest, a possible conviction, and the long-term, negative collateral consequences that accompany them, with (b) smart-on-crime policies that increase public safety, save taxpayer dollars, and strengthen communities.

### **➤ Provide Additional Help to Counties**

Every legislative session, policy-makers continue to pass laws that increase penalties for crimes and lengthen the stay of confinement, but the state has failed to appropriate additional funds through its general revenue to support this mandate. Although the Task Force has increased its funding distributions, counties cannot continue to shoulder the majority of the financial burden associated with supporting indigent defense services. Furthermore, fees are not always a reliable source of revenue: the worse the economy becomes, the less likely individuals are to pay – especially those whose fees are tied to criminal charges. TCJC fully supports the Task Force in any request for additional funding, even if incremental, to assist counties in maintaining well run public defender offices and other indigent defense programs.

➤ **Provide Continued State Support to Sustain Effective Programs**

The Task Force would benefit from additional clarification and direction on issues related to funding, particularly as it considers whether regional programs (or programs in regions that lack adequate resources to sustain full functionality) should receive continued state funding and involvement so they do not cease to exist. TCJC supports an increased prioritization of the Task Force's discretionary grant program (versus formula grants) to encourage and facilitate quality indigent defense services through innovative programs and improved accountability.

➤ **Continue to Strengthen Indigent Defense Service Delivery Models in Texas**

The state must promote best practices and integrity of process in indigent defense:

- ***Independence of indigent defense delivery:*** Independence from the judiciary (through a board or panel) insulates public defenders and the private defense bar from political influence and potential conflicts of interest, which could prevent the opportunity for a cohesive and zealous defense that, according to the American Bar Association, is essential to a balanced system of justice.<sup>13</sup> Policy-makers should require that indigent defense services are managed by an independent entity that maintains a fair and impartial appointment process, provides defense quality oversight, and ensures prompt payment for proper defense and support services, such as investigators, experts, case managers, etc.
- ***Caseload/workload standards:*** Although the Task Force requires that counties consider and set caseload standards, counties are not required to adopt nationally recognized caseload/workload standards for defenders accepting indigent defense cases. The National Legal Aid and Defender Association warns that an excessive number of cases diminishes quality of representation.<sup>14</sup> As such, a policy requiring counties to follow a recommended caseload/workload standard, even if slightly higher than national recommendations to accommodate for financial constraints, would equalize opportunity and reasonable access for defense services across Texas counties. *Note:* Policy-makers could also reduce large caseloads by removing jail time as an option for certain jailable misdemeanors and instead rely on fines or community supervision. This will reduce misdemeanor caseloads requiring defense services while continuing to ensure public safety.
- ***Transparency at the local level:*** Local governments should take a page from the Task Force's practices and provide more specific indigent defense data online to ensure greater transparency. Specifically, the routine reporting of appointments, expenditures, and caseloads by attorney would help ensure greater integrity of the appointment process at the local level. This could easily be accomplished by requiring each defense attorney receiving appointments to submit brief information (shown in the chart below) to his or her local appointment administrator; current technology would allow this information to be compiled and reported instantaneously or at least on a monthly basis.



Attorney	Case Type (all that apply)	Caseload		Payments			Additional Request			Outcomes		
		Private (by type)	Appointed (by type)	Requested	Paid	Pending	Type	Amount Requested (by type)	Amount Received (by type)	Pleas (by case type)	Dismissals (by case type)	Convictions (by case type)
[Name]	Felony, Misdemeanor, Juvenile, Appellate, Capital, Specialized	Number	Number	Amount	Amount	Amount	Investigator, Expert Witness, Case Manager, Other	Amount	Amount	Number	Number	Number

➤ **Diversify the Task Force’s Board Composition**

Since the inception of the Task Force, the Board has commendably set policies that have established a framework for identifying and targeting weakness in indigent defense delivery in Texas. Each board member brings with him or her the strengths and expertise instrumental to the performance of the Task Force. However, in its future efforts to improve and strengthen the delivery of indigent defense services, TCJC believes the Board would benefit from incorporating more individuals who are knowledgeable about the day-to-day working of quality indigent defense.

Lastly, TCJC fully supports all the recommendations (included with the Task Force package) made by Dr. Tony Fabelo, Research Director for the Council of State Governments, and appreciates his long-standing commitment to improving Texas’ criminal justice system.

