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# Indigent Defense Spending and Cost Containment in Texas

**A Report to the  
Texas Indigent Defense Commission**

Pursuant to a Legislative Budget Rider FY 2018-2019  
85th Texas Legislature



# Indigent Defense Spending and Cost Containment in Texas

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## **BUDGET RIDER (FY 2018/2019)**

*Out of the amounts appropriated above, TIDC shall make grants to counties from the General Revenue-Dedicated Fair Defense Account No. 5073 in accordance with all uses authorized by Government Code, Chapter 79, with funds being disbursed by the Comptroller. Of this amount, \$2,566,528 in fiscal year 2018 and \$2,474,370 in fiscal year 2019 shall be distributed to counties that implement cost containment initiatives designed to limit local indigent defense cost increases. No portion of the appropriation made by this section shall be used to offset the Office of Court Administration's administrative support provided to the TIDC except by mutual agreement of the TIDC and the Office of Court Administration.*

*TIDC shall submit a report to the Legislature no later than December 1, 2018, detailing the effectiveness of various cost containment measures implemented by counties and proposing additional measures to reduce county operating costs with respect to indigent defense.*



## **Executive Summary**



## Executive Summary

Since FY 2003, spending on court-appointed cases in Texas has increased in linear fashion, approximately doubling to \$265 million by FY 2017. This report explains what caused this growth. It also reviews strategies used by the Texas Indigent Defense Commission and by counties to manage these costs without compromising the Sixth Amendment guarantee of effective assistance of counsel. There are three key findings and recommendations:

### Finding 1:

**The Fair Defense Act of 2001 established statewide standards for indigent defense that have helped insulate Texas and its counties from potential lawsuits.**

Class action lawsuits that impose rapid, systemic reform are increasingly used to transform state courts. Although some individual counties have been sued, thus far, the state has avoided legal challenges. This is in part because, when confronted with the system failures, the 77<sup>th</sup> Legislature responded by passing the Fair Defense Act (FDA) in 2001. The law set new quality standards, establishing state oversight mechanisms, and appropriated grant funds to help counties better fulfill their Sixth Amendment duty to indigent defendants.

Unsurprisingly, correcting for constitutional deficits has required changes in practice, as well as financial investment. The number of defendants qualifying for court-appointed counsel rose sharply, bringing the number of court appointments closer to similar rates nationally. Systemic restructuring to meet new standards and timeliness required significant expenditures. The effort has largely shielded Texas from costly and disruptive court actions and has set counties on a path toward achieving the goal of constitutionally meaningful representation.

### Finding 2:

**Four main factors explain increases in indigent defense spending since 2003: inflation, rising attorney appointment rates, growth in the share of felony cases, and spending on indigent defense system improvements.**

Since implementation of the Fair Defense Act, indigent defense spending has progressed on a steady upward trajectory. Four main factors have contributed to this trend: inflation, rising attorney appointment rates, changes in indigent case composition, and programs to improve the quality of public defense.

Inflation. At first look, indigent defense spending has risen more than 100% since 2003. After adjusting these values for inflation, however, real growth over the 14-year timeframe is shown to be about half that: 56% overall or just 2.7% per year.

Appointment Rates. Rising attorney appointment rates have also driven costs upward as Texas increased compliance with constitutional requirements. In the seven years after 2003, a 30% increase in court-appointed cases was accompanied by a 27% increase in indigent defense costs.

Case Composition. Cost escalation between 2010 and 2017 is attributable to different trends: investment in quality improvements and a rising share of high-cost felonies. More than a quarter of the increase in spending (27%) occurred because of a shift in the case mix toward felonies.

Quality Improvement. Importantly, after backing out effects of uncontrollable costs for case composition and inflation, the controllable new spending for quality improvements since 2010 declines from 2.7% (accounting for inflation alone) to 1.9% (accounting for both inflation and case mix). Without accounting for either of these factors, the nominal (unadjusted) annual growth rate would be 4.8% over the same seven-year period.

Equally important, the 1.9% annual inflation- and case- adjusted increase is the amount directed toward indigent defense system improvements such as quality-managed systems (e.g., public defender or managed assigned counsel offices). While quality-managed systems have many advantages, they are not necessarily cheaper; they require greater initial spending to get started, and considerably more money is spent on investigation and experts, which are key features of high-quality indigent defense services.

### **Finding 3:**

**TIDC discretionary grants are an effective tool to help counties implement cost-effective indigent defense systems that comply with requirements of the Fair Defense Act and the US Constitution.**

The Texas Indigent Defense Commission was established to oversee compliance with the Fair Defense Act and promote improvements through monitoring, technical assistance and funding to counties. Of the tools at their disposal, discretionary grants are perhaps the most effective for attaining these goals.

A key focus of the Commission has been on disseminating proven practices that help jurisdictions raise indigent defense standards while also managing financial burden. Nearly every county in the state has benefitted from discretionary grant funds either directly or indirectly from at least one of TIDC's cost containment grants: smart technology, mental health defenders, Regional Public Defender for Capital Cases, pretrial risk assessment, video conferencing, or post-conviction appellate review.

The discretionary grant program is also being used to lead counties into the future. A recently released report, *Indigent Defense Innovation*, highlights new opportunities to improve attorney efficiency and effectiveness. Some, such as court date reminder texts, routine task automation, and online dispute resolution, take advantage of emerging technology. Attorney checklists and mentoring are simple practices with an outsized impact. Participatory defense, early representation, restorative justice, and comprehensive defense teams are a fresh interpretation of traditional defense roles. By thinking creatively and investing strategically, TIDC has crafted a vision to help counties continue progress to comply with the FDA and close the "Sixth Amendment gap."

## Recommendations

Three recommendations are made in an effort to sustain momentum toward constitutionally compliant and fiscally-responsible indigent defense into the future.

1. TIDC should continue to expand investments in cost containment strategies discussed in Part III;
2. TIDC should pursue new innovations identified in their recent publication, *Indigent Defense Innovation*; and
3. TIDC should continue to pursue programs like public defender and managed assigned counsel offices that ensure responsible indigent defense spending tied to accountability and oversight.





## **Indigent Defense Spending and Cost Containment in Texas**



## Introduction

Spending on court-appointed criminal defense in Texas roughly doubled between FY 2003 and 2017. Consequently, the 2017 Regular State Legislature appended a rider to the Texas Indigent Defense Commission's (TIDC) FY 2018-19 budget with two main requirements. The Commission was instructed to:

- 1) Distribute approximately \$2.5 million in each of fiscal years 2018 and 2019 from the General Revenue-Dedicated Fair Defense Account to counties implementing initiatives designed to limit local indigent defense cost increases; and
- 2) Submit a report by December 1, 2018 detailing the effectiveness of cost containment measures implemented by counties and proposing additional measures to reduce county operating costs.

This report answers the second charge.

### Organization of the Report

Part I provides the context for understanding why additional investments in indigent defense were necessary. Chapter 1 documents the urgent need for reform that placed jurisdictions at significant risk of litigation prior to the 2001 passage of the Fair Defense Act (FDA). Chapter 2 describes the extent of change required by counties to meet the new standards established by the FDA. Reforms were costly in their own right, and also increased the number of indigent cases paid as access to counsel expanded. The Texas Indigent Defense Commission was created to promote improvements through standards, oversight, and grant funds, while counties maintained primary responsibility for planning and financing improvements needed make to local delivery systems compliant with the new law.

Part II analyzes the four main cost drivers responsible for the rise in indigent defense expenditures since passage of the Fair Defense Act of 2001. Chapter 3 assesses the impact of inflation on historical comparisons of indigent defense spending. Chapter 4 examines how growth in case volume was primarily responsible for increased spending from 2003 to 2010, while Chapter 5 explores how growth in the number of costly felonies assigned to attorneys drove spending from 2010 to 2017. Chapter 6 isolates the cost impact of new quality-oriented programs undertaken by counties seeking to close the "Sixth Amendment gap" by rectifying systemic deficiencies in constitutionally required indigent defense representation.

Part III describes the effectiveness of cost containment measures being implemented by counties with TIDC grant funds and proposes additional measures designed to limit growth in local costs. To date, through program-specific grants, TIDC has prioritized six areas of investment in innovations: smart technology, video-teleconferencing, forensic testing, mental health defenders, death penalty representation, and pretrial risk assessment. These system improvements and evidence of their cost efficiency, are reviewed in Chapter 7. Chapter 8 explores the Commission's vision to sustain momentum toward constitutionally compliant and fiscally-responsible indigent defense into the future.

Part IV stands alone, summarizing high-level conclusions from this report. First, considering the historically minimal investment in indigent defense and the accompanying constitutional deficiencies, new spending has been inevitable to fulfill the Sixth Amendment guarantee of effective assistance of

counsel. However, this study finds that, after backing out effects of uncontrollable costs – inflation and case composition – the rate of growth in controllable new spending for quality improvements since 2010 is just 1.9%.<sup>1</sup>

Second, the Texas Indigent Defense Commission has made strides toward increasing the quality of indigent defense statewide, all while pursuing fiscally-responsible investments in local county jurisdictions.

Finally, although Texas has taken its obligations to provide reasonably effective indigent defense seriously, it still lags behind peer states. Local county jurisdictions shoulder nearly 87% of the financial responsibility for indigent defense, and sustained investment is needed to stay the course toward full compliance with the FDA and the US Constitution.

Progress is being made toward reform of Texas' indigent defense system while limiting financial burdens on county jurisdictions – but much work remains. With state funding near the lowest in the nation, and with county spending constrained by budget pressures and limits on property tax revenue, progress will be slow. TIDC has invested in better and more efficient practices that enhance accountability, transparency and quality; continued progress toward a system that ensures fair defense to all citizens in compliance with constitutional requirements is likely to be proportional to future state investment.

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<sup>1</sup> See Part II: Chapter 4, “Changing Case Composition as a Contributor to Indigent Defense Spending.”

**PART I**  
Systemic Deficiencies  
Requiring Increased Investments



## 1. Why Texas Increased Indigent Defense Investments

Though Texas statutes and the Constitution of the United States have endorsed the appointment of counsel to poor defendants, conformance in practice across jurisdictions has been uneven historically. In 2001, after reports by the media, advocates, and researchers revealed an underperforming public defense delivery system vulnerable to legal challenge, Texas lawmakers decided to introduce new standards and oversight to reform indigent defense practices. A review of the evolution of indigent defense policy in Texas demonstrates the urgency, importance, and necessity for these changes and the increased investment that accompanied them.

### Indigent Defense in Texas, a Brief History

When the 1963 US Supreme Court case of *Gideon v. Wainwright*<sup>2</sup> affirmed the right to the assistance of counsel for indigent defendants, Texas already had a long-standing practice of appointing counsel in felony cases.<sup>3</sup> The right to counsel has been acknowledged in every Texas Constitution since Texas became a Republic in 1836. However, the state delegated responsibility to provide and pay for these services to counties, which funded them through local property taxes. Lacking any investment of state funding and with no means of oversight to hold jurisdictions accountable, the delivery of indigent defense varied widely across the State's 254 counties.

By 2000, separate studies by the State Bar of Texas, the Texas Appleseed Fair Defense Project, and the Texas Defender Service reached the common conclusion that the state was facing a crisis in indigent defense that required an immediate response.<sup>4</sup> Court cases and media reports, for example, featured instances of malpractice in which defense attorneys failed to consult with their client or interview witnesses, slept through trial, or delayed reading trial transcripts in time to prepare a meaningful appeal.<sup>5</sup> Additional evidence gathered through hundreds of surveys and interviews with judges, prosecutors, and defense attorneys<sup>6</sup> revealed Texas had effectively defaulted on its constitutional

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<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> As early as 1857, the Texas Code of Criminal Procedure provided, "(w)hen the defendant is brought into Court, for the purpose of being arraigned, if it appears that he has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him." Acts of June 1, 1959, 56th Leg., R.S., Ch. 484, § 1; John F. Onion Jr., "A Texas Judge Looks at the Right to Counsel," *Tex. B.J.*, 28, 357 (1965); Sharon Keller and Jim Bethke, "Justice for All," *Texas Bar Journal*, 76, no. 3 (Spring 2013): 189-190.

<sup>4</sup> Texas Appleseed Fair Defense Project, *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas*, December 2000; Allan Butcher and Michael Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas*, September 2000; Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty*, October 2000.

<sup>5</sup> *Ibid.* See also e.g., *Burdine v. Johnson*, 66 F.Supp.2d 854 (N.D. Tex. 1999); Howard Swindle and Dan Malone, "Judge Says Inmate Wrongly Convicted," *Dallas Morning News*, September 2000; Steve Mills, "Texas Case Highlights Defense Gap," *Chicago Tribune*, June 2000, p.1; New York Times, *Judge Frees Texas Inmate Whose Lawyer Slept at Trial*, March 2000; Dallas Morning News, *Man Freed After 13 Months in Jail*; New York Times, *Death Penalty in Texas Case is Overturned, Citing Lawyer*, August 31, 2000. See also, Editorial, "A Fair Chance for Criminal Defense," *Austin American-Statesman*, April 2001; Editorial, "A Legal Loophole: Texas Must Modernize Indigent Criminal Defense," *Houston Chronicle*, February 2001; Editorial, "Justice System Can be Fair," *Dallas Morning News*, February 2001; Editorial, "Justice for All: Texas Needs the Proposed Fair Defense Act," *El Paso Times*, February 2001; Editorial, "Justice for the Poor," *Forth Worth Star-Telegram*, January 2, 2001; "Judges Resolution Seeks Upgrade of Legal Defense for the Poor in Texas," *Fort Worth Star-Telegram*, September 2000; "The Cost of Poor Advice," *Time*, July 1999, p. 36.

<sup>6</sup> *Supra* note 4.

obligation to provide access to competent representation. Those studies found “a complete absence of uniformity in standards and quality of representation” in the counties studied, with “the absence of statutory requirements, or consistent standards, guidelines, or oversight...”<sup>7</sup> limiting access and diminishing the quality of representation in courts and counties statewide.

**Insufficient Access to Counsel.** Some widely observed practices effectively denied the right to counsel. For instance, procedures for requesting counsel were unclear and eligibility criteria were rarely objectively specified; the appointment decision was often left to the judge’s intuition. Individuals able to make bail might be deemed too well-off to qualify for a lawyer, or they might be sent out to “test the market” for affordable representation. Poor defendants – including those detained in jail – might be required to discuss a plea deal with the prosecutor before an attorney would be assigned. Additionally, without any standard for prompt appointment, defendants were commonly unrepresented during the crucial interval between arrest and indictment when evidence is fresh and most likely to produce a charge reduction or dismissal.

**Insufficient Quality of Counsel.** Lacking independence from the judiciary,<sup>8</sup> appointed attorneys too often defaulted on their duty to provide “competent” and “diligent” defense representation.<sup>9</sup> Judges often favored appointments to campaign donors with little consideration of qualifications. Low rates of pay discouraged experienced attorneys from taking appointments, while a small percentage of lawyers earned significant income from an excessive volume of cases. Moreover, attorneys taking substantial income from court appointments had incentives to act against the best interests of their own clients in order to please the court.<sup>10</sup> Investigator and expert witness services were rarely requested or were commonly capped by judges whose authorization was required.

**Insufficient Financial Investment.** Beyond these constitutional deficiencies, inadequate funding was a significant obstacle to effective assistance of counsel. A survey conducted by the Office of Court Administration found that FY 1999 per-capita spending on legal defense of the poor was \$4.65, just two-thirds of the funding available in similar states.<sup>11</sup> At the same time, just one percent of the overall budget was used for investigative services and expert witnesses. This level of funding proved insufficient to support constitutionally adequate defense services – a problem that persists in some jurisdictions to the present.

## **A System at Risk of Litigation**

These research reports compiled by well-respected academics, professional, and reform organizations offered a disturbing appraisal of Texas’ indigent defense system. Not only did they place Texas near the bottom nationally in terms of funding, access, and quality of indigent defense, but they also made the

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<sup>7</sup> *Supra* note 4, Texas Appleseed Fair Defense Project, pg. 43.

<sup>8</sup> The Fair Defense Act does not resolve the issue of judicial independence. Judges retain statutory authority to determine procedures for appointing counsel (See Article 26.04 (a), CCP) and to approve payments to court-appointed lawyers (See Article 26.05 (c), CCP).

<sup>9</sup> American Bar Association, “Model Rules of Professional Conduct,” last modified January 2016, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/).

<sup>10</sup> Attorneys were sometimes expected to assist courts by avoiding trials, limiting motions for investigators and experts, withholding evidentiary motions, or failing to shield defendants from fines and fees they cannot afford.

<sup>11</sup> *Supra* note 4, Texas Appleseed Fair Defense Project, pg. 14 & Appendix A.



state a prime target for costly and disruptive court actions similar to those causing systemic restructuring of other large-scale state systems: school finance,<sup>12</sup> foster care,<sup>13</sup> and prisons.<sup>14</sup> Such risks persist, recent innovations in litigation strategies are opening new avenues for holding states accountable in court for fulfilling Sixth Amendment responsibilities.<sup>15</sup>

Figure 1-1. Key Structural Indigent Defense Lawsuits<sup>17</sup>

Class action lawsuits based on objective failures such as excessive attorney caseloads, insufficient attorney compensation, a lack of attorney hiring or training standards, or the absence of an oversight mechanism are a fairly recent tool to gain injunctive relief and achieve broad-based reform of

<sup>13</sup> *TX- M.D. V. Abbott* (March 29, 2011); *M.D. v. Perry*, No. C-11-84 (S.D. Tex. June 2, 2015).

<sup>15</sup> Cara Drinan, "The Third Generation of Indigent Defense Litigation," *N.Y.U. Rev L & Soc. Change* 33, (2009): 427-478.

<sup>17</sup> Map reprinted with permission from Lauren Lucas, “Public Defense Litigation: An Overview,” *Indiana Law Review* 51, (2018): 89-109.

government operations (see Figure 1-1).<sup>18</sup> Performance benchmarks such as professional norms<sup>19</sup> and caseload standards<sup>20</sup> are also being developed to back these actions.

**Recent Targets of Litigation.** Using systemic strategies, lawsuits to effect large-scale change have been brought in at least 18 state courts.<sup>21</sup> In Michigan and New York, legal actions provided the impetus for significant and costly restructuring of entire indigent defense delivery systems.<sup>22</sup> Litigation in Florida, Kentucky, Louisiana, Missouri, and Tennessee challenged public defense caseloads.

Some Texas counties have also already been sued. The landmark Supreme Court case *Rothgery v. Gillespie County*, which originated in Texas, established that the right to counsel attaches when a criminal defendant first appears before a judicial officer even if charges have not been filed.<sup>23</sup> A 2006 class action case, *Heckman, et al., v. Williamson County*,<sup>24</sup> settled out of court, resulted in system changes to address allegations that requests for counsel were intentionally discouraged, delayed, or denied. Other legal actions related to pretrial bond access for indigent defendants are currently pending in three major jurisdictions: Dallas County, Galveston County, and Harris County.

The State of Texas has thus far avoided similar legal challenges, in part because, when confronted with facts about system failures, the 77<sup>th</sup> Legislature responded by codifying new quality standards, establishing state oversight mechanisms, and appropriating grant funds to help counties fulfill their Sixth Amendment duty to indigent defendants.<sup>25</sup> However, many aspects of the system could still be vulnerable to potential legal challenge.<sup>26</sup> Sixth Amendment challenges are finding greater success than ever before in state court; if progress stalls, Texas could follow Michigan and New York with comprehensive reform imposed on the terms of the court.

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<sup>18</sup> Michael Waterstone, “A New Vision of Public Enforcement,” *Minn. L. Rev.* 92, (2007): 434-497. See also John C. Jeffries, Pamela S. Karlan, Peter W. Low, and George A. Rutherglen, “Civil Rights Actions: Enforcing the Constitution,” *Foundation Press* 848 (2000).

<sup>19</sup> See American Bar Association, “Criminal Justice Standards for the Defense Function,” last modified June 16, 2016, [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition-TableofContents.html](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html); American Bar Association, “Ten Principles of a Public Defense Delivery System,” February 2002; American Bar Association, “Eight Guidelines of Public Defense Related to Excessive Workloads,” August 2009. See also, National Legal Aid & Defender Association, “Performance Guidelines for Criminal Defense Representation,” last modified January 2016, <http://www.nlada.org/defender-standards/performance-guidelines>; National Legal Aid & Defender Association, “Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,” Last modified January 2017, <http://www.nlada.org/defender-standards/guidelines-governmental-contracts>; State Bar of Texas, “Performance Guidelines for Non-Capital Criminal Defense Representation,” January 2011.

<sup>20</sup> Dottie Carmichael, Austin Clemens, Heather Caspers, Miner Marchbanks, III, Steve Wood, “Guidelines for Indigent Defense Caseloads,” A Report for the Texas Indigent Defense Commission, January 2015.

<sup>21</sup> These include California, Colorado, Connecticut, Georgia, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New York, Pennsylvania, South Carolina, Tennessee, Utah, and Washington.

<sup>22</sup> *Hurrell-Harring v. State*, No. 8866-07; *Duncan v. State*, No. 07-000242-CZ.

<sup>23</sup> *Heckman v. Williamson County*, 369 S.W.3d 137 (Tex.2012); *Rothgery v. Gillespie County*, 554 US 191 (2008).

<sup>24</sup> *Ibid.*

<sup>25</sup> See Chapter 2.

<sup>26</sup> Additional lawsuits have been filed focusing on bail issues and fines and fees. See National Association of Public Defense. “Public Defense Litigation,” last modified January 2018, <https://www.nacdl.org/pdlitigation/>

## **Conclusion**

Though the Texas Constitution included a right to counsel for more than 160 years, statewide provisions ensuring that the indigent accused had consistent access to meaningful legal representation was absent until 2000. Counties were first required by law to adopt standards or report indigent defense practices in 2001. The Legislature's passage of the Fair Defense Act has led to increased investments necessary to implement important improvements in indigent defense. These steps may have staved off legal action against the state. However, practices in many jurisdictions still do not fully guarantee Sixth Amendment rights, and continued progress toward reform is key to avoiding a legal challenge. The next chapter considers major provisions of the law guiding indigent defense policy and illustrates the ways system changes have impacted county spending obligations over the past 18 years.

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## 2. The Texas Fair Defense Act

In the face of mounting evidence that the old system was constitutionally deficient, lawmakers rewrote Texas law regarding the implementation and financing of indigent defense in 2001. The Fair Defense Act (FDA) required most local jurisdictions to change practices in order to meet constitutional requirements. For the first time, the State endeavored to provide oversight and limited financial support to improve indigent defense services. But local jurisdictions have borne most of the cost; and, because few counties had any significant infrastructure on which to build, these system upgrades have been a major strain on county budgets. This chapter reviews how the requirements introduced by the FDA led to increased investments in indigent defense and the role of TIDC to help Texas counties find innovative, feasible, and efficient ways to comply.

### County Reforms Required under the Fair Defense Act

The Texas Fair Defense Act (FDA) of 2001 set standards for improving the quality of indigent defense, while leaving counties with a great deal of discretion to determine how they will be met. Specifically, the Act required jurisdictions to adopt procedures allowing for:

- Prompt magistration proceedings providing for a clear opportunity to request counsel shortly after arrest
- Standardized, locally-defined criteria of indigence
- Minimum qualifications required of court-appointed attorneys
- Prompt appointment of counsel
- Fair, neutral, and non-discriminatory attorney selection process
- Judges must adopt local Indigent Defense Plan, including schedule of fees and payment procedures for appointed attorneys and detailing procedures for accessing counsel., and
- Creation of TIDC to monitor compliance and promote improvement through technical assistance and funding

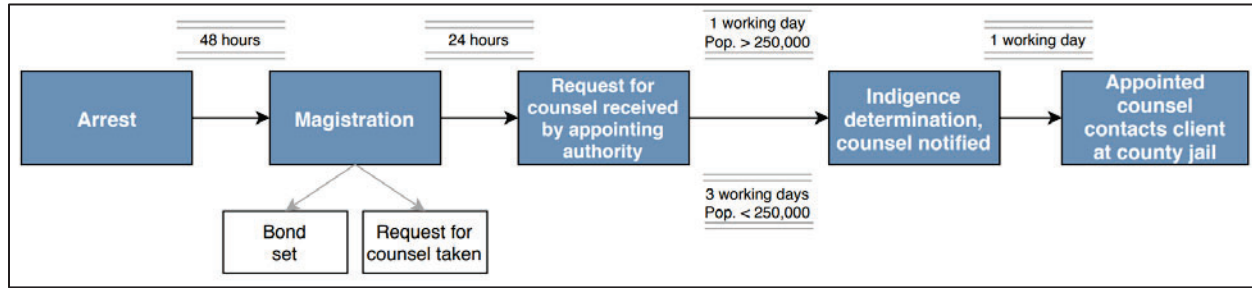
To provide transparency regarding county delivery systems, jurisdiction were also required to adopt and post biennial written procedures describing the prompt and fair appointment of counsel. Indigent Defense Plans, submitted every two years, are reviewed by TIDC for compliance with major provisions of the Act:<sup>27</sup>

Cost Impacts of Statutory Standards and Timelines. Though every jurisdiction had flexibility to craft a local response, non-trivial changes were often required to comply with the law. Before the FDA, requests for counsel had rarely been taken within 48 hours of arrest. In addition, the use of standardized eligibility criteria with a determination required in 1 to 3 days of receiving the request meant counties with previously low court appointment rates experienced an immense financial and systemic shock. The number of defendants receiving lawyers at county expense rose sharply, jarring county budgets. Systemic restructuring to accommodate these changes required significant new spending in nearly every domain of criminal case processing (see Figure 2-1).

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<sup>27</sup> Texas Indigent Defense Commission, “2017 Biennial Indigent Defense Countywide Plan Instructions,” last modified September 14, 2017. County plans available at <http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx>

Figure 2-1. Statutory Timelines Required by the Fair Defense Act



**Indigent Defense System Funding.** In addition to developing a plan to meet the requirements of the FDA, counties were asked to find ways to fund the programs they proposed. Prior to the law, counties carried the full burden for indigent defense; since the Act’s passage, little has changed. Even with state funding, the jurisdiction share has averaged 87% since FY 2003; in FY 2017, local counties spent \$234.5 million.

Moreover, beyond the strain on current budgets, the ability to raise new revenue through property taxes is limited both politically and by law.<sup>28</sup> As indigent defense budgets compete with other spending priorities – schools, criminal justice agencies, and infrastructure, for example – local leaders are concerned that, after nearly two decades of trying, they may be unable to close the “Sixth Amendment gap” alone.<sup>29</sup> In an appeal for help, all 254 counties have adopted resolutions through the County Judges and Commissioners Association of Texas requesting full state funding for indigent defense; further, five of the largest counties have also passed independent resolutions seeking assistance to address this largely unfunded mandate.<sup>30</sup>

As these examples illustrate, change after the Fair Defense Act has been challenging and costly; yet it is unavoidable for counties in order to achieve the goal of delivering constitutionally meaningful representation. Compliance with Sixth Amendment obligations necessarily involves spending; new and better indigent defense can only be created with investment.<sup>31</sup>

<sup>28</sup> A number of recent bills introduced in the state legislature have attempted reduce the rollback rate (i.e., the figure by which Texas city, county, school, and special districts can raise property taxes annually without a voter petition) from the current 8% to 6% or lower. See Anna Tinsley, “Here’s how Governor Abbott would Limit Property Tax Increases,” *Star-Telegram*, last modified January 17, 2018, <https://www.star-telegram.com/news/politics-government/election/article195238049.html>. Similarly, Governor Greg Abbot has recommended a property tax revenue growth cap of 2.5% per year. Texans for Greg Abbott 2018 Property Tax Reform Rollout, *Bicentennial Blueprint Framing Our Future*, 2018.

<sup>29</sup> See Appendix B for data that places indigent defense in the context of other spending categories.

<sup>30</sup> Bexar, Dallas, El Paso, Harris, Travis; See Texas Indigent Defense Commission and Texas Judicial Council, “Legislative Appropriations Request for Fiscal Years 2018 and 2019,” September 12, 2016. Texas Association of Counties, “Legislative Brief: Indigent Defense,” last modified August 2018, <https://www.county.org/Legislative/County-Legislative-Issues/Indigent-Defense>; Texas Association of Counties, “Contact Senate Finance Members in Support of Additional Indigent Defense Funds; Hearing Date Change,” last modified February 3, 2017, <https://www.county.org/News/Contact-Senate-Finance-Members-in-Support-of-Addit>

<sup>31</sup> See Appendix C for information about how indigent defense in Texas compares to other states nationally.

## Texas Indigent Defense Commission Oversight

The Fair Defense Act created the Texas Task Force on Indigent Defense<sup>32</sup> (TFID) as a permanent standing committee of the Texas Judicial Council to administer and supervise the technical provisions and intent of the law. In 2011 the committee was reconstituted as the Texas Indigent Defense Commission (TIDC). The Commission leads progress in the state's 254 independent counties in a variety of ways:

- Indigent Defense System Oversight -- Through fiscal and policy monitoring, TIDC staff ensure that the requirements of the FDA are implemented with fidelity.<sup>33</sup>
- Grant Funds – In addition to administering formula funds, discretionary grants are central to the Commission's strategies for leading counties toward effective and efficient indigent defense practices.
- Stakeholder Training and Education – TIDC is the leading resource to inform stakeholders at all levels of rights and responsibilities under the Sixth Amendment, and to help find ways to meet these obligations.<sup>34</sup>
- Data Collection and Reporting – Public data systems created by the Commission provide transparency about indigent defense implementation.<sup>35</sup>

Discretionary Grants to Lead FDA Compliance. The Fair Defense Act allocated the first state contribution toward the cost of indigent defense: \$11.6 million in 2003, increasing to \$38.3 million in FY 2017. The Texas Indigent Defense Commission distributes these resources through two grant programs. Formula grants are determined by population and indigent defense spending are awarded annually to all qualifying counties. Formula funds covered a relatively small portion – just 13% of all indigent defense spending in 2017.<sup>36</sup> Discretionary grants require counties to apply and be approved for short-term<sup>37</sup> program funding for the purpose of establishing practices known to improve quality and increase compliance with the FDA.<sup>38</sup> As such, this funding stream is a primary vehicle for cost-effective indigent defense system improvement.

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<sup>32</sup> See Texas Indigent Defense Commission, "Fair Defense Law: A Primer for Texas County Officials," February 2017.

<sup>33</sup> Counties are selected for monitoring based on objective risk scores and geography or county officials may request a review. Local practices are assessed for compliance with the six core requirements of the FDA. More information regarding TIDC's Policy Monitoring Program can be found online at:

<http://tidc.texas.gov/monitoring/policy-monitoring.aspx>; Policy Monitoring Administrative Rules with Commentary: <http://tidc.texas.gov/media/40462/policymonitoringrulesadopted2015.pdf>.

<sup>34</sup> Original research and reports help disseminate an array of strategies to promote cost-effective and quality representation. More than 1,000 judges, county officials, and attorneys are trained by TIDC staff each year. Model forms make it possible for jurisdictions to easily adopt pre-approved indigent case processes that conform to professional and legal standards. Model forms are available at: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.

<sup>35</sup> See <http://tidc.tamu.edu/Public.Net/>

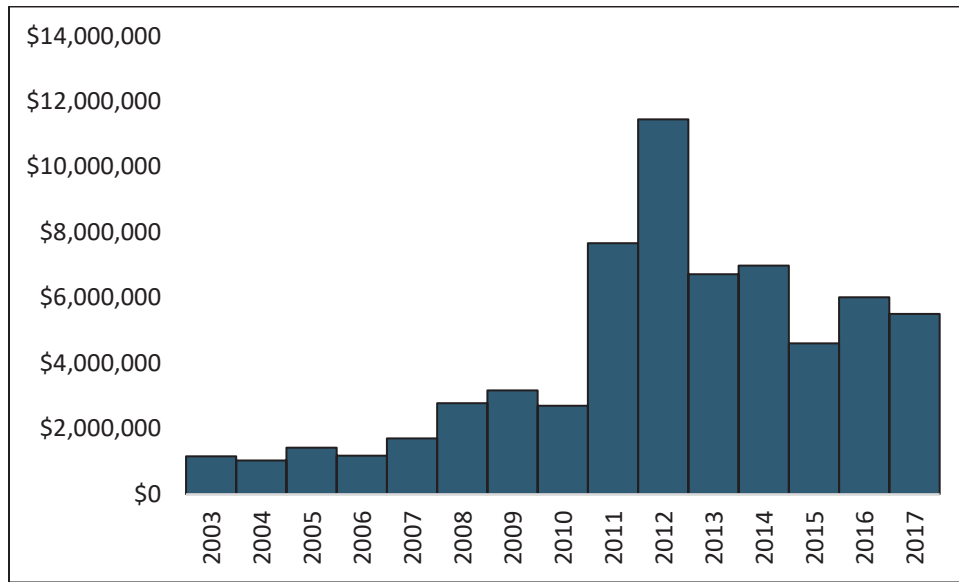
<sup>36</sup> For more information on TIDC's Formula Grants Program, see: <http://tidc.texas.gov/grants-reporting/formula.aspx>. For more on discretionary grants, see: <http://tidc.texas.gov/grantsreporting/discretionary.aspx>.

<sup>37</sup> Most discretionary grants to counties have a declining state contribution of 20% per year over a period of four years. Counties carry most of the financial burden thereafter. Sustainability are also discretionary grant funding.

<sup>38</sup> Discretionary grant funds may also be approved for jurisdictions seeking financial relief from extraordinary indigent defense costs. In FY 2017, 0.40% of all discretionary grant funds were allocated for this purpose.



Figure 2-2. Discretionary Grant Funding Awarded by State, FY 2003-2017



Note: Monies are reported in nominal dollar amounts, unadjusted for inflation. See “Discretionary Grant Funds Disbursed” by TIDC, available from <https://tidc.tamu.edu/public.net/Reports/SummaryReport.aspx>.

Spending for discretionary grants (Figure 2-2) has averaged about \$7 million per year since a higher baseline was established in 2011. Projects are selected both to elevate the standard of quality of indigent defense, and to help manage financial burden. In return, many of the model practices for efficient service delivery in use today originated from discretionary grant support.

For example, indigent defense coordinators and technology solutions first introduced by discretionary grants in some select counties now expedite the appointment process in jurisdictions around the state. Elsewhere, specialty defenders have proliferated throughout Texas. These attorneys help mitigate the financial impact of the highest-cost cases involving defendants facing the death penalty or people with mental illness who often cycle through county criminal justice systems.<sup>39</sup>

## Conclusion

The Fair Defense Act of 2001 enacted a framework for indigent defense system reform and placed responsibility for change primarily upon the shoulders of Texas counties. Although the FDA yielded discretion to counties to determine how local systems might best be changed, in many cases, major system re-design was required to fulfill statutory timeframes; budgets were additionally shocked by soaring appointment rates, particularly in counties that previously limited access to counsel. Constitutional deficits were substantial and necessary improvements have been costly.

<sup>39</sup> See Part III, Chapter 7 “Cost Containment Grants and Effectiveness.”



**PART II**  
An Analysis of  
Indigent Defense Cost Drivers



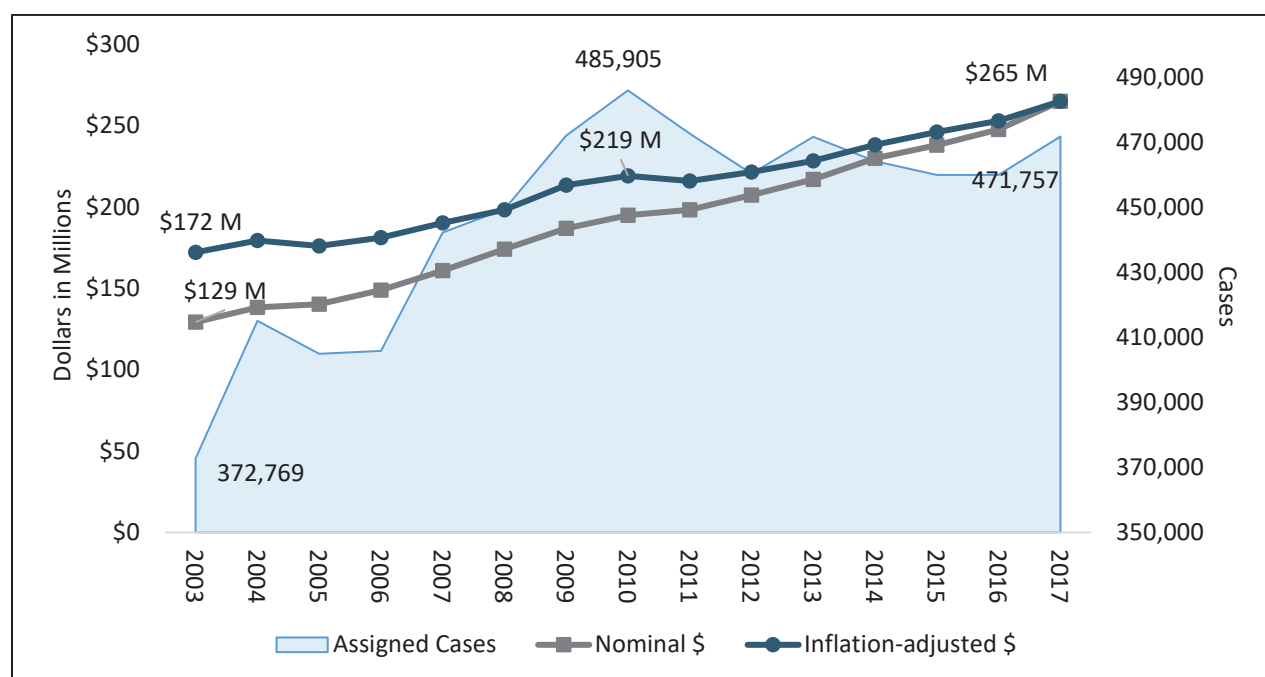
### 3. Inflation as a Contributor to Indigent Defense Spending

Charged with the responsibility to identify and fund the changes needed to align indigent defense systems with the law, jurisdictions have continually sought out cost-effective approaches. The Texas Indigent Defense Commission (TIDC) has promoted and funded county-level programs that couple cost-saving features with solutions that improve defense services; efficiency measures have been implemented alongside fundamental reforms. Before exploring specific strategies to mitigate the growth of these costs, however, it is helpful to quantify the scope of spending increases to date, along with the reasons expenditures have been on the rise.

#### Impact of Inflation on Indigent Defense Spending

Considering the extent of early deficits separating the practice of public defense from constitutional ideals, as well as extremely low spending levels in the 2001 baseline year, it is not surprising that indigent defense costs increased after the FDA became law. Indeed, Figure 3-1 shows nominal spending has risen more than 100% since 2003 from \$129 million to \$265 million in 2017.<sup>40</sup> After considering inflation, however, real growth is revealed to be substantially more modest. With inflation-adjusted baseline spending closer to \$170 million in 2017 dollars, the absolute increase from 2003 to 2017 was just 56%.

Figure 3-1. Indigent Defense Spending and Cases in Texas, FY 2003–2017



Notes (costs): Estimates are adjusted to 2017 \$USD and are taken from the TIDC annual Indigent Defense Expenditure Report (IDER).

<sup>40</sup> These monies comprise the “Total Court and Administration Expenditures” listed on the Combined Statewide Indigent Defense Expenditure Report (IDER).

To put this in perspective, over a period of fourteen years, indigent defense spending has risen just 3.9% per year on average. A 3.9% rate of increase compares favorably with that observed for other county government functions.<sup>41</sup> Moreover, despite this upward trajectory, the rate of increase has not been sufficient to put Texas' indigent defense spending on par with other states.<sup>42</sup> From this viewpoint, real spending growth does not appear excessive.

## **Conclusion**

Although inflation-adjusted costs of indigent defense have risen from \$172 million in 2003 to \$265 million in 2017, this growth equates to just 3.9% in new spending each year. This moderate rate of increase is perhaps reasonable and necessary to bring 254 counties into compliance with professional and constitutional standards assuring the right to counsel. Inflation cannot, however, explain all growth in expenditures. Subsequent chapters explore other contributing factors.

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<sup>41</sup> See Appendix B, "Spending Comparisons Among Peer States to Texas."

<sup>42</sup> See Appendix C, "Indigent Defense Relative to Other County Spending."