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Thank you for allowing me the opportunity to provide feedback to this Committee on the crucial role of the Task Force on Indigent Defense in the provision of services to those passing through our criminal justice system. Not only has the Task Force improved the ability of numerous individuals to retain quality counsel, but throughout its efforts it has gained the respect and support of numerous organizations and associations. TCJC feels especially fortunate to have worked so closely with the Task Force throughout the past eight years – and as much as we have been willing to assist the Task Force in furthering its critical mission, the Task Force team has continually done what it can to assist stakeholders and advocates throughout the state in realizing their own important indigent defense goals. The Task Force deserves and requires the ongoing support of our state’s key leadership.

## NOTES

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<sup>1</sup> The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.”

<sup>2</sup> 372 U.S. 335, 342 (1963). The Court held that the Sixth Amendment right to counsel is a fundamental right which transfers to the States through the Fourteenth Amendment.

<sup>3</sup> Texas Fair Defense Act, Senate Bill 7, 77<sup>th</sup> Legislature, Regular Session, 2001.

<sup>4</sup> The Texas Judicial Council is the policy-making body for the state judiciary. It examines the work accomplished by the courts and submits recommendations for improvement of the system to the Legislature, the Governor, and the Supreme Court in efforts to simplify judicial procedures, expedite court business, and better administer justice.

<sup>5</sup> The Office of Court Administration is a state agency in the judicial branch that operates under the direction and supervision of the Supreme Court of Texas. It provides resources (including technical assistance, training, and fiscal consultation) and other information (statistics, analysis, and reports) for the efficient administration of the judicial branch of Texas.

<sup>6</sup> Task Force on Indigent Defense, Office of Court Administration, “Representing the Mentally Ill Offender: An Evaluation of Advocacy Alternatives,” 2010.

<sup>7</sup> Task Force on Indigent Defense (TFID) and the Public Policy Research Institute at Texas A&M University, “Evidence for the Feasibility of Public Defender Offices in Texas,” November 9, 2006. *Note additionally:* Public defender offices provide the added benefit of relieving the court’s administrative burden in assigning attorneys and processing vouchers, typical in a rotational system of providing indigent defense.

<sup>8</sup> TFID and The Spangenberg Group, “Blueprint for Creating a Public Defender Office in Texas, Second Edition,” June 2008.

<sup>9</sup> Several local news articles highlight specific problems with rotation and contract systems of appointment, including the following: (1) Lisa Falkenberg, “An Idea Whose Time has Come?,” *Houston Chronicle*, Commentary, March 12, 2008. Falkenberg notes criticism of biased appointments, a lack of performance standards, and problems funding investigations in Harris County. (2) Rick Casey, “Supremes May Slap Texas Again,” *Houston Chronicle*, Commentary, March 13, 2008. Casey followed the *Rothgery* case being considered by the Supreme Court. Rothgery was jailed for five days on erroneous charges, depleted his savings for bond, and filed several requests for an appointed attorney who, once appointed six months later, quickly cleared Rothgery’s name. (3) Jim Getz, “New Public Defender Works to Prevent Mix-ups,” *Dallas Morning News*, January 21, 2007. Getz noted a problem in Kaufman County, prior to the establishment of a public defender office, in which one man placed on probation sat in jail for a year because his court-appointed attorney had no obligation to follow up.

<sup>10</sup> TFID, “Task Force on Indigent Defense 2009 Annual and Expenditure Report,” pgs. 21-22. See Funding (Revenue) discussion of court costs and fees upon conviction, Surety Bond Fees, and State Bar Fees that are disbursed through the Task Force to support counties in providing indigent defense services.

<sup>11</sup> *Ibid.*

<sup>12</sup> TFID, “Programs, Processes, and Technology: An Overview of Discretionary Grants Funded by the Texas Task Force on Indigent Defense,” Report to the Senate Committee on Criminal Justice, 2010, p. 2.

<sup>13</sup> American Bar Association, *The Ten Principles of a Public Defense Delivery System*, Resolution adopted February 5, 2002.

<sup>14</sup> James R. Neuhard, “The Ten Commandments of Public Defense Delivery Systems,” National Legal Aid and Defender Association.