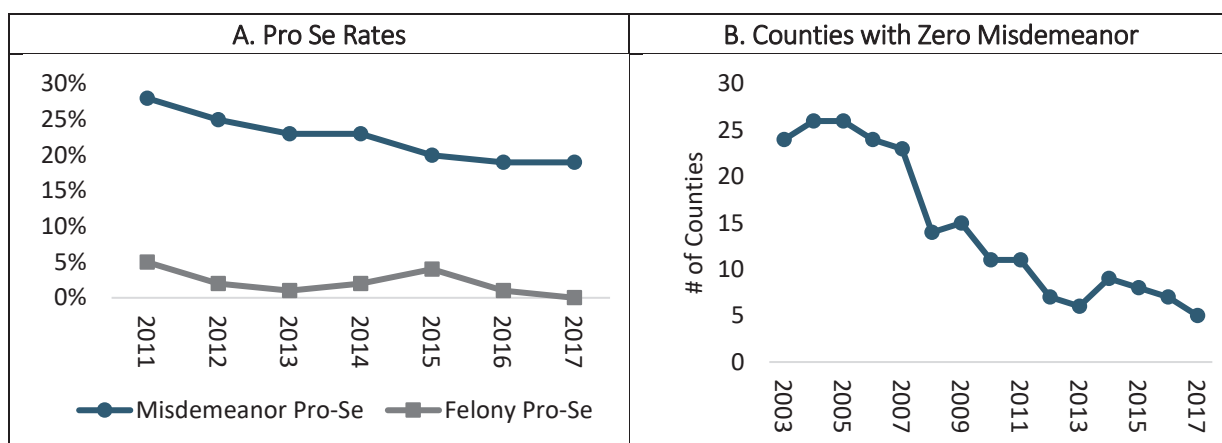
## 4. Access to Counsel as a Contributor to Indigent Defense Spending

Following implementation of the Fair Defense Act, new eligibility standards and appointment timelines pushed counties to assign court-appointed lawyers to people who, in the past, would have been denied representation. Consequently, rising attorney appointment rates comprise a sizeable portion of annual growth in indigent defense spending since 2003.

### 2003-2010: Increased Access to Constitutionally Required Court Appointments

The FDA expressly disallowed a number of long-standing and widely prevalent practices that suppressed indigent defendants' access to counsel.<sup>43</sup> For the first time, individuals applying for a court-appointed attorney were evaluated by standardized eligibility criteria, and mandatory appointment timelines eliminated delays in attorney access.<sup>44</sup> Complementary legislation passed in 2007 established new procedures for waiving the right to counsel, making it more difficult for courts to press defendants into uncounseled pleas.<sup>45</sup>

Figure 4-1. Access to Counsel



Note: Estimates calculated from data reported by Texas Office of Court Administration.

The combined effect of these changes has been significant. Since 2011, the number of misdemeanor defendants left to represent themselves in court has declined by nearly 20 percentage points; pro se felony cases have been virtually eliminated (Figure 4-1a). Similarly, in 2003, 24 counties did not appoint a lawyer in even one misdemeanor case; by 2017 only 5 jurisdictions were so distinguished (Figure 4-1b).

<sup>43</sup> See Chapter 1.

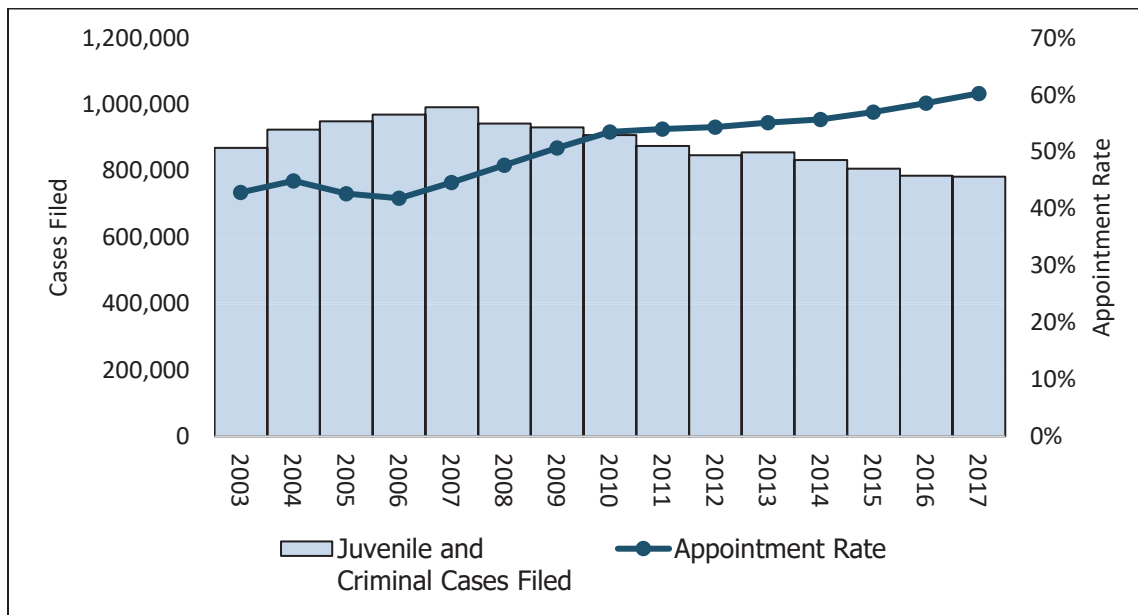
<sup>44</sup> Texas Code of Criminal Procedure 14.06 (a); CCP 1.051 (a) (c) and (j); CCP 15.17; CCP 26.04. Whereas prior to the Fair Defense Act a lawyer might not be assigned for weeks or months, after the FDA every eligible defendant should have met with a lawyer within 5 to 7 working days of arrest depending on county size.

<sup>45</sup> Texas CCP 1.051(g).

Conversely, Figure 4-2 shows the number of cases defended by court-appointed lawyers increased more than 30% in just seven years, from roughly 373,000 cases in 2003 to over 485,000 cases in 2010.<sup>46</sup> The 3.9% annual cost increase during the early years of the FDA, then, seems to be explained by the number of new people who began receiving the legal representation that is their constitutional right.

After 2010, however, the linear increase in case volume ended (Figure 4-2). New court appointments peaked and then stabilized, fluctuating in a 15,000-case range through 2017 (i.e., between 460,000 and 485,000 cases). This stable number of indigent cases in the numerator, combined with declining prosecutions in the denominator yielded a steady and sizeable rise in the *rate* of court appointments as a share of all criminal cases (Figure 4-2). The statewide indigent appointment rate rose from 45% in 2003 to more than 60% in 2017. Thus, the number of criminal cases filed fell by about 10 percentage points from 2003 to 2017 (mostly in misdemeanors), while demands on the indigent defense system rose nearly 17 percentage points in the same timeframe. The difference was directly linked to improving constitutional standards under the FDA.

Figure 4-2. Appointment Rates in Texas, FY 2003–2017



Note: The appointment rate is calculated by dividing the number of court-appointed cases by the total number of cases filed.

## Conclusion

Immediately after the Fair Defense Act, as systems that had denied access to counsel were dismantled, appointment rates began to rise. In the seven years after 2003, a 30% increase in court-appointed cases was accompanied by a 27% total increase in indigent defense costs. Importantly, the new spending was not excessive; it was a remedial response to unmet demand. Counties seeking to comply with Texas law and the US Constitution could adapt to, but not avoid the effects on local budgets.

<sup>46</sup> The increase in court-appointments cannot be explained by a rise in criminal cases attributable to growth in populations or criminality as the number of cases added to court dockets increased just 4% during the same seven-year interval (Figure 4-2).

## 5. Changing Case Composition as a Contributor to Indigent Defense Spending

Though rising attorney appointment rates explained indigent defense cost increases prior to 2010, a new cost driver emerged after case growth stabilized in the aggregate: An increasing share of felony cases. Thus, as spending continued to increase in a mostly-linear trajectory, the underlying cost drivers evolved. Similar to appointment rates, jurisdictions could try to adapt to, but could not control this trend.

### 2010-2017: Changing Case Composition

In the seven years immediately following the passage of the FDA, rising case volume was the primary factor driving up indigent defense spending. However, Figure 3-1 also shows costs continued to grow even after indigent appointments stabilized in 2010. With case numbers no longer pushing costs upward, ongoing cost escalation between 2010 and 2017 is attributable to two new and parallel trends: uncontrollable changes in the types of cases receiving court appointments and quality investments generating higher costs per case.

Table 5-1. Composition of Statewide Indigent Defense Caseload by Case Type in FY2010 and FY2017

	Share of Cases				Cost per Case		
	2010 (n=474,654)	2017 (n= 469,054)	% Difference		2010	2017	% Difference
All Felony	41%	45%	+4% points		\$721	\$773	+ 1%
Misdemeanor	48%	46%	-2% points		\$207	\$266	+ 29%
Juvenile	12%	8%	-4% points		\$291	\$443	+ 52%

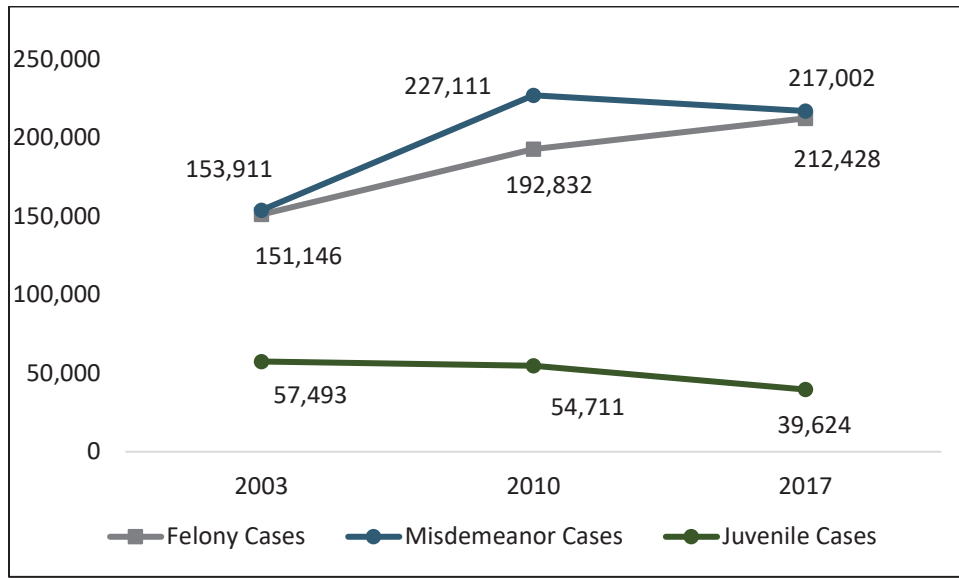
Notes: Appellate cases are excluded from analysis. Because appeals comprise less than 1% of all cases yet are the most costly case type to defend,<sup>47</sup> they exert a disproportionate impact distorting overall case and cost trends.

Movement in these independent cost dimensions over time is depicted in Table 5-1 and Figure 5-1. Although the proportion of lower cost misdemeanor and juvenile cases fell after 2010, the cost-impacts of these declines in volume were offset by a significant rise in cost per case. Defense of each misdemeanor cost 29% more in 2017 than in 2010, and the cost of juvenile counsel rose by 52%. Among felonies, however, the opposite was true: Per case spending remained essentially unchanged over the seven-year interval, while felonies rose by 5 percentage points as a share of all court appointments.<sup>48</sup>

<sup>47</sup> In 2010, the average cost of appeals was \$2,474 per case for 3,418 cases. In 2017, the average cost of appeals was \$4,001 per case for 2,644 cases.

<sup>48</sup> Spending escalation would have been considerably steeper if the per-case cost of felony appointments had risen at the same 3% annual rate as misdemeanors (Table 5-1). Further investigation may be needed to examine why new investment in this case type has not changed over seven years. Cost savings attained through underinvestment or neglect risk diminishing the quality, effectiveness, and conformance with constitutional and professional standards of indigent representation.

Figure 5-1. Felony, Misdemeanor, and Juvenile Case Volume Trends



Notes: Source of data is <https://tidc.tamu.edu/public.net/default.aspx>

The separate effects of these competing trends are sorted out in Table 5-2.<sup>49</sup> More than one-quarter of expenditure growth over the past seven years – \$10.1 million – was entirely the result of changing case composition, particularly the rising share of higher-cost felony cases. The number and mix of cases filed is determined by prosecutors, and it is difficult to imagine how court appointments might be reduced without compromising the right to counsel. The remaining \$28 million in new spending since 2010 is the portion attributable to rising per case costs associated with new investments in implementing quality-managed indigent defense systems.<sup>50</sup>

<sup>49</sup> See Appendix A for a detailed description of the methods used to allocate spending to case composition and cost per case.

<sup>50</sup> See Chapter 6, “Quality Improvement as a Contributor to Indigent Defense Spending,” for a discussion of quality-related spending.



Table 5-2. Growth in Spending Attributable to Changes in Case Composition and Cost Per-Case, FY2010 to 2017 (*Inflation-Adjusted Dollars*)

	Portion of Spending Growth Due To Change In:				Total 2010-2017
	Case Composition		Cost per Case		Growth in Spending
<b>All Felonies</b>	\$15,944,802	+	\$9,385,520	=	\$25,330,322
<b>Misdemeanor</b>	-\$1,557,810	+	\$12,339,369	=	\$10,781,559
<b>Juvenile</b>	-\$4,233,804	+	\$5,912,176	=	\$1,678,372
<b>Total</b>	\$10,153,189	+	\$27,637,064	=	\$37,790,253
<b>Percent</b>	27%	+	73%	=	100%

Notes: Appellate cases are excluded from analysis. Because appeals comprise less than 1% of all cases yet are the most costly case type to defend,<sup>51</sup> they exert a disproportionate impact distorting overall case and cost trends.

After quantifying the effect of felony case share on total spending, the two major uncontrollable costs – inflation and case composition – can be isolated to more precisely assess growth in controllable case costs. Knowing the controllable growth rate can help stakeholders assess the possible scope of cost containment. Results are presented in Table 5-3. After backing out effects of the uncontrollable costs of case mix and inflation, the controllable new spending for quality improvements since 2010 declines from 2.7% (accounting for inflation alone) to 1.9% (accounting for both inflation and case mix). Without accounting for either of these factors, the nominal (unadjusted) annual growth rate would be 4.8% over the same seven-year period. Equally important, the 1.9% annual inflation- and case- adjusted increase is the amount directed toward improvements to indigent defense delivery systems.

Table 5-3. Annual Changes in Spending, FY 2010 to 2017

	Change between 2010 and 2017		
	Difference in spending 2010-2017	Increase in spending 2010-2017	Avg. annual increase in spending
<b>Nominal spending only</b>	\$60,057,553	33%	<b>4.8%</b>
<b>Inflation-adjusted spending only</b>	\$37,790,253	18%	<b>2.7%</b>
<b>Inflation- and case-adjusted spending</b>	\$27,637,064	13%	<b>1.9%</b>

Notes: See Appendix A for calculation method.

## Conclusion

After growth in new indigent defense cases stabilized in 2010, costs continued to rise an additional 21% over the next seven years. Not all of this increase was related to FDA compliance. Instead, slightly more than one-quarter of new spending after 2010 (27%) occurred because of changes in case composition –

<sup>51</sup> In 2010, the average cost of appeals was \$2,474 per case for 3,418 cases. In 2017, the average cost of appeals was \$4,001 per case for 2,644 cases.

chiefly a rise in felonies as a share of all court-appointed cases. As a consequence, as much as 27% of new indigent defense spending since 2010 was effectively beyond the ability of jurisdictions to contain.

The remaining 73% of new investment -- \$27.6 million expended over seven years -- reflects rising costs per indigent case. The next chapter will examine how these new monies were deployed to support county indigent defense systems and whether there are indications that slowed growth may be accomplished without undermining the requirements of the FDA.

## 6. Quality Improvement as a Contributor to Indigent Defense Spending

The Fair Defense Act does not just require Texas counties to address what has been called the “no body problem” by making sure indigent defendants have access to attorneys. The legislation is also designed to address the “warm body problem” whereby the accused have representation but, because of insufficient supervision, overwhelming caseloads, inadequate training and experience, or need for professional supports among other things, the appointed attorney fails to provide meaningful representation.

While remediating the “no body problem” requires *more* appointments, the “warm body problem” requires more meaningful representation that aligns defense services with professional quality standards. The preceding chapter has shown that the majority of new spending since 2010 has been directed toward improvements in defense quality.<sup>52</sup> This chapter explores why quality-managed systems are an appealing response to the demands of the FDA and how quality-directed expenditures on indigent defense cases are being allocated.

### Growth in Quality-Managed Indigent Defense Systems as a Response to the FDA

Many of the deficiencies in Texas indigent defense that motivated the legislature to pass the FDA result from a lack of oversight, accountability and transparency. Counties seeking to establish structurally robust systems capable of sustaining effective representation have increasingly turned to public defender offices (PDOs) or managed assigned counsel offices (MACs) as alternatives to the fragmented, case by case approach relied upon in most jurisdictions.<sup>53</sup>

When the Fair Defense Act passed in 2001, just 7 Texas counties had a locally operated defender office with dedicated responsibility for overseeing court-appointments. Since 2005, that number has risen to 39 (Figure 6-1). Twenty-nine new jurisdictions have created or joined PDOs and 3 have implemented MACs. Today indigent defendants in 8 of the state’s 10 largest jurisdictions<sup>54</sup> – containing nearly half of the state’s population (45%) – benefit from quality-managed offices in their home county – at least for some portion of cases. In addition, 180 smaller jurisdictions with populations below 300,000 are enrolled in the Regional Public Defender Office for Capital Cases (RPDO).<sup>55</sup>

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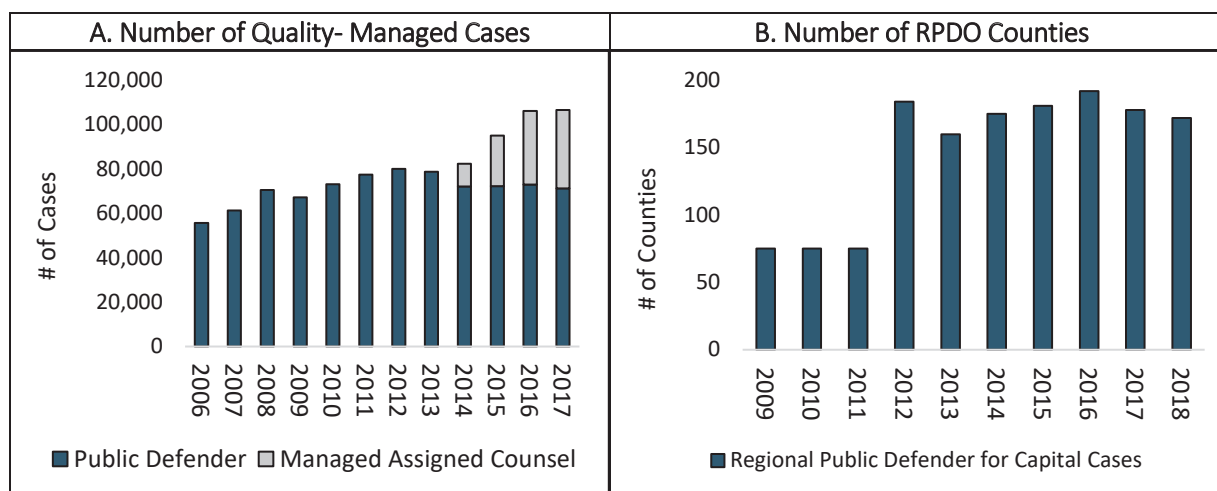
<sup>52</sup> See Chapter 5. The remaining roughly 30% of new spending is attributable to changing case composition chiefly resulting from rising share of high-cost felonies as a proportion of all court appointments.

<sup>53</sup> Texas Indigent Defense Commission, “Primer on Managed Assigned Counsel Programs,” September 2017. Under a public defender system, defense services are provided by an agency or organization under contract with a county. A public defender system still requires a secondary system for the appointment of counsel when there is a conflict. A managed assigned counsel office is similar to a public defender office except that the attorneys are private contractors rather than employees of the office or agency charged with providing defense services. Whereas a public defender attorney is paid a salary, MAC attorney vouchers are submitted to the MAC director who reviews and approves payment.

<sup>54</sup> Ordered by size, these are Harris County, Dallas County, Bexar County, Travis County, Collin County, El Paso County, Hidalgo County, and Fort Bend County.

<sup>55</sup> The Regional Public Defender Office for Capital Cases was established in 2009 to provide capital case representation counties with populations less than 300,000 in Texas’ 7<sup>th</sup> and 9<sup>th</sup> Administrative Judicial Regions. The program is now available to 238 jurisdictions that qualify on the basis of size.

Figure 6-1. Number of Cases and Counties Served by Quality-Managed Indigent Defense Systems



As the number of offices has grown, so has the number of defendants served. Figure 6-1A shows the volume of cases has approximately doubled from 55,715 in 2006 to 107,648 today. Moreover, since 2014, the share of cases represented by managed assigned counsel defenders has been growing. In 2017, nearly one-third of quality-managed cases were defended by a MAC attorney.

### Benefits of a Quality-Managed Office

Jurisdictions are drawn to invest in public defender or managed assigned counsel offices for a variety of reasons.

**Accountability.** Better oversight and assurances of a high service level are among the main reasons TIDC has featured PDOs and MACs as fiscally responsible strategies to elevate quality standards. When public defense is outsourced to private practitioners, stakeholders have few ways to monitor the quality of service provided. In quality-managed PDOs or MACs, on the other hand, attorneys are supervised and clear professional expectations are articulated, supported and enforced.

**Support.** Defense attorneys working in quality-managed offices are better supported than peers in solo practice. Administrative responsibilities like maintaining the office infrastructure or hiring and managing staff are handled through the office infrastructure so attorneys are freed to practice defense full-time without distraction.

PDO and MAC lawyers are also well-supported professionally. Supervisors provide mentorship, training, professional development, feedback, and performance reviews, all of which hold lawyers accountable while advancing skills. Public defender and managed assigned counsel attorneys can more easily remain on the leading edge of practice, benefitting clients with a higher level of service.

**Comprehensive Services.** When defenders are co-located in a specialized office, economies of scale make it feasible to provide comprehensive defense expertise to improve outcomes, especially in the most difficult and costly cases. Each of the state's 36 public defender offices has professional investigators on staff; many also have social workers, mental health professionals, mitigators, or immigration attorneys. Ready access to key expertise has been shown to help contain costs for jurisdictions. A study of the Wichita County Public Defender's Office found that because staff

investigators help attorneys assemble case facts more promptly than private assigned counsel in the same jurisdiction, charges were filed and disposed more quickly saving the county over \$200 per case as a result.<sup>56</sup>

**Better Case Outcomes.** When defense is quality-managed, better case outcomes result. The Wichita County public defender study, for instance, found people with a public defender were significantly less likely than those with private assigned counsel to have a guilty finding and more likely to have all charges dismissed.<sup>57</sup> Similarly, compared to statistically similar peers with other types of counsel, clients of the Dallas County Mental Health Public Defender Office were less likely to be found guilty and more likely to get a sentence of probation instead of jail time. Among the most serious and costly capital death cases, Texas RPDO public defenders get higher plea rates and fewer death sentences, saving years-long appeals that would otherwise cost counties and the state millions of dollars each.<sup>58</sup>

These trends have also been confirmed outside of Texas. A study in the federal appointment system found public defenders achieve sentences eight months shorter on average and cost taxpayers \$61 million less each year than private assigned lawyers.<sup>59</sup> A Philadelphia study found public defenders reduce client murder conviction rate by 19%, the probability of a life sentence by 62%, and overall time served in prison by 24%. Overall, the evidence suggests quality-managed indigent defense systems are more successful achieving case resolutions that serve justice, are better for defendants, and reduce costs of case processing and incarceration.<sup>60</sup>

**Administrative Specialization.** PDOs and MACs help streamline system-wide administration of indigent defense. With specialized capacity to administer court appointments located in the office, judges, court personnel, and county auditors are relieved of related duties. In quality-managed offices, administrators review and select qualified attorneys, assign cases, notify attorneys, resolve assignment conflicts, review attorney payment vouchers, track continuing legal education requirements, and handle attorney discipline when necessary. Furthermore, because PDOs and MACs disperse compensation for attorneys and experts, county auditors process significantly fewer individual payments. Centralizing the administration of defense functions also promotes independence from influence by the judiciary – a core tenet of fair defense.

## **Costs of Quality-Managed Defense**

Since 2010, standardized<sup>61</sup> per case expenses for non-public defenders have remained relatively constant while public defender case spending has risen 5% per year (Figure 6-2). Public defenders

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<sup>56</sup> Savings were attributed to in court processing, prosecution, and pretrial detention costs. Dottie Carmichael and Miner Marchbanks, III, "Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs," A Report to the Texas Indigent Defense Commission, October 2012.

<sup>57</sup> *Ibid.*

<sup>58</sup> Christy Hoppe, "Executions Cost Texas Millions," *The Dallas Morning News*, March 8, 1992; Richard C. Dieter, "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis," *Death Penalty Information Center*, October 2009.

<sup>59</sup> Radha Iyengar, "An Analysis of the Performance of Federal Indigent Defense Counsel," *National Bureau of Economic Research*, last modified June 2007, <http://www.nber.org/papers/w13187>

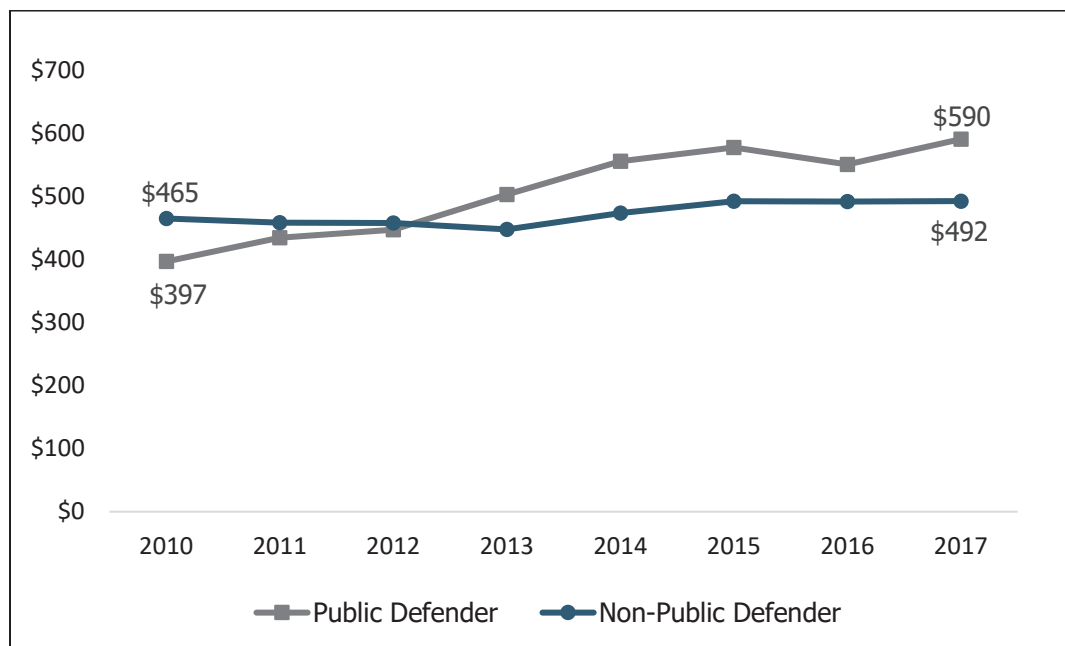
<sup>60</sup> James Anderson and Paul Heaton, "How Much Difference

Does the Lawyer Make: The Effect of Defense Counsel on Murder Case Outcomes," 122 *Yale L. J.* 154, 2012.

<sup>61</sup> Because the proportion of high- and low-cost case types differ between PD and NPD systems over time, in Figure 6-2, the 2017 NPD case distribution is uniformly applied to both public defender and non-public defender cases in

surpassed per case expenditures for other types of counsel in 2012 and have continued an upward trajectory since then. In 2017, controlling for case composition, public defender cases cost \$98 more than those defended by other types of lawyers.

Figure 6-2. Per-Case Spending for Public Defender and Non-Public Defender Cases Standardized 2017 to the Distribution of Non-Public Defender Cases (*Inflation-Adjusted Dollars*)



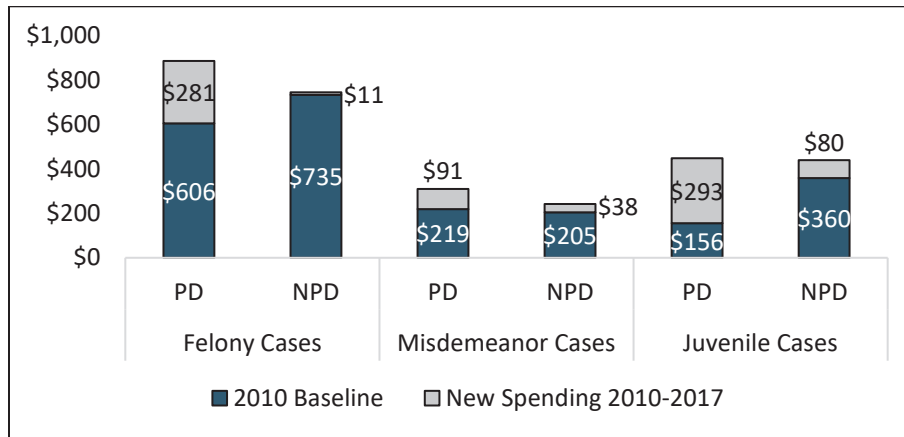
Notes: Because the proportion of high- and low-cost case types differ between public defender and non-public defender systems over time, the 2017 non-public defender case distribution is uniformly applied to cases in all years.

These systems offer more comprehensive, integrated, and efficient defense services than private assigned attorneys can ordinarily provide, but they also require greater initial spending.<sup>62</sup> Figure 6-3 illustrates that, as more public defender offices have opened, enhanced their operations, or added services in the past 7 years, per case spending has caught up with and surpassed cases of the same type defended by non-public defenders (NPDs).

all years. Actual values for the number of cases and costs are then used to compute the real cost per case for each case type. Hence, average case costs can be compared using a fixed case distribution: 47% felony, 45% misdemeanor, and 7% juvenile cases. Appeals which comprise less than 1% of cases are omitted from analysis.

<sup>62</sup> *Supra* note 56; See Ted Robbins, "Cutting Public Defenders Can Cost Federal Government More," last modified August 24, 2013, <https://www.npr.org/2013/08/24/214997385/sequestration-is-costly-in-public-defenders-offices>; Eve Brensike Primus, "Culture as a Structural Problem in Indigent Defense," 100 *MINN. L. REV.* 1769, 1790 & n.116, 2016; Michigan Indigent Defense Commission, "Delivery System Reform Models: Planning Improvements in Public Defense," Last modified December 2016, <http://michiganidc.gov/wp-content/uploads/2015/04/Delivery-System-Reform-Models-Final-Dec-2016.pdf>

Figure 6-3. Incremental Increase in Cost per Case Spending Since 2010 for Public Defenders and Non-Public Defenders (*Inflation-Adjusted Dollars*)



**Investigation Expenditures.** More spending on investigation is the primary reason public defender costs are climbing relative to other types of counsel. Overall spending on investigation and experts remains abysmally low in most jurisdictions. Across all cases in 2017, Texas counties spent just \$5 per misdemeanor and \$34 per non-capital felony on fact investigation. Although average investigation expenditures have risen 80% for misdemeanors and 23% for non-capital felonies since 2010, almost all of this new spending has been in public defender systems (Figure 6-4). Among misdemeanors, in 2017 PDOs spent an average \$31 per case compared to only 71 cents for private assigned counsel. Similarly, public defenders spent \$93 on investigation per felony case compared to just \$28 by private assigned attorneys.

Figure 6-4. Investigation Expenditures per Case for Non-Public Defender and Public Defender Misdemeanor and Non-Capital Felony Cases (*Inflation-Adjusted Dollars*)

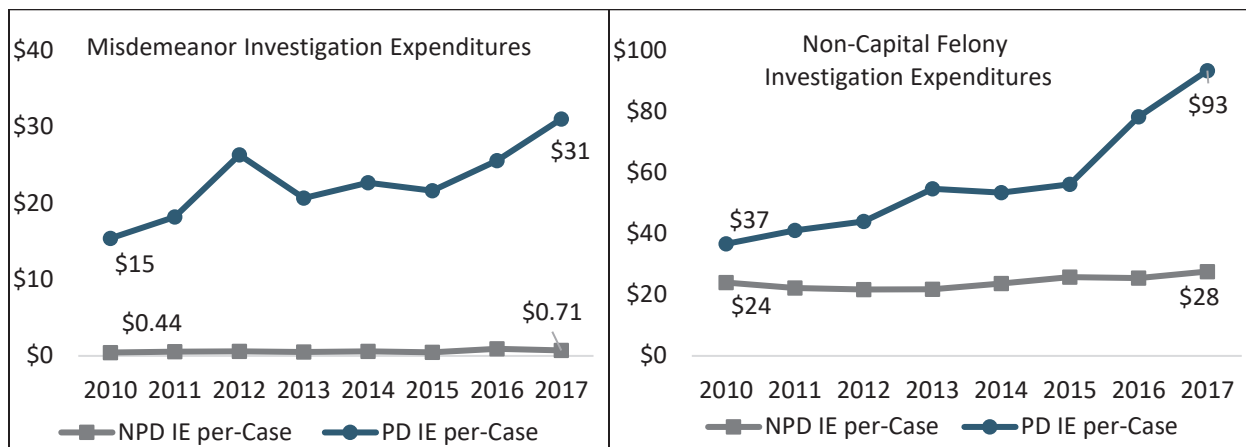
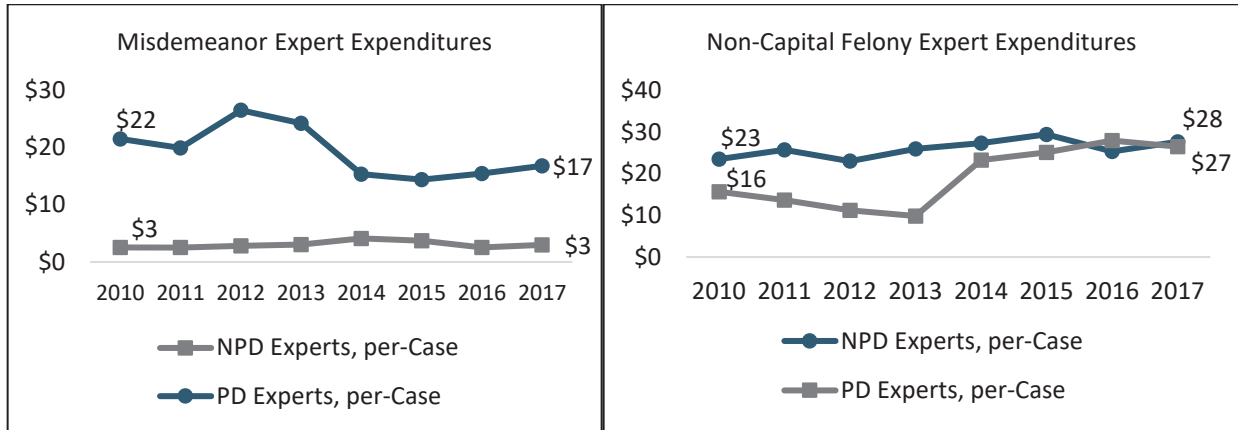


Figure 6-5. Expert Expenditures per Case for Non-Public Defender and Public Defender Misdemeanor and Non-Capital Felony Cases (*Inflation-Adjusted Dollars*)



Notes: Cost of public defender experts are based on salaries of mitigation and mental health staff.

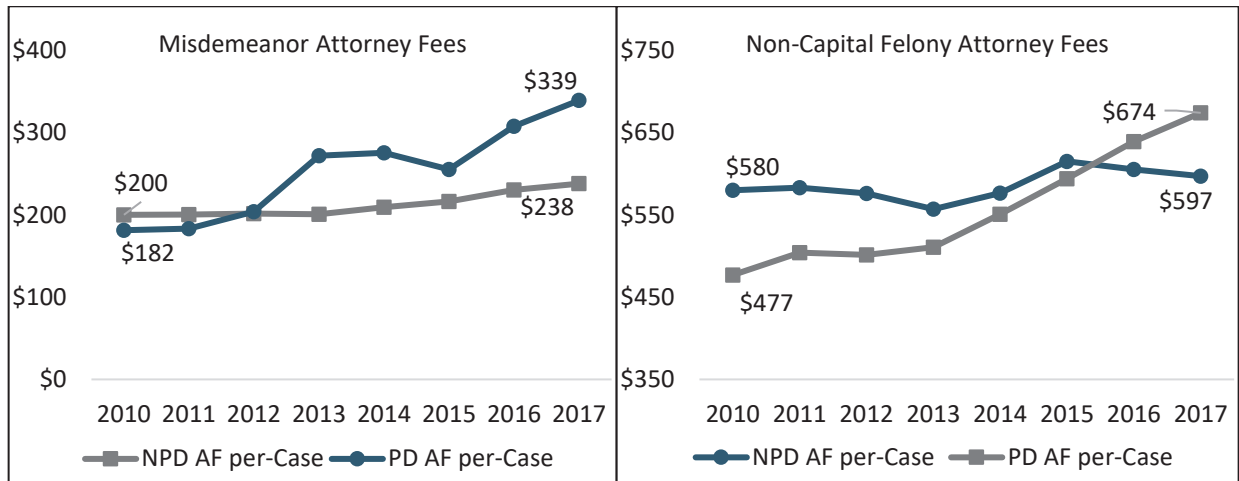
**Expert Expenditures.** Investment in expert witnesses is another significant factor explaining the rise of public defender costs. Spending on experts is relatively low across all cases: around \$3 per misdemeanor and \$25 per felony in 2017. Figure 6-5 again illustrates differences among public and non-public defenders. Investment in this essential defense function is consistently higher among PDOs for misdemeanor cases. Among felonies, though spending was initially lower, public defender offices have grown steadily since 2010, chiefly due to the addition of value-added defense team specialists such as social workers and mitigators.

**Attorney Compensation.** Rising per case costs for public defenders are not attributable to increases in attorney compensation. In 2017, both misdemeanor and felony PDO lawyers cost counties about \$30 more per case compared to fees for private court-appointed lawyers (Figure 6-6). In general, a full-time misdemeanor attorney is estimated to earn about \$36,400 annually in a public defender office or about \$32,300 other practice settings. Felony attorneys would earn approximately \$43,700 for public defenders compared to \$45,900 for private court-appointed lawyers.<sup>63</sup> Rich compensation for court appointed lawyers therefore appears to be a negligible contributor to the overall rise in indigent defense costs.

<sup>63</sup> To convert case payments into salary estimates, full-time attorneys are assumed to carry the number of cases recommended in the Texas Indigent Defense Commission's caseload guidelines: 226 misdemeanors and 128 felony cases per year. A 25% allowance was made for FDA-required administrative overhead and an additional 20% was estimated for fringe benefits such as insurance and retirement. *Supra* note 20.



Figure 6-6. Attorney Fees per Case for Non-Public Defender and Public Defender  
Misdemeanor and Non-Capital Felony Cases (*Inflation-Adjusted Dollars*)

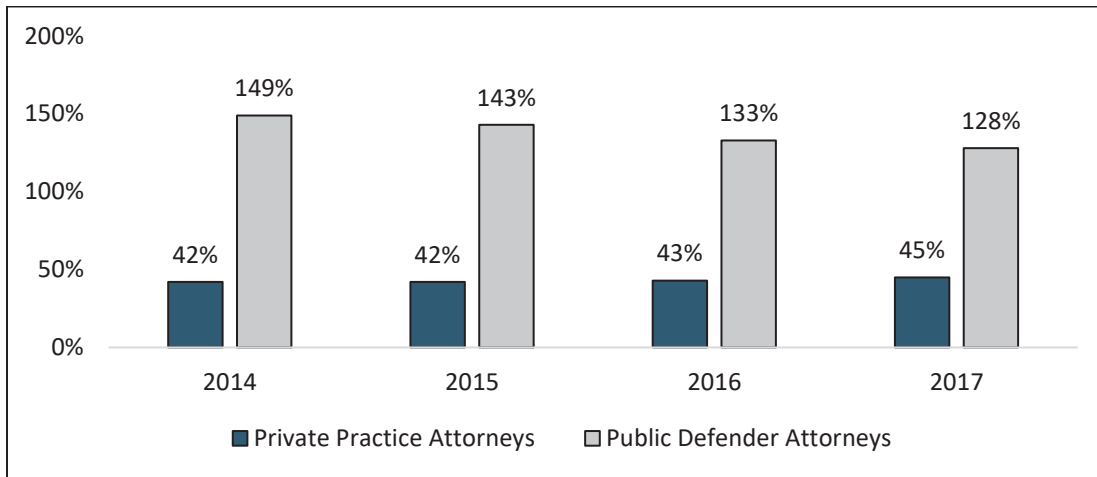


**Effect of Excessive Caseloads.** While attorney compensation might at first appear similar in both public defender and non-public defender defense systems, there is an additional consideration: caseloads. Figure 6-7 compares PDO and NPD attorney caseloads taken from TIDC’s required annual practice time report. On average, counties are taking advantage of public defender’s fixed cost structure to reduce spending by overloading some offices with too many cases. In fact, in some jurisdictions, high public defender caseloads appear to be keeping indigent defense costs artificially low.

After applying the TIDC-recommended case-time to the *actual* number of cases assigned to individual attorneys,<sup>64</sup> the data show that in 2017 public defenders were doing the work of 1.3 full-time attorneys on average. By comparison, Figure 6-7 indicates far fewer cases are being assigned to individual private appointed lawyers, though it should be noted this data does not account for private lawyers’ retained cases.

<sup>64</sup> Data taken from the Commission’s caseload and practice time reports. Texas Indigent Defense Commission, “Attorney Reporting Form and Instructions,” last modified January 2018, <http://www.tidc.texas.gov/policies-standards/attorney-caseload-reporting/>

Figure 6-7. Appointed Caseloads for Private Practice and Public Defender Attorneys



Excessive caseloads are a serious concern. The many cost and quality advantages of public defender and managed assigned counsel offices are undermined if attorneys are overwhelmed with too many cases. Equally as important, although no statutory parameters for case limits currently exist in Texas, excessive caseloads erode defendants' constitutional right to competent and effective counsel by inhibiting attorneys' ability to provide a proactive, zealous, and meaningful defense required by the US Supreme Court.<sup>65</sup> The practice opens jurisdictions to the very lawsuits the Fair Defense Act seeks to avoid; excessive attorney caseloads have been a complaint in a majority of recent systemic lawsuits holding states accountable for meaningful indigent defense.<sup>66</sup>

These data imply further reductions in attorney fees do not offer potential as a cost containment strategy. Not only is current compensation considerably below professional rates, but one-third more public defender attorneys would need to be hired to responsibly accommodate the number of cases being assigned.

## Conclusion

Since 2010, 73% of growth in new indigent defense spending has been due to the expansion of quality-managed approaches like public defender and managed assigned counsel offices. Jurisdictions increasingly see these centralized specialty-defense departments as a cost-effective means to meet the requirements of the FDA. Quality-managed offices cost somewhat more than private assigned counsel systems, in part due to initial outlays for system transition; the offices also spend more on experts and investigation -- essential defense functions that are often not available to private assigned attorneys.

In return, PDOs and MACs provide supervision and accountability that is impossible to achieve in a traditional private assigned counsel system. As a result there is greater transparency and confidence regarding the service received in exchange for tax dollars. Managed programs also provide relief for judges, court personnel, and auditors by taking responsibility for administering court appointments.

With a large number of full-time defense attorneys in the office, it is feasible to keep a range of expertise on hand to support comprehensive, individualized defense services. However, some

<sup>65</sup> See *Strickland v. Washington*, 466 US 668 (1984) and *United States v. Cronin*, 466 US 648 (1984).

<sup>66</sup> See Chapter 1.

jurisdictions risk undermining the benefits of the office by overloading PDO attorneys with too many cases. In general, properly funded public defender and managed assigned counsel systems appear to be a cost-effective means to close the Sixth Amendment gap that is growing in popularity among counties seeking to comply with the indigent defense laws of Texas and the standards of the US Constitution.



## **PART III**

### **Cost Containment Strategies Funded by TIDC Grants**



## 7. Cost Containment Grants and Effectiveness

The Legislative Budget Rider authorizing this study calls upon TIDC to distribute approximately \$2.5 million in each of Fiscal Years 2018 and 2019 to counties that adopt cost containment initiatives to limit local indigent defense cost increases. In addition, the rider requires an examination of the effectiveness of these cost containment measures. This section of the report addresses these requirements.

Because indigent defense expenses have risen substantially since the passage of the Fair Defense Act in 2001, the Texas Indigent Defense Commission has directed technical assistance and funding to incentivize adoption of cost-effective practices that also meet the objectives of constitutionally, legally, and ethically compliant indigent defense services. TIDC has awarded grants across six cost containment strategies.

- Smart Technology to streamline indigent defense processes and effectively screen for eligibility
- Specialized Mental Health Defenders advocating for treatment-based alternatives to incarceration for mentally ill defendants or other special populations
- Statewide Regional Public Defender in Capital Cases to help counties manage costs in death penalty cases
- Pretrial Risk Assessment to reduce unnecessary pretrial incarceration
- Video Teleconferencing to facilitate communication between clients, attorneys, and courts
- Post-Conviction Appellate Review Support as a coordinated response to forensic testing crisis

In accordance with the requirements of the Legislative Budget Rider, 12 discretionary grants in FY 2018 were awarded to jurisdictions choosing to implement these advancements (see Appendix D for FY 2018 and 2019 grants). Subsequent chapters describe these cost containment approaches including the ways in which they promote higher quality defense practices as well as constrain costs to taxpayers.

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## Smart Technology Grants

Before counties were required to meet indigent defense standards stipulated by the Fair Defense Act, automated information technology (IT) systems for tracking eligibility and processing court appointments were virtually unheard of in Texas. When the FDA was passed, many jurisdictions cobbled together a network of disconnected paper trails in an attempt to keep up with attorneys, defendants, cases, and payments. While essential data was maintained, it was not in a form that could be easily transmitted between users or used for real-time system monitoring, evaluation, and improvement.

### TIDC Support for IT

TIDC grants supporting technology-based solutions to these issues have been a turning point for the cost-effective administration of the Fair Defense Act. Since 2003, at least 20 counties have benefitted from a \$5.6 million investment in start-up funding for technology solutions to manage implementation of the FDA.

**Software Systems.** Early support focused on basic technical capacity for tracking indigent defense milestones in isolation.<sup>67</sup> More recently, grants have supported integration of indigent defense data and metrics into comprehensive criminal justice system software available through the state’s two major vendors: TechShare and Odyssey.<sup>68</sup> This development has multiplied efficiency gains by enhancing system-wide coordination of information and services between previously disparate processing centers.

**Data Guidelines.** To ensure that grant monies are well-spent, TIDC has also produced *Recommended Functionality and Data Guidelines for Indigent Defense Technology Projects*.<sup>69</sup> These standards specify the data tracking and reporting capabilities needed to monitor compliance with state law and local rules. Where indigent defense systems have been automated, key statutory elements – e.g. number of requests for counsel, statutory timelines, vouchers approvals and payment, and more – can be monitored through system-generated reports and dashboards.

#### Smart Technology



TIDC funded the development and implementation of TechShare Indigent Defense, a cloud-based indigent defense process management system.

- Streamlines eligibility assessments to screen out non-indigent defendants
- Automates attorney appointments and notifications
- Paperless process for the submission, review, approval, and payment of attorney fee vouchers

**\$5.6 Million in 20 Counties**

<sup>67</sup> For instance, in 2012, Bell County was funded to develop the Fair Indigent Defense Online (FIDo) system – a web-based platform limited to monitoring “front-end” process such as time to magistration, time to appointment of counsel, and attorney appointment rates.

<sup>68</sup> Only the Conference of Urban Counties’ TechShare system currently has indigent defense management software currently in use by eleven counties (see <https://cuc.org/techshareindigentdefense/>). Approximately 120 Texas jurisdictions subscribe to Tyler Technology’s Odyssey case management system, but the Indigent Defense module is currently still in development (see <https://www.tylertech.com/solutions/courts-public-safety/courts-justice>).

<sup>69</sup> Texas Indigent Defense Commission, “Recommended Functionality and Data Guidelines for Indigent Defense Technology Projects,” last modified January 2014, <http://www.tidc.texas.gov/resources/publications/?ptype=1405>

## Indigent Defense System Efficiency Gains

The effect of investment in data management systems has been to improve the efficiency and cost-effectiveness of indigent defense services.

**Attorney Appointments.** With automation, attorney appointment has become both more accountable and more efficient. Bench appointments decline as judges can assign cases directly from the rotation wheel; exceptions can be documented, counted, and analyzed. Attorneys are automatically notified when cases are assigned, and special expertise related to immigration, language, or mental health issues can be considered early on, reducing the need for replacement counsel. Finally, attorneys can administer much of their personal information from their own computer without having to draw on county staff.<sup>70</sup>

**Eligibility Determination.** Automated indigency determinations are more accurate, timely, and uniform, and the cost of collection is lower. Moreover, county officials can be more certain that only those who meet local criteria will have an attorney appointed.

**Payment Voucher Processing.** Electronic payment vouchers are a significant advancement over attorney payment information extracted from paper vouchers. Online submission reduces time spent by auditors fixing billing errors; ensures uniform rates for similar services; and expedites time to payment. Automated audit checks promote accountability, and indigent defense expenditure reports required at the state level can be compiled at the push of a button. The voucher review process is improved for judges as well: They can easily return invoices to attorneys for changes, document reasons for modifications, and electronically forward approvals to the auditor for payment.

**Required Reporting.** TechShare Indigent Defense software streamlines the preparation of counties' annual Indigent Defense Expenditure Reports, a key source of data used to monitor appointment rates and service usage.

## Criminal Justice System Efficiency Gains

Beyond enabling cost-effective compliance with the Fair Defense Act, investments in data tracking are yielding system-wide efficiencies for entire local justice systems. Timely, accurate, data-sharing increases productivity for jail booking staff, magistrate judges, indigent defense coordinators, pretrial officers, trial court judges, auditors, and clerks. Data dashboards summarize key indicators of criminal justice system health, and help target improvements in accountability and responsiveness.<sup>71</sup>

## Conclusion

TIDC investment in information technology has been an effective strategy to help counties contain the costs of compliance with the FDA. By creating common statewide data standards, supporting the development of software systems tracking court-appointment milestones, then integrating those modules into overarching local criminal justice data systems, the Commission is helping counties find

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<sup>70</sup> Examples include address changes, qualifications for various appointment wheels, and dates of availability to take new cases.

<sup>71</sup> The benefits of an integrated local data network are illustrated in TIDC's technology grant to Dallas County. There, the indigence determination is available to magistrate judges considering defendants' ability to pay when setting financial conditions of pretrial release. A lawsuit filed by Equal Justice Under Law, *O'Donnell v. Harris County*, hinges on this same issue.

relief from disjointed and costly paper-based systems; routine case processes are more efficient and justice is more effectively served.

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## Video Teleconferencing Technology

Before video teleconferencing (VTC) technology became available, isolation and scarcity of counsel were significant barriers to fulfilling the timelines and quality standards of the Fair Defense Act. Since 2003, TIDC discretionary grants totaling over \$1.4 million have equipped more than 20 rural counties with VTC technology. This investment has increased the overall efficiency of attorney appointment, magistration, and court hearings where distance is a barrier.

### Attorney Appointment

Improved Attorney-Client Communication. Stakeholders in jurisdictions receiving VTC grants agree the technology has improved the timeliness and quality of attorney-client communication. To illustrate, lawyers accepting court-appointments in Callahan and Jones Counties travel 40 to 60 miles round-trip from Abilene. In Hill County, two-thirds of wheel attorneys travel at least 80 miles round-trip to meet clients.

Juvenile defendants pose an even greater challenge as Texas Family Code requires detention hearings with an attorney present at least every two weeks for every child in custody.<sup>72</sup> Yet, rural counties often contract for detention placements with distant out-of-county juvenile facilities. In Hood County, youth are housed 240-miles away -- a four-hour drive from the arresting jurisdiction. Without VTC, county stakeholders find it is nearly impossible over these distances for attorneys to consistently have initial contact with clients within 24 hours of appointment.

#### Videoconferencing



TIDC funds counties' videoconferencing systems to quickly and easily connect defendants, attorneys, and courts.

- Facilitates prompt magistration hearings
- Allows remote eligibility determinations
- Simplifies attorney-client communication

**\$1.4 Million in 20+ Counties**

Lower Attorney Turnover. Cost savings also offer considerable appeal for jurisdictions to employ this technology. Counties claim a 30 percent reduction in travel expense and billable hours for attorney time in transit. Less obvious, savings are achieved due to lower turnover among lawyers on the appointment wheel once travel demands were reduced. A more stable attorney panel reduces administrative demands on the courts and provides a broader base of expertise for indigent defendants.

### Magistration

Ready Access to Magistrate Judges. The Article 15.17 hearing is another key process improved by the Commission's VTC technology grants. Within 48 hours following arrest, the accused must be brought before a magistrate judge, informed of the right to counsel, and given the opportunity to request an attorney.<sup>73</sup> In rural counties, though, this timeline is sometimes insurmountable. Justices of the peace may be widely dispersed and difficult to reach; other law enforcement duties may interfere with the ability of officers to transport the defendant in time. Where VTC technology is installed, statutory

<sup>72</sup> See Texas Family Code Section 54.01(h).

<sup>73</sup> Texas Code of Criminal Procedure Article 15.17

timelines are more manageable: Arrestees can be taken directly to jail where an available magistrate can conduct the hearing remotely using an internet-connected web camera.<sup>74</sup>

The cost and efficiency impacts of these VTC applications are substantial. Law enforcement officers no longer accrue unnecessary time and mileage costs while driving arrested defendants around the county in search of an available justice of the peace; after depositing defendants directly at the jail, they can return to enforcement duties immediately after each arrest. Equally important, statutory timelines for attorney requests are reliably being met, which county officials say speeds initial client contact, expedites release on bond, reduces jail days, alleviates overcrowding, and saves jurisdiction dollars.

### **Eligibility Screening**

Video conferencing has also been used by indigent defense coordinators to remotely monitor completion of financial affidavits by defendants at magistrature or in jail. By observing form completion as it occurs, the coordinator can ensure every question is fully and accurately reported, reducing the need for corrected paperwork and helping to ensure the prompt appointment of counsel.

### **Conclusion**

Video conferencing systems are supported by the Commission as a cost-effective solution to achieve compliance with prompt magistrature and timely appointment standards in remote rural regions of Texas. Costs of time and travel for attorneys and law enforcement officers have been drastically cut in counties where Article 15.17 hearings and attorney-client contact can be accomplished electronically. Reductions in attorney turnover and closer supervision of defendants completing indigence affidavits offer additional savings. By alleviating the need for defendant transport from jails to court, VTC reduces court time, staff time, and transportation costs, while improving safety in rural jurisdictions using the technology.

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<sup>74</sup> Uvalde, Real, and Medina Counties have established a regional magistrature system in which jailers can look across county lines to find available magistrates and connect them to defendants via technology.

## Forensic Testing

TIDC has helped to circumvent potentially major financial shocks to Texas counties affected by changes in national DNA protocols. Without their involvement, tens of thousands of individuals in this state alone might have asked for and received court-appointed attorneys for post-conviction DNA testing in cases where the outcome could not have been altered. Instead, the Commission found ways to identify and resolve affected cases while controlling costs. Texas has been one of the first states to lead a response on this issue, creating a successful model for others to follow.

### Scope of Potential Impact of DNA Mixture Cases

In May of 2015, the Federal Bureau of Investigation issued a notification to states: Longstanding protocols used by DNA laboratories were being amended to correct for errors in the database used to calculate match statistics in DNA mixtures involving two or more people.<sup>75</sup> During the subsequent re-analysis of results for active cases in Texas, it was next revealed that DNA mixture interpretation was also inconsistent; some laboratories have calculated the statistics in complex mixture cases in a way that failed to consider certain important scientific limitations. As a result, conclusions could differ vastly depending on the laboratory protocols used.<sup>76</sup>

The potential consequences of these dual errors are significant. Virtually every past conviction involving DNA mixture evidence could potentially be called into question, initiating a costly but necessary array of due process protections. DNA testing laboratories provided prosecuting agencies with lists of all cases using STR testing for review and notification where appropriate,<sup>77</sup> and notices were published in Texas prison libraries. Moreover, any

#### Forensic Testing



After the discovery of widespread errors in DNA testing, TIDC worked with the Texas Forensic Science Commission and other stakeholders to proactively create the Statewide Texas DNA Mixture Case Review Project.

Through a centralized resource center using an efficient case screening protocol, the project was able to review and close out hundreds of cases while avoiding hundreds of attorney appointments and unnecessary re-analysis.

**\$1 Million Statewide**

<sup>75</sup> Texas Forensic Science Commission, “Justice Through Science,” Sixth Annual Report, last modified November 30, 2017, <http://www.txcourts.gov/media/1440353/fsc-annual-report-fy2017.pdf>. The FBI notification stated that statistically inconsequential errors had been identified in the database used by laboratories to calculate DNA match statistics in criminal cases. In addition, protocols for mixture interpretation also changed over time to more adequately account for certain important scientific limitations. In light of these considerations, the Texas Forensic Commission recommended a statewide review of DNA mixture cases.

<sup>76</sup> When the FBI released their amended database, labs in Texas began re-doing the statistical conclusions on prior cases at attorney’s request. Part of this process involved reinterpreting mixtures of DNA using new protocols and procedures that were put into place following the implementation of the 2010 Scientific Working Group on DNA Analysis Methods (SWGDM) Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories. When some of the more complex mixtures were re-interpreted using the new guidelines, it was discovered there could be large differences in statistical conclusions reached.

<sup>77</sup> Although it is unresolved whether Texas prosecutors are legally obligated to notify every defendant whose conviction rested in part upon a “combined probability of inclusion” calculation, most generally notify affected

indigent defendants determined to be affected have a right to court-appointed counsel to guide them through the review process.<sup>78</sup>

The scope of cases impacted is potentially massive. The Department of Public Safety laboratories, which perform only about half of the forensic casework for Texas, generated a list of 25,000 cases analyzed since beginning STR analysis in 1999. As a result of the sheer volume of cases, the Texas Forensic Science Commission (FSC) assembled a panel of stakeholders and scientific experts to coordinate a statewide response. The group's objective was to narrow the list of cases to those appropriate for review by the legal system.

### **Evidence for Cost Containment**

Had a better plan not emerged, by default, convicted individuals who wanted their case reviewed would have been instructed by the prosecuting agency to request appointed counsel directly from the convicting court. Each newly-appointed lawyer would be obliged to become familiar with the very complicated scientific issues involved, then study available case records to assess the effect of the DNA mixture evidence on the conviction. With few private practice lawyers familiar with the complex subject of DNA, attorney fees would likely be at least \$1,000 per case; every 1,000 persons requesting an attorney would cost jurisdictions a minimum of \$1 million.<sup>79</sup> Moreover, since the Texas Court of Criminal Appeals affirmed DNA mixture claims qualify for re-testing under Chapter 64 of the Texas Code of Criminal Procedure, lawyers unacquainted with the science would inflate costs further with inappropriate requests for the service.

In place of this inefficient and expensive response, TIDC proposed a better idea in collaboration with the FSC and other multi-agency stakeholders. Discretionary grant funds were used to create the Texas DNA Mixture Review Group. Led by the Chief of the Appellate Division of the Harris County Public Defender's Office, the program responds to review requests.<sup>80</sup> Where the "combined probability of inclusion" statistic was not used, defendants can be informed that re-testing will not change their outcome. In instances where the statistic was used, Review Group attorneys can coordinate with the prosecutor and the laboratory to obtain an amended DNA report, direct the defendant to request locally appointed writ counsel, and assist the assigned writ lawyers by answering questions or providing model pleadings. At the request of local officials, Review Group attorneys will also serve as counsel when post-conviction testing is advised, a particularly efficient service in counties with few DNA mixture cases.

Since the beginning of the project in 2016, the Harris County PDO has assessed approximately 2,500 cases that would otherwise have been disbursed for review by less expert lawyers in counties across the state. With a three-year budget of \$1.1 million and assisted by volunteer attorneys including civil law firms, this same review work would likely have cost Texas counties \$2.5 million if it had been performed by locally-appointed lawyers. The average actual cost per review – about \$400 each – represents a 60% discount on the \$1,000 per case cost anticipated without TIDC coordination and grant support.

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persons of exculpatory information that has come to light regarding past convictions. Personal communication with Harris County Chief Appellate Public Defender Bob Wicoff, November 16, 2018.

<sup>78</sup> Tex. Code Criminal. Procedure. Ann., Art 64.01(c)

<sup>79</sup> In Harris County, although the presumptive maximum for Chapter 64 post-conviction DNA cases is \$750, a review of 14 recent cases selected at random found appointed attorneys were paid an average \$958 per case. One case cost nearly \$1,400.

<sup>80</sup> Tarrant and Travis Counties received separate discretionary grant funds to implement their own reviews.



Moreover, the project is achieving its objective of controlling what could have been a chaotic and costly run on attorney appointments and baseless DNA tests. Of the 880 reviews completed in Harris County, just 39 defendants – less than 5% – have requested a court-appointed lawyer for DNA proceedings.

## **Conclusion**

Although 2015 changes in the protocol used for the analysis of DNA mixtures involving more than one defendant might have thrown the Texas indigent defense system into crisis, TIDC directed discretionary grant funds to mount a coordinated response to contain potentially astronomic costs statewide. By centralizing case reviews in the Harris County Public Defender Office's Appellate Division, paid and volunteer attorneys built up the expertise and connections with DNA laboratories for an efficient and accurate determination of whether the test results meet threshold requirements for new testing. Centralizing this work has reduced costs to Texas counties by as much as 60% while raising the quality of representation and trust in the system for defendants affected by the change.

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## Mental Health Defenders

Defendants with mental health needs utilize a disproportionate share of resources in the criminal justice system. As many as 65,000 people with a severe mental illness are “super-utilizers” who repeatedly cycle through jails, emergency rooms, hospitals, and homeless services.<sup>81</sup> Texas counties spend at least \$450 million each year on justice-involved adults, and at least \$230 million on juveniles, with severe mental concerns.<sup>82</sup>

To help jurisdictions respond, TIDC directs discretionary grant funding toward mental health defenders. An attorney-led team with the expertise needed to advocate for defendants’ legal and therapeutic objectives can improve criminal case outcomes, avoid unnecessary incarceration, and reduce recidivism – all results that help moderate overall criminal justice costs.

### Growth of Specialized Mental Health Defense

Since 2004, the Texas Indigent Defense Commission has provided start-up support for fourteen programs to strengthen representation for people with mental illness. Early grants created separate mental health divisions within existing public defender offices.<sup>83</sup> Travis County (2007) created the nation’s first stand-alone mental health public defender office, and Bexar County (2015) is among the first Texas jurisdictions to provide representation to defendants with mental illness at magistration.

As managed assigned counsel has expanded, Lubbock (2009), Montgomery (2011), Collin (2013), and Travis (2016) Counties received discretionary grants for mental health MACs. Smith County (2018) is training stakeholders – defense attorneys, court staff, prosecutors, probation officers, case managers, pre-trial department personnel, and other members of the community – to improve individual and system outcomes for defendants with mentally illness (Smith County, 2018).

#### Mental Health Defenders



Persons with mental health issues are over-represented in the criminal justice system. Specialized defenders improve their outcomes.

- Help defendants navigate court processes
- Secure treatment-based alternatives to incarceration
- Reduce recidivism by making community connections

**\$7,040,000 in 18 counties**

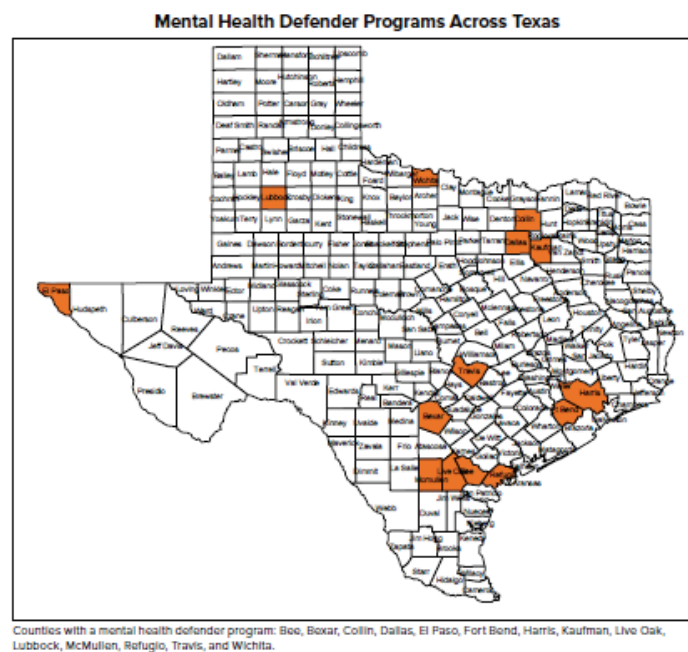
<sup>81</sup> Meadows Mental Health Policy Institute (MMHPI), “Brief Overview: Texas Mental Health Landscape,” last modified February 10, 2016,

<http://www.texasstateofmind.org/wp-content/uploads/2016/02/Brief-Overview-of-Landscape.pdf>

<sup>82</sup> Meadows Mental Health Policy Institute, “*Texas Behavioral Health Landscape*,” Last modified December 2014, <http://texasstateofmind.org/wp-content/themes/texasstateofmind/assets/MediaDownloads/Texas+Behavioral+Health+Landscape+-+December+2014.pdf>

<sup>83</sup> These include El Paso (2004), Dallas (2006), Harris (2011), Kaufman (2012), Wichita (2013) and Fort Bend (2016) Counties, and the Bee County Regional Public Defender (2017).

Figure 7-1. Counties that Support Mental Health Defender Programs



Notes: Reprinted with permission from *Texas Mental Health Defender Programs*. TIDC. 2018

## Factors Distinguishing Mental Health Defense

Mental health defenders are backed by a team of multi-disciplinary professionals including at least one investigator and a social worker. Team members advocate for the interests of individual clients but also contribute to broader system improvements through a variety of practices.<sup>84</sup>

- High quality, client-centered legal representation – Social workers work with clients to develop treatment dispositions for consideration by the court.<sup>85</sup> In addition, they can provide another dimension of supervision through client follow-up to ensure compliance. These treatment-oriented strategies can help clients remain in the community successfully.<sup>86</sup>
- Meeting clients' social service needs – Holistic advocates link clients to social services that address underlying criminogenic needs – homelessness, drug addiction, mental illness, education, or job training needs, as examples – that may affect future involvement in the criminal justice system. Participation in such programs may constitute part of an alternative disposition plan and help ensure long-term stability for clients.

<sup>84</sup> Cynthia Lee, Brian Ostrom, and Matthew Kleiman, "The Measure of Good Lawyering: Evaluating Holistic Defense in Practice," *Albany Law Review*, 78, (2015): 1215-1238.

<sup>85</sup> In Dallas County, mental health public defenders make sure appropriate cases are brought to the attention of mental health prosecutors who are often more willing to consider the role of mental impairment in the criminal case.

<sup>86</sup> See Dottie Carmichael, Miner P. Marchbanks, Mary Kirven, Laura Klaversma, Mary Beth Durkin, and Tony Fabelo, "Representing the Mentally Ill Offender: An Evaluation of Advocacy Alternatives," A Report to the Texas Task Force on Indigent Defense, April 2010, Chapter 9.

- Consideration of collateral consequences – Mental health defense teams proactively mitigate secondary impacts of conviction relating to clients’ employment, housing, child custody, driving privileges, public benefits, student aid eligibility, or immigration status. By preserving the factors that stabilize people’s lives – by helping them stay in their homes and keep their jobs – defendants are more likely to avoid criminal justice involvement in the future.
- Community and stakeholder education – Mental health defenders share expertise with community members who may not be clients. Texas teams hold regular trainings and conferences for criminal justice stakeholders,<sup>87</sup> and often take the most difficult cases referred by private assigned attorneys. In this way, investment in specialized defense capacity helps spark improvement throughout the local criminal justice community.
- Systemic advocacy – Mental health defense teams are in a unique position to raise public awareness of policy issues impacting criminal defendants with cognitive disabilities. Team members often participate in problem-solving with local criminal justice, health care, or social service planning and coordination groups.

## Evidence for Cost Containment

Holistic defense practices help attorneys deliver effective assistance of counsel, resolving criminal charges while meeting social service needs and improving the overall fairness of the legal process. A recent report published by the Texas Indigent Defense Commission<sup>88</sup> summarizes a variety of ways in which investment in mental health defenders generates a solid return on investment. While costs are concentrated in the defense sector, benefits are more diffuse, producing system-wide cost savings.

Reduced Jail Populations. Texas statutes articulate a preference for pretrial release on personal bond for nonviolent offenses if appropriate community-based treatment is available.<sup>89</sup> Where assistance from a mental health defense team is provided soon after arrest, defendants get out of jail and into appropriate services more quickly. Current mental health defenders provide evidence these practices save money.

- Bexar County Public Defender’s Office reports avoiding an estimated 3,615 county jail days in FY 2017 alone by providing a mental health attorney at magistration. At about \$60/day for detention,<sup>90</sup> this translates to \$217,000/year in unexpended jail costs.

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<sup>87</sup> As examples, the Travis County Mental Health Public Defender (MHPD) offers regular training benefitting judges, prosecutors, law enforcement, jail personnel, advocates, and other stakeholders. The Collin County Mental Health Managed Counsel (MHMC) Office sponsors an annual Mental Health Symposium attended by as many as 300 law enforcement officers, judiciary, attorneys, and mental health providers.

<sup>88</sup> Texas Indigent Defense Commission, “Texas Mental Health Defender Programs,” October 2018.

<sup>89</sup> Texas CCP Article 17.032.

<sup>90</sup> Average cost per day for Texas jails – August 2015-July 2016. Information provided by the Texas Commission on Jail Standards on August 17, 2016.

- The Fort Bend Mental Health Public Defender reports an average 38 fewer jail days for people represented by the office. This equates to more than \$2,200 in unspent detention costs per mentally ill defendant.<sup>91</sup>
- In Collin County, the Mental Health Managed Counsel Program saved the county an estimated \$630,000 in 2014 by vigorously advocating for mental health personal bonds and by reducing jail days through outpatient competency restoration.

Specialized defense counsel can also help the court make a prompt and accurate determination if mental competency restoration is needed for defendants to stand trial.<sup>92</sup>

- Both Collin County MHMC and the Wichita County Public Defender say mental health defense teams trained in recognizing competency issues helped reduce the number of competency evaluations being requested. Savings amounted to over \$200,000 per year in Collin County and nearly \$40,000 over 15 months in Wichita County.
- The Wichita County Public Defender's Office estimates \$48,000 in savings to the county attributed to the mental health defense team's advocacy for earlier transfer to state mental health hospital for competency restoration required for trial.

Reduced Recidivism. By treating clients holistically and addressing underlying social and therapeutic problems that contribute to involvement in crime, mental health public defenders lower the probability their clients will recidivate. Reductions in new offending not only constrain future incarceration costs, but also save corresponding costs of law enforcement, prosecution, and court case processing associated with new crimes.<sup>93</sup>

- A 2010 evaluation of the Dallas County Mental Health Public Defender<sup>94</sup> showed that six months after case disposition, clients of the office were two-thirds less likely to have recidivated compared to statistically similar people with private assigned attorneys. Trends held for at least 18 months with differences for people with schizophrenia reaching statistical significance.
- A 2016 evaluation in Travis County<sup>95</sup> found that between FY 2009 and FY 2013, 39% of Mental Health Public Defender clients re-offended. However, the re-offense rate for a matched sample of individuals with a private assigned attorney reached 50% – 11 percentage points higher.

Improved Case Outcomes. A client-centered approach focuses diverse resources on the comprehensive and individualized needs of each defendant, and dedicated teams build trust and rapport with prosecutors and the judiciary. As a result, the evidence shows mental health public defender offices are more successful than private appointed lawyers at avoiding conviction and sentences of incarceration.

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<sup>91</sup> *Ibid.*

<sup>92</sup> See Texas CCP Article 46b.

<sup>93</sup> See "Improved Case Processing Efficiency," pg. 53.

<sup>94</sup> The study examined cases disposed over a six-year period from 2003 through 2008. *Supra* note 85.

<sup>95</sup> Travis County Justice Planning, "Travis County Mental Health Public Defender Office," February 2016.

- A 2012 evaluation of the Harris County Public Defender’s Office found Mental Health Division clients were five times more likely to receive a dismissal compared to a matched group of defendants assigned private counsel. The mental health defense team secured dismissals for 27% of clients compared to just 6% in the comparison group.<sup>96</sup>
- In the Travis County Mental Health Public Defender Office, 47% of cases disposed between FY 2009 and FY 2014 were dismissed. In contrast, only 19% of those defended by private assigned attorneys had the same favorable outcome.

When convictions do occur, incarceration is less likely for clients represented by a holistic defense team.

- A 2010 evaluation found Dallas County mental health public defender clients are twice as likely to receive probation and between 17% and 36% less likely to receive a sentence of incarceration (depending on diagnosis) compared to statistically similar peers with other forms of counsel.<sup>97</sup>

These data show mental health public defenders not only reduce pretrial detention, but also continue lowering jail days even after the case is disposed. More dismissals and higher rates of probation are better for defendants, and help contain detention costs for counties.

Improved Case Processing Efficiency. Investment in mental health public defenders yields significant efficiency returns for the entire local justice system. A larger number of personal bonds, higher dismissal rates, fewer sentences of incarceration, and lower recidivism rates help stem the flow of cases into already over-taxed county offices. With costs of prosecution, court processing, and indigent defense, estimated to be \$1,905 for each new felony case and \$567 per misdemeanor,<sup>98</sup> efficiencies introduced by holistic mental health defense services make a significant contribution toward controlling cumulative system-wide costs.

Texas mental health defender offices also name additional efficiencies that are more difficult to quantify. For example:

- The Collin County MHMC Program notes jail and medical cost savings emanating from more effective case management, expedited dispositions, and release of defendants. State hospitalization, transportation, jail, and court savings also accrue from the role of the office as a liaison to the state mental health hospital and courts.
- Travis County MHPD data demonstrates cases are disposed more quickly. While the MHPD requires an average 51 days to dispose a case, private attorneys take nearly twice as long at 91 days on average.

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<sup>96</sup> Tony Fabelo, Carl Reynolds, and Jessica Tyler, “Improving Indigent Defense: Evaluation of the Harris County Public Defender,” September 2013, Pg. 30, Table 11.

<sup>97</sup> Social workers on the defense team facilitate these outcomes by recommending treatment-oriented dispositions and providing post-disposition support to make sure clients meet terms of probation set by the court.

<sup>98</sup> Dottie Carmichael, George Naufal, Steve Wood, Heather Caspers, and Miner Marchbanks, III, “Liberty and Justice: Pretrial Practices in Texas, Technical Appendix,” March 2017, Table C.6a-d. These estimates are based on typical cases uncomplicated by issues of mental illness.

- Supports and assistance provided by the Wichita County Public Defender’s mental health case manager to private assigned counsel representing people with mental illness saved the county about \$7,500 hourly billing reductions.

## **Conclusion**


TIDC investment in mental health defense capacity improves quality of representation, achieves better outcomes for clients, and increases system-wide efficiency and cost-effectiveness. Although costs of mental health public defenders are centered in the office, benefits accrue not only to clients but to other county offices as well. Reduced recidivism helps law enforcement; counties save money from reduced jail days; and court systems experience more efficient case processing, improved coordination of competency assessment and restoration, and expedited dispositions. These findings show comprehensive defense yields broad-based impacts, improving the cost-effectiveness of services for a high-need and high-cost population.



## Death Penalty Representation

Capital death cases present an unpredictable and costly challenge for rural Texas jurisdictions. When an indigent defendant is accused of a capital murder felony, small and mid-sized counties, which may have indigent defense operating budgets in the tens of thousands of dollars, are responsible for legal defense costs that can stretch upwards of \$1 million.<sup>99</sup> Moreover, qualified capital defense professionals may be unavailable for hundreds of miles. To help address these dual problems, in 2008 TIDC established the Regional Public Defender Office for Capital Cases (RPDO).

Today every Texas county with fewer than 300,000 residents can pay an annual formula-based premium in return for “murder insurance” (see Figure X for participating counties). In the case that an indigent defendant is accused of a capital murder felony, subscribing jurisdictions are spared the financial shock of an unexpected high-cost capital defense representation, and criminal justice stakeholders can rest assured people facing capital death charges will receive a meaningful defense that conforms to requirements of the US Constitution, Texas State Bar guidelines, and other professional standards of defense.

<b>Death Penalty Representation</b>	
TIDC worked with Lubbock County to create the statewide, opt-in Regional Public Defender Office for Capital Cases (RPDO).	
<ul style="list-style-type: none"><li>• Provides comprehensive, standards-based capital defense representation</li><li>• Like an insurance policy against budget spikes from costly capital litigation</li></ul>	
<b>\$20 Million in 183 Counties</b>	

Because many smaller counties would be financially unable to shoulder the full yearly premiums for RPDO membership, the Indigent Defense Commission underwrites part of the cost of participation through a sustainability grant.<sup>100</sup> A 2013 study<sup>101</sup> demonstrated the value of membership for participating jurisdictions both in terms of saving costs and improved quality of representation in the most serious and expensive criminal cases. As such, the RPDO is a prominent TIDC cost containment strategy.

### Effective Capital Death Representation

Though funding and geography have historically limited the ability of rural jurisdictions to provide high-quality defense services in capital death cases, those choosing to contract with the RPDO are automatically in full conformance with the State Bar of Texas’ Capital Defense guidelines.<sup>102</sup> For a predictable annual fee, these counties can provide death penalty defendants with a full team of highly-qualified caseload-controlled attorneys and defense team members specializing in death-penalty law.<sup>103</sup>

<sup>99</sup> Administrative Judicial Regions (AJR) Seven and Nine. Since FY 2008, RPDO has expanded into all nine AJRs.

<sup>100</sup> Beginning in FY 2018-19, the Commission replaced the discretionary grant used to offset RPDO costs between the 2008 and 2017 fiscal years with a permanent sustainability grant administered by Lubbock County.

<sup>101</sup> Dottie Carmichael and Heather Caspers, “Judgement and Justice: An Evaluation of the Texas Regional Public Defender for Capital Cases,” A Report to the Texas Indigent Defense Commission, June 2013.

<sup>102</sup> State Bar of Texas, “Guidelines and Standards for Texas Capital Counsel,” *Texas Bar Journal* 69, 2006. In 2006, the State Bar of Texas (SBOT) adopted “Guidelines and Standards for Texas Capital Counsel.” The guidelines established criteria for high-quality representation in death penalty cases.

<sup>103</sup> *Supra* note 101, Guidelines 3.1 and 4.1.

Importantly, RPDO attorneys are financially and operationally independent of the courts, making it possible to implement the defense without judicial interference. In member counties, judges have neither the ability nor the financial incentive to constrain compensation of attorneys, investigators, or mitigation specialists. In contrast, 60% of other court-appointed capital death attorneys surveyed in the 2013 report said that compensation limits imposed by courts make it difficult for private practice lawyers to staff non-attorney capital team members.

Waivers of death penalty counsel or indictment delays are also used in non-member counties to delay assignment of a two-attorney defense team required by law for more than five months on average. RPDO-member counties, on the other hand, appoint a capital-qualified defense team within days and do so in a larger proportion of cases. The study also showed that RPDO investigators and mitigation specialists provide a higher level of service, beginning work within two weeks of being appointed and meeting with the client at least every two weeks thereafter. Only about one-third of capital defendants with private assigned attorneys received a similar level of support.

### **Evidence for Cost Containment**

Most of the cost-savings achieved in RPDO cases are the result of a legal strategy favoring pleas: In the 2013 study sample, 73% of RPDO cases were pled compared to just 21% of non-RPDO cases. Capital cases resolved in a jury trial stand an 80 percent chance of ending in a death sentence. Yet, by investing two to three times more of the defense budget in mitigation work, the RPDO team can develop a powerful defense narrative that is often capable of convincing prosecutors to abandon a capital death trial and reach a negotiated disposition instead.<sup>104</sup>

With pleas less expensive than trials, the study found estimated costs<sup>105</sup> for an RPDO case (\$55,198) to be about 25% less than a similar case defended by private assigned counsel (\$73,571).<sup>106</sup> Since plea agreements typically include a waiver of the right to appeal, future costs to both counties and the state are dramatically constrained as well. Since inception in 2008, the RPDO has closed 138 cases with only 8 cases – just 6% -- disposed in death-eligible trials.<sup>107</sup>

Above the membership fee, counties pay only the costs of expert witnesses. However, because the facts of the case and defense theory are determined so promptly, the study found RPDO attorneys spend about \$1,500 less on experts in a non-capital trials<sup>108</sup> and about \$30,000 less in capital re-trials.<sup>109</sup>

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<sup>104</sup> Consider the following from Carmichael and Caspers' (2013, pg. viii) study of the death penalty in Texas. They write that "As a result of their strategic emphasis on resolving cases by plea, just one in 26 RPDO cases in the study sample ended in a sentence of death. Among private assigned counsel, a much higher proportion of clients – one in five – received this worst possible outcome. Not only is the public defender more likely to save the life of the defendant, but they also achieve better non-death sentencing outcomes. While most public defender clients received life or a term of years sentence, two-thirds of people with private assigned counsel got a life sentence with no possibility of parole."

<sup>105</sup> RPDO costs were estimated based on market value for similar services if provided by a private practice legal team.

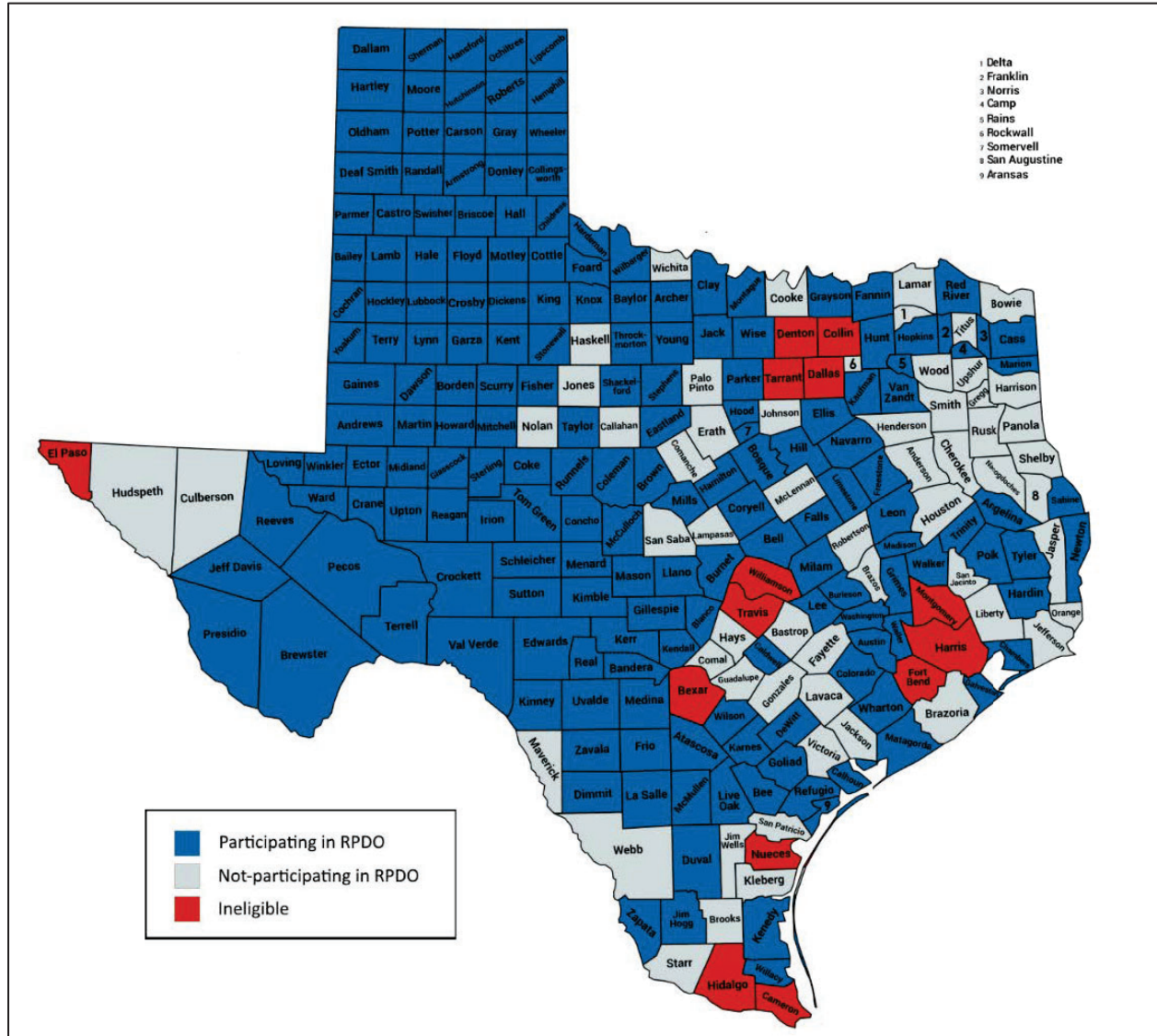
<sup>106</sup> *Supra* note 101.

<sup>107</sup> Personal communication with RPDO Office Administrator Elaine Nauert, November 16, 2018.

<sup>108</sup> At the request of the county, RPDO will continue to provide representation if charges are reduced to a non-capital felony.

<sup>109</sup> *Supra* note 101. In the study, no capital death trials were defended by the RPDO so it was not possible to compare expert costs against non-RPDO attorneys in those cases.

Figure 7-2. RPDO-CC Participation Across Texas in 2018



Source: Texas Indigent Defense Commission, 2018

Table 7-2 depicts three illustrative cases that help demonstrate RPDO cost containment more concretely. In County A, the prosecutor's decision to pursue a capital death trial raised required total defense spending to more than \$1.6 million not including county-paid experts, yet the jurisdictions' actual cost for these services was only 3% of that amount – about \$48,000. In Counties B and C, which ended in plea agreements, jurisdictions received services 2 to 10 times the value of their average annual contributions. These data illustrate the substantial return on investment in RPDO membership for small jurisdictions seeking quality representation in capital death cases.

Table 7-2. Expected County Expenses for Capital Defense without RPDO Service

	EXPECTED COSTS					
	County A Trial		County B Plea		County C Plea	
	\$47,897		\$108,488		\$50,000	
	Avg. Annual Cost		Avg. Annual Cost		Avg. Annual Cost	
	Hours	Cost	Hours	Cost	Hours	Cost
1st Chair	1,505	\$225,795	3,600	\$539,955	106	\$15,900
2nd Chair	6,414	\$801,706	3,374	\$421,756	217	\$27,094
Mitigation	5,826	\$349,581	3,976	\$238,539	581	\$34,836
Investigator	1,574	\$78,717	3,548	\$177,410	273	\$13,662
Investigation Costs		\$195,669		\$39,135		\$2,080
Total	15,319	\$1,651,469	14,498	\$1,416,795	1,177	\$93,573

Notes: Estimates provided by the Office of Regional Public Defender for Capital Cases and are nominal dollars.

## Conclusion

Evaluation results show the RPDO program has successfully elevated the quality of legal representation in death-penalty cases at a cost that is both predictable and attainable for small- to mid-sized counties. Jurisdictions that contract with the RPDO can be assured capital death defendants will receive prompt access to qualified, independent legal representation at a fraction of the cost expected if they had not been members.

## Pretrial Risk Assessment

Most Texas jurisdictions require financial bond as the primary means to guarantee court appearance and prevent new offending among people facing criminal charges. Increasingly, however, policymakers, judges, and other stakeholders are asking whether release based on a defendant's individualized risk might be a fairer and more effective way to ensure court appearance and prevent new criminal activity while awaiting trial.

By assessing factors shown to predict bond failure such as a defendant's age, criminal record, and current charges, a validated pretrial assessment tool quantifies the risk associated with a defendant's release to a community. In addition to equal justice and public safety benefits, TIDC has identified risk-based release as a cost-containment measure helping counties avoid unnecessary pretrial incarceration, which, in turn, has a positive impact on recidivism.

### Pretrial Risk Assessment



Risk assessment identifies which defendants can be safely released or monitored, saving money on jail. TIDC helped fund the development of a statewide, online pretrial detention risk assessment tool from the Office of Court Administration.

TIDC also funded a pilot project in Nueces County to implement a local tool.

**\$120,000 Statewide**

### Constitutional and Safety Benefits of Risk-Based Release

Failure of the financial bail system to provide equal access to justice has formed the basis for a number of costly lawsuits in recent years.<sup>110</sup> When people without financial resources are detained because of an inability to pay bail, they are denied the same opportunity for pretrial liberty available to more affluent citizens. Importantly, TIDC support for expanding the use of evidence in the decision to release helps inoculate Texas counties against potential legal actions.

Pretrial risk assessment also contribute to real reductions in criminal activity. A recent Texas study found people let out of jail on cash or surety bonds without consideration of their individualized risk commit 22% more new crimes. In addition, 1.5 times more of the offenses committed by people released based on ability to pay are violent felonies including homicides and robberies. Weapons offenses occur at a rate 8 times higher.<sup>111</sup> Where judges lack an objective means to evaluate defendant risk, a small number of very dangerous individuals released on cash or surety bond can bring serious and costly harm to the community.

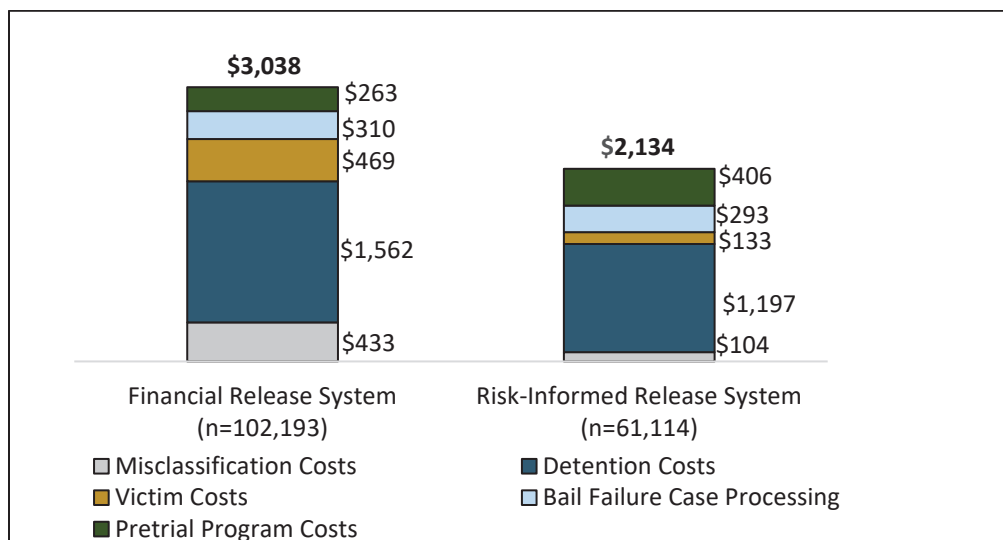
<sup>110</sup> Since January 2015, Equal Justice Under Law has filed nine class action challenges to financial bail systems in eight states; See <https://equaljusticeunderlaw.org/money-bail-1>. Civil Rights Corps has filed thirteen additional lawsuits in just the last two years against wealth-based pretrial detention. Three of these are in Texas counties; See <https://www.civilrightscorps.org/work/wealth-based-detention>. Plaintiffs have argued that requiring money for pretrial release violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

<sup>111</sup> Dottie Carmichael, George Naufal, Steve Wood, Heather Caspers, and Miner Marchbanks, III, "Liberty and Justice: Pretrial Practices in Texas," A Report to the Office of Court Administration and the Texas Indigent Defense Commission, March 2017.

## Evidence for Cost Containment

For each day a person who poses no threat to society is jailed, Texas counties spend about \$60;<sup>112</sup> lengthy pretrial detention of a low-risk individual has also been shown to increase the chance of future recidivism, multiplying costs over the long term.<sup>113</sup> At the same time, when the wrong people are released, counties accrue costs for locating absconders or processing new criminal violations.<sup>114</sup> By improving the accuracy of decisions to release or detain, validated risk assessment reduces spending on both of these concerns.

Figure 7-3. Pretrial Cost per Defendant within Financial and Risk-Informed Release Systems



A 2017 study compared pretrial costs in Texas jurisdictions with and without validated pretrial risk assessment.<sup>115</sup> Results depicted in Figure 7-3 showed that, including the costs of administering the pretrial assessment, release informed by a validated tool lowered criminal justice system expenses by nearly one-third. Although pretrial risk assessment and supervision increased cost to the county by about \$100 per defendant, direct savings of more than \$700 per defendant were achieved through higher court appearance rates, less new offending, reductions in case processing costs (i.e., courts, prosecution, and defense costs), lowered victim costs, and fewer pretrial jail days.<sup>116</sup>

<sup>112</sup> *Supra* note 98.

<sup>113</sup> Without the ability to plan a defense while free in the community, low-risk people detained until trial are five times more likely to get a jail sentence and four times more likely to be sentenced to prison. See Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes." *Houston, TX: The Laura and John Arnold Foundation*, 2013.

<sup>114</sup> *Supra* note 111, Chapter 4 and Technical Appendix. A bail forfeiture is estimated to cost \$1,004 for a minor court hearing. New criminal activity costs \$3,754 per felony or \$2,294 per misdemeanor for re-arrest, court hearings, prosecution, and representation for indigent defendants.

<sup>115</sup> *Ibid.* See <https://www.pretrial.org/>

<sup>116</sup> Misclassification costs depicted in Figure 7-3 are a statistically determined increment reflecting potential savings missed by jailing people who should have been released or by releasing people who should have been detained.



## **Nueces County Pilot Project**

To pilot the use of risk assessment as a decision tool, in 2017 TIDC awarded a discretionary grant to Nueces County. This currently active grant supports two new staff positions to compile existing electronic records and determine, based on a risk assessment tool, if the defendant is a low, moderate, or high risk for flight or safety. The resulting evaluation, generated within 72 hours of arrest, is shared with magistrates or District Judges to determine conditions of release and supervision. In addition to the overarching goals of improving fairness and public safety, stakeholders also view risk-based release on as a means to circumvent jail overcrowding. While impacts of the program are being evaluated, judges in Nueces County report early evidence that jail population has been reduced by as much as 15%, falling from 100% of capacity in April 2017 to 86% in August of that same year.

## **Conclusion**

Recent evidence suggests the costs of an evidence-based pretrial release system are more than offset by savings that occur when defendants are properly classified based on risk. Risk-informed pretrial practices are associated with lower rates of bond failure, less new criminal activity – particularly violent crime – committed while on bond, and fewer pretrial jail days both due to initial detention and resulting from re-arrest on new offenses. Resulting savings more than offset the costs of risk assessment administration.

Jurisdictions that adopt validated pretrial risk assessment are also less vulnerable to the high costs of litigation, particularly involving equal justice claims. Recognizing these benefits, the Texas Indigent Defense Commission is supporting a pilot jurisdiction, Nueces County, to evaluate the effect of pretrial risk tools on containing system-wide costs of criminal case processing. Early evidence of impact is promising.

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## 8. Other Promising Innovations in Indigent Defense

The Legislative Budget Rider underlying this report asked what additional measures are being proposed to help counties reduce operating costs with respect to indigent defense. Certainly, as evidenced elsewhere in this report,<sup>117</sup> TIDC has a developed portfolio of resourceful practices that blend objectives for quality improvement and cost containment. While these basic strategies remain relevant and supported, the Commission is also looking to the future.

Their vision is articulated in a recently released document: *Indigent Defense Innovation*.<sup>118</sup> The report scans the research and policy environment for novel approaches to help court-appointed lawyers do their job better and more efficiently. Solutions are identified that build on past successes, but that also carry indigent defense into the next generation of practice.

### Digital Communication

Since 2003, TIDC has awarded numerous discretionary grants to expand the use of technology in indigent defense. To date, video-teleconferencing technology and software development have been featured;<sup>119</sup> promising new applications include automated calling to connect attorneys and clients and text reminders of court dates. Early research evaluating the effect of texting has found substantial declines in failures to appear in court, avoiding the cost of re-arrests for law enforcement and of appearance re-sets for courts, prosecutors, defense counsel. Similar systems are also being piloted in Texas counties.

### Attorney Checklists

Effective solutions are not always highly technical. Checklists are a simple tool to ensure people engaged in complex procedures – surgeons, pilots, defense attorneys – remember small but important details needed to prevent critical mistakes. Pioneered by the San Francisco Public Defender’s Office, checklists help ensure consistency of essential functions like conducting the initial client meeting, drafting a motion to suppress, and preparing the client for testimony. They are expected to contain costs by improving defense effectiveness and achieving better case outcomes with minimal investment required.

### Routine Task Automation

While good legal counsel requires discretion and expertise, a great deal of lawyering involves routine tasks or standardized legal documents that can be made more efficient through automation. Software applications can save staff time by reviewing court databases to find cases needing filings or petitions, then auto-generating the instrument. This use of automation frees time for attorneys and law clerks to focus on higher-level tasks and expedites the timing and efficiency of filings. For clients or the public, online chatbots are also available to provide information about cases using an automated question-and-answer format.

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<sup>117</sup> See Chapter 7.

<sup>118</sup> Texas Indigent Defense Commission, “Indigent Defense Innovation,” last modified Fall 2018, [http://www.tidc.texas.gov/media/58029/tidc\\_indigent\\_defense\\_innovation\\_2018.pdf](http://www.tidc.texas.gov/media/58029/tidc_indigent_defense_innovation_2018.pdf)

<sup>119</sup> See Chapter 7.

## **Participatory Defense**

Participatory defense provides training for family and friends of the accused to supplement the work of the attorney. Because people close to the defendant can provide key character witness, the recounting of personal histories through testimony, letters of support, and social biography videos extend the capacity of defense counsel and help mitigate a defendant's sentence. In this way, participatory defense is a potentially effective practice for elevating defense quality without additional cost.

## **Early Representation**

Access to counsel shortly after arrest increases the chance defendants will be released on personal bond. If this important opportunity is missed due to a lack of an attorney, the early disadvantage leaves defendants more likely to both plea and offend again in the future.<sup>120</sup> The Bexar County Public Defender Office (BCPDO) is among the few Texas jurisdictions that provide representation to indigent defendants with mental illness at magistration. In its first year, the program observed a 150% increase in the number of defendants released on personal bonds; prompt diversion to mental health treatment also reduces jail costs and recidivism saving costs and improving outcomes for clients, counties, and communities.

## **Restorative Justice**

Through restorative justice programs, defendants and victims of crime can speak to each other and determine if there are tangible ways to repair the harm caused. At the same time, resources are often available to address and potentially resolve some of the underlying reasons for a defendants' actions. Travis County's Neighborhood Conference Committee (NCC) is one example of a potentially scalable program that diverts first-time juvenile misdemeanants to learning interventions like anger management classes, community service, apology letters, homework assistance, and tutoring sessions with a mentor. The evidence indicates these program not only hold defendants accountable and reduce recidivism, but can help victims cope with their circumstances.

## **Comprehensive Defense Teams**

Expanding on TIDC's mental health defender model,<sup>121</sup> comprehensive defense uses contact with the criminal justice system to address the root causes of unlawful behavior. An attorney-led defense team integrates the expertise of caseworkers, civil legal aid attorneys, and investigators to help clients confront problems that drive recidivism like mental illness, substance abuse, or poverty. Clients participate on the defense team; alternative dispositions are sought to help them stay out of jail and linked to rehabilitative programs in the community. A similar program in the Kentucky Department of Public Advocacy reduced the length of incarceration by 80% and returned \$3.76 for every dollar invested.<sup>122</sup>

## **Online Dispute Resolution**

Online dispute resolution (ODR) offers promise for reducing backlogged court dockets and helping defendants avoid missed work to resolve low-level offenses. The City of Farmers Branch is the first jurisdiction in Texas to offer ODR as a means to resolve traffic tickets, code infractions, and Class C

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<sup>120</sup> Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," last modified November 8, 2016, <http://www.econ.pitt.edu/sites/default/files/Stevenson.jmp2016.pdf>

<sup>121</sup> See Chapter 7.

<sup>122</sup> *Supra* note 118, pg. 19.

misdemeanor warrants. From the convenience of a computer or smart phone, individuals and their defense attorneys can interact with a prosecutor and judge to settle their cases. In the first year of use, failures to appear in municipal court decreased 31%. The Office of Court Administration is currently partnering with the Pew Charitable Trusts and the National Center for State Courts to pilot ODR for civil cases, but the online system is also a solution to increase access to justice for minor infractions and misdemeanors.

## **Mentoring**

When aspiring defense attorneys graduate from law school, they are typically unschooled in the skills required to provide effective representation. Trial and error does not guarantee attorneys will learn how to provide competent representation. Mentoring programs give young lawyers a chance to gain knowledge and experience under the guidance of more practiced colleagues. The Future Appointed Counsel Training (FACT) Program hosted by the Harris County Public Defender's Office is one example. Experienced lawyers complete 75 hours of training activities with mentees. In addition to helping young attorneys gain supervised trial experience, mentoring programs increase the number of attorneys eligible for appointment without compromising quality.

## **Workload Studies**

Workload studies determining the amount of time that *should* be allocated for indigent defense have emerged as a forceful tool for ensuring quality defense. A 2015 study in Texas used attorney timekeeping and the judgments of criminal defense experts to assess whether defense lawyers are spending enough time to deliver reasonably effective counsel. Findings showed attorneys should defend no more than 226 misdemeanors or 128 felonies in a year; with current caseloads, 66% more time is recommended on cases at every offense level. A more recent analysis used caseload data to estimate as many as 40% of all indigent defense cases in Texas are represented by an overburdened attorney.<sup>123</sup> Workload studies in Missouri, Louisiana, Rhode Island, and Texas have been used to improve indigent defense through budgetary planning, education, legislation, litigation, or even caseload refusal.

## **Managed Systems, Accountability, and Responsible Spending**

As described above, the growth of managed indigent defense systems, specifically public defenders and managed assigned counsel programs, is usually associated with some growth in costs. This is largely the consequence of transitioning from an under-resourced system. In addition to addressing a lack of quality representation, these programs also provide a much greater degree of oversight and accountability, and with it, a greater visibility into what the public is actually getting for its money. Under typical assigned counsel systems, individual attorneys appointed on a case-by-case basis are not directly supervised. While judges see the lawyers in court, the vast majority of legal work is done outside of court with little oversight. While transitioning counties to public defender offices may result in some increase in costs, that spending is more transparent, more accountable, and thus more responsible than before.

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<sup>123</sup> Nicholas Davis, George Naufal, Heather Caspers, and Geoff Burkhardt. "Indigent Defense Caseloads in Texas: Assessing the Extent of High Volume Practice," last modified August 2018, [http://www.nicholastdavis.com/wp-content/uploads/2018/08/caseload\\_draft.pdf](http://www.nicholastdavis.com/wp-content/uploads/2018/08/caseload_draft.pdf)

## **Conclusion**

TIDC is proposing innovative ideas for cost containment that propel indigent defense into the future. Some, such as court date reminder texts, routine task automation, and online dispute resolution, take advantage of emerging technology. Attorney checklists and mentoring are simple practices with an outsized impact. Participatory defense, early representation, restorative justice, and comprehensive defense teams are a fresh interpretation of traditional defense roles.

What these diverse strategies have in common is their promise for raising the quality of indigent defense services while increasing efficiency and containing costs to jurisdictions. By thinking creatively and investing strategically, TIDC has crafted a vision to help counties continue progress to comply with the FDA and close the Sixth Amendment gap.

## **PART IV**

### Conclusion



## CONCLUSIONS

Since FY 2003, spending on court-appointed cases in Texas has increased in linear fashion, approximately doubling to \$265 million by FY 2017. This report explains what caused this growth. It also reviews strategies used by the Texas Indigent Defense Commission and by counties to manage these costs without compromising the Sixth Amendment guarantee of effective assistance of counsel. There are three key findings and recommendations:

### **Finding 1:**

**The Fair Defense Act of 2001 established statewide standards that led to increased investment in indigent defense. This investment has helped insulate Texas and its counties from potential lawsuits by improving compliance with constitutional requirements.**

In 2000, multiple reports documented a near-complete absence of standards or oversight in the delivery of indigent defense in Texas. Because of a dearth of data, it was difficult to assess the state of indigent defense in Texas. But what little information could be collected strongly indicated that defendants were routinely denied access to counsel, and when counsel was present, the quality of representation was low. These practices placed Texas near the bottom nationally in terms of funding, access, and quality of indigent defense, and made the state a prime target for litigation.

Class action lawsuits that impose rapid, systemic reform are increasingly used to transform state courts. Although several individual counties have been sued, thus far, the state has avoided legal challenges. This is in part because, when confronted with the system failures, the 77<sup>th</sup> Legislature responded by passing the Fair Defense Act (FDA) in 2001. The law set new quality standards, establishing state oversight mechanisms, and appropriated grant funds to help counties better fulfill their Sixth Amendment duty to indigent defendants.

Because of the FDA, requests for counsel were taken promptly, within 48 hours of arrest, uniform eligibility criteria replaced judge's intuition in determining indigence, and eligibility determinations required within 1 and 3 days of receiving the request meant defendants could not be denied a lawyer for weeks or months to "shop around" for affordable representation.

Unsurprisingly, correcting for these constitutional deficits has required changes in practice, as well as financial investment. The number of defendants qualifying for court-appointed counsel rose sharply, bringing the number of court appointments closer to similar rates nationally. Systemic restructuring to meet new standards and timeliness required significant expenditures. The effort has largely shielded Texas from costly and disruptive litigation like that which has befallen at least 18 other states. Even more important, it has set counties on a path toward achieving the goal of constitutionally meaningful representation.

## Finding 2:

**Four main factors explain increases in indigent defense spending: inflation, rising attorney appointment rates, growth in the share of felony cases, and spending on indigent defense system improvements.**

Since implementation of the Fair Defense Act, indigent defense spending has progressed on a steady upward trajectory. Four main factors have contributed to this trend: inflation, rising appointment rates, changes in indigent case composition, and programs to improve the quality of public defense.

**Inflation.** At first look, nominal indigent defense spending has risen more than 100% since 2003 from \$129 million to \$265 million in 2017. After adjusting these values for inflation, however, real growth over the 14-year timeframe is shown to be about half that: 56% overall or just 2.7% per year.

**Appointment Rates.** Rising attorney appointment rates also drove costs upward as Texas increased compliance with constitutional requirements. New eligibility standards and appointment timelines pushed counties to assign court-appointed lawyers to people who, in the past, would have been denied representation. In the seven years after 2003, a 30% increase in court-appointed cases was accompanied by a 27% increase in indigent defense costs. During this interval, increased spending was a function of increased demand for indigent defense. After 2010, however, cases stabilized while costs continued to rise an additional 21% over the next seven years suggesting different factors sustained continued spending growth between 2010 and 2017.

**Case Composition.** With case volume no longer pushing costs upward, ongoing cost escalation between 2010 and 2017 is attributable to two new parallel trends: investment in quality improvement and a rising share of high-cost felonies. As a proportion of all cases, felonies increased from 41% in 2010 to 45% in 2017. This 4 percentage point increment translates into over \$25 million in additional spending.

More than a quarter of the total increase in spending through 2017 (27%) occurred because of this shift in the case mix toward felonies.<sup>124</sup> Since the filing of felony charges is determined by prosecutors, this portion of total indigent defense spending is largely uncontrollable by jurisdictions without denying counsel. Moreover, if 27% of new spending since 2010 has been to cover the cost of more felony cases, the remaining 73% of spending has been directed toward system improvements reflected in rising case costs.

**Quality Improvement.** Importantly, after backing out effects of the uncontrollable costs of case mix and inflation, the controllable new spending for quality improvements since 2010 declines from 2.7% (accounting for inflation alone) to 1.9% (accounting for both inflation and case mix). Without accounting for either of these factors, the nominal (unadjusted) annual growth rate would be 4.8% over the same seven-year period. Equally important, the 1.9% annual inflation- and case- adjusted increase is the amount directed toward improvements to indigent defense delivery systems.

When it comes to determining how to invest in indigent defense quality improvement, counties are often turning to public defender offices or managed assigned counsel offices. One reason is they are

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<sup>124</sup> Spending attributable to case composition was determined by comparing actual 2017 spending with what it would have been if the composition of cases was unchanged from 2010. See Appendix A for methods.



more accountable than systems that rely on unsupervised private assigned counsel. In PDOs and MACs, attorneys have oversight, and clear professional expectations are articulated, supported and enforced. There are other advantages as well including better administrative support, access to specialized defense expertise, and better case outcomes. However, quality-managed systems are not necessarily cheaper. They require greater initial spending to get started, and considerably more money is spent on investigation and experts, which are features of a high-quality indigent defense system.

### **Finding 3:**

**TIDC discretionary grants are an effective tool to help counties implement cost-effective indigent defense systems that comply with requirements of the Fair Defense Act and the United States and Texas Constitutions.**

The Texas Indigent Defense Commission was established to oversee compliance with the Fair Defense Act and promote improvements through monitoring, technical assistance, and funding to counties. Of the tools at their disposal, discretionary grants are perhaps the most effective for attaining these goals. Counties can apply for short-term program funding with support declining over a three- to four-year period as the program becomes fully integrated locally. Funded programs are designed to help jurisdictions elevate indigent defense practices, while managing financial burden. As such, this funding stream is a primary vehicle for cost-effective indigent defense system improvement.

A key focus of the Commission has been on disseminating proven practices. Nearly every county in the State has benefitted from discretionary grants either directly or indirectly. These grants support quality-driven approaches like specialized public defenders for mental health or capital cases, or back pretrial risk assessment to reduce unnecessary pretrial incarceration. Smart technology projects benefit entire county justice systems by automating and integrating indigent defense case processing. Video conferencing reduces transportation costs for rural jurisdictions. After the discovery of widespread errors in DNA testing, a one-time discretionary grant to the Harris County Public Defender's Appellate Division has saved counties millions of dollars in unnecessary court appointments.

While TIDC has an established portfolio of cost containment programs, the discretionary grant program is also being used to lead counties into the future. Some innovations, such as court date reminder texts, routine task automation, and online dispute resolution, take advantage of emerging technology. Attorney checklists and mentoring are simple practices with an outsized impact. Participatory defense, early representation, restorative justice, and comprehensive defense teams are a fresh interpretation of traditional defense roles.

What both these current and future discretionary grant strategies have in common is their promise for raising the quality of indigent defense services while increasing efficiency and containing costs to jurisdictions. By thinking creatively and investing strategically, TIDC has crafted a vision to help counties continue progress to comply with the FDA and close the "Sixth Amendment gap."

## Recommendations

This report describes the central role for the Texas Indigent Defense Commission in bringing the State's 254 counties into compliance with professional and constitutional standards assuring the right to counsel. The evidence indicates that the discretionary grant program is an effective agent for incentivizing change. The following recommendations are made to sustain momentum toward constitutionally compliant and fiscally-responsible indigent defense into the future.

1. TIDC should continue to expand investments in cost containment strategies discussed in Part III;
2. TIDC should pursue new innovations identified in their recent publication, *Indigent Defense Innovation*; and
3. TIDC should continue to pursue programs like public defender and managed assigned counsel offices that ensure responsible indigent defense spending tied to accountability and oversight.

## **Appendix A**

### **Calculating Case-Adjusted Indigent Defense Spending**



## Method Used to Determine the Effect of Case Composition on Felony Spending

### Table A-1: Standardizing Spending from 2010 to 2017<sup>1</sup>

Begin with county spending reported to the Texas Indigent Defense Commission on the Indigent Defense Expenditure Report for FY 2010 and FY 2017, excluding appeals.

#### Stage 1: Standardize 2010 spending to 2017 caseload

- 1) Reallocate the number of cases of each case type in 2010 (grey cells, Column 1) to match the share of cases in 2017 (Column 3).<sup>2</sup> Multiplying values in Column 1 by Column 3 results in the adjusted 2010 case distribution shown in Column 4.
- 2) To generate the sum of money that *would have been spent* in 2010, multiply the number of cases in Column 4 by per-case spending associated with that case from 2010 (Column 6).
- 3) To calculate the total amount of money that would have been spent in 2010 given the 2017 case allocation (Column 7), multiply the adjusted number of cases (Column 4) by the per-case spending estimates (Column 6).

#### Stage 2: Calculate the effect of changes in case composition vs. case costs on spending

Compare how this standardized 2010 spending estimate compares to actual 2017 spending in order to parse **changes in spending attributable to case composition** from **changes in spending that are the result of increased per-case spending**.

- 1) Determine the difference between actual 2017 and adjusted 2010 (Column 10) spending: Subtract Column 9 from Column 8.
- 2) For a comparison, determine the real or unadjusted difference in spending between 2010 and 2017 (Column 11): Subtract actual 2010 spending (Column 5) from actual 2017 spending (Column 8).
- 3) Determine the amount of money attributable to changes in case composition: Subtract the adjusted 2010-2017 spending differential (Column 10) from the real 2010-2017 spending differential (Column 11). This leaves us with the amount of spending that is attributable to changes in case composition (Column 12).

#### Stage 3: Calculate percentage of change attributable to case composition vs. case costs

- 1) Divide the proportion of money attributable to either the cost of a case or case composition (Column 13) by the real 2010-2017 spending differential (Column 14).

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<sup>1</sup> We chose to focus on the period 2010 to 2017 because this is the time period within which overall case volume stabilizes, yet spending still increases. In an effort to show how spending might increase while cases decreased, the role of case composition is particularly important to understand. The same exercise, however, could be replicated for other two-year comparisons.

<sup>2</sup> To calculate the share of cases in each case type in 2017, we simply divide the number of cases in each of the three categories by the sum of all cases (i.e. Total cases).

- 2) The result is presented in Column 15. From 2010 to 2017, 27% of the actual change in spending is attributable to changes in case composition. In contrast, 73% of the actual change in spending is attributable to greater investment in per-case spending.

Table A-1. The effect of case composition and per-case spending investments on total indigent defense spending from FY2010 to FY2017

Stage 1: Standardize 2010 spending to 2017 caseload						
	(1)	(2)	(3)	(4)	(5)	(6)
	Actual cases		2017 share of cases	2010 cases at 2017 share of cases	2010 actual spending	2010 per-case spending
	2010	2017				
All felony	192,832	212,428	45.3%	214,959	\$138,954,734	\$721
Misdemeanor	227,111	217,002	46.3%	219,588	\$47,026,173	\$207
Juvenile	54,711	39,635	8.4%	40,107	\$15,861,390	\$290
Total	474,654	469,065	100.0%	474,654	\$201,842,297	\$211,995,486

Stage 2: Calculate the effect of changes in case composition vs. case costs on spending					
	(8)	(9)	(10)	(11)	(12)
	2017 actual spending	2010 spending adjusted for 2017 caseload	Cost of change in per-case spending	Real difference between 2017 and 2010 spending	Cost of changes attributable to changes in case composition
All felony	\$164,285,056	\$154,899,536	\$9,385,519.71	\$25,330,322	\$15,944,802
Misdemeanor	\$57,807,732	\$45,468,363	\$12,339,368.78	\$10,781,559	-\$1,557,809
Juvenile	\$17,539,762	\$11,627,586	\$5,912,175.74	\$1,678,372	-\$4,233,803
Total	\$239,632,550	\$211,995,486	\$27,637,064.23	\$37,790,253	\$10,153,188

Stage 3: Percentage of change attributable to case composition and per-case spending changes		
	(13)	(14)
	Proportion of money attributable to:	Real difference between 2017 and 2010 spending
Case composition	\$10,153,188	\$37,790,253
Cost per case	\$27,637,064	\$37,790,253
		Percentage of real change attributable to:
		27%
		73%

Notes: All spending estimates are adjusted to 2017 dollars to account for the effect of inflation.

## Table A-2: Changes in Spending over Time

In Table A-2, the estimates constructed in the Table A-1 are applied to assess how the net change in actual spending is affected by the changing composition of cases.

In Panel A, unadjusted spending total for all felony, misdemeanor and juvenile spending in 2010 was \$179,574,997. Adjusted for inflation, 2010 spending would have been equivalent to \$201,842,297 in 2017 dollars. If we adjust for both inflation *and* case composition, however, then spending would have been \$211,995,486 (see Table A-2, Column 7).

Panel B converts the difference in spending between 2010 and 2017 identified in Panel A (Column 3) to total and average annual increases in spending.

Table A-2. Calculating Annual Change in Spending from 2010 to 2017 Using Different Spending Estimates

	A. Difference in Spending between 2010 and 2017		
	(1)	(2)	(3)
	2010	2017	Difference in spending between 2010 and 2017
Nominal spending	\$179,574,997	\$239,632,550	\$60,057,553
Inflation-adjusted spending	\$201,842,297	\$239,632,550	\$37,790,253
Inflation- and case-adjusted spending	\$211,995,486	\$239,632,550	\$27,637,064

	B. Change between 2010 and 2017		
	(1)	(2)	(3)
	Difference in spending 2010-2017	Increase in spending 2010-2017	Avg. annual increase in spending
Nominal spending only	\$60,057,553	33.4%	4.8%
Inflation-adjusted spending only	\$37,790,253	18.7%	2.7%
Inflation- and case-adjusted spending	\$27,637,064	13.0%	1.9%

Notes: All "case-adjustments" are made to the distribution of cases in 2017. Case-adjusted spending conveys what spending *would have been in 2010* had the distribution of cases resembled that of 2017.



## **Appendix B**

### **Indigent Defense Relative to Other County Spending**



## Indigent Defense Relative to Other County Spending

Indigent defense is not the only expense straining local budgets. To further contextualize cost burden, growth for court appointed representation can be measured against commitments to other spending domains. Two data sources were available to provide complimentary perspectives on this question; they include selected criminal justice budgets for two fiscal years, and a 2016 survey of county spending conducted by the Texas Association of Counties (TAC).

Table B-1. Spending Changes from 2012 to 2017 Based on County Budget Data (n=195)

Spending Category	2012 Baseline	2017 % Change	Difference
District and County Clerks	\$305,125,004	+22%	\$66,130,224
<b>Indigent Defense</b>	<b>\$221,542,085</b>	<b>+20%</b>	<b>\$43,589,301</b>
Prosecution	\$503,589,535	+10%	\$50,454,792
County Law Enforcement	\$2,679,816,584	+5%	\$139,002,931

Notes: Spending estimates from 2012 have been adjusted for inflation to 2017 dollars.

### County Budget Data

First, adopted county budget data for FY 2012 and FY 2017 was collected from 195 Texas counties (77% of jurisdictions).<sup>1</sup> After standardizing amounts in 2017 dollars, Table B-1 shows proportional spending increases were greatest for court clerks and indigent defense, each rising about 20% over five years. Although prosecution (+10%) and county law enforcement (+5%) showed smaller percentage increases, their base budgets were also considerably higher – at least double that of public defense. As a consequence, total spending and absolute growth were both lower for indigent defense than for any of the other criminal justice-related budget categories considered.

Further, only increases in indigent defense spending are accompanied by new demand. While the indigent defense system represented 11,500 more cases over the five-year reporting period – a 2.5% increase – cases added to other sectors of the criminal justice system fell by roughly 76,000 cases or 9%.

### County Survey Data

A 2016 survey conducted by the Texas Association of Counties offers a window into unfunded county obligations.<sup>2</sup> Counties were asked to report spending for 14 categories of unfunded state mandates from 2011 and 2016. Responses from 98 counties were then extrapolated based on population to compute statewide spending estimates.

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<sup>1</sup> Results include 38 of the largest 39 jurisdictions; average population for omitted counties is 15,979. If counties maintain a website, they are required by Article 111.009, Local Government Code to post a copy of the budget. Counties were contacted directly to request budgets that were not publicly posted. For counties included in the analysis, indigent defense spending was taken from Indigent Defense Expenditure Reports submitted annually to TIDC by auditors.

<sup>2</sup> Texas Association of Counties, “The Cost of County Government: 2016 Unfunded Mandates Survey.”

Findings in Table B-2 show an overall pattern of rising costs in every spending category.<sup>3</sup> On average, spending increased 15% across all categories after weighting by baseline values; indigent defense cost grew at a nearly identical rate, 17%. Also, most areas of spending increased faster than indigent defense. These data indicate that even where counties might commit additional resources to indigent defense, there are a host of other unfunded mandates that hamstring such investment. Further the table affirms that indigent defense spending in recent five-year intervals has been proportional to other areas of growth in jurisdiction-level spending.

Table B-2. Spending Changes from 2011 to 2016 Based on County Survey Data (n=98)

Spending Category	2011 Baseline	2016 % Change	Difference
Special Elections	\$347,795	+208%	\$724,830
Adult Probation	\$13,948,386	+68%	\$9,439,465
Mandated County Trainings	\$24,518,647	+42%	\$10,205,673
Jail Staff Training	\$1,961,492	+41%	\$796,028
Autopsies	\$10,461,290	+33%	\$3,428,439
Veterans' Services	\$10,352,318	+27%	\$2,822,498
Electronic Voting Equipment	\$7,410,080	+21%	\$1,577,391
Indigent Health Care	\$67,126,608	+18%	\$11,922,287
Motor Vehicle Collections	\$114,420,354	+17%	\$19,472,541
<b>Indigent Defense</b>	<b>\$216,161,842</b>	<b>+17%</b>	<b>\$36,846,346</b>
Jail Indigent Health Care	\$31,492,840	+14%	\$4,559,175
County Jails	\$1,259,713,611	+13%	\$158,877,013
Juvenile Probation	\$426,842,406	+13%	\$55,621,389
Appraisal District	\$61,242,132	+10%	\$6,163,902

Notes: Reported spending has been adjusted for inflation so that it represents 2017 dollars. All estimates were taken from "The Cost of County Government: 2016 Unfunded Mandates Survey" by the Texas Association of Counties, available here: <https://www.county.org/Legislative/County-Legislative-Issues/Unfunded-Mandates>. Indigent defense spending has been adjusted so that the case composition for years 2011 and 2016 is standardized.

In the absence of state funding, the quality of indigent defense often comes down to the financial status and political wherewithal of the 254 individual counties in Texas. Inequity across jurisdictions can create patchwork systems with access to justice dependent upon where a person is arrested, and counties with the greatest need of indigent defense services may be the least able to afford it.<sup>4</sup>

<sup>3</sup> Funding for a local office for the Texas Department of Public Safety was omitted from reporting because no statutory mandate requires counties to support such an office.

<sup>4</sup> National Legal Aid & Defender Association, "A Race to the Bottom: Speed and Savings over Due Process," last modified June 2008, [http://defender.nlada.net/library/documents/mi\\_racetothetobottomjseri06-2008\\_report](http://defender.nlada.net/library/documents/mi_racetothetobottomjseri06-2008_report); Justice Policy Institute, "System Overload: The Costs of Under-Resourcing Public Defense," July 2011.

## **Appendix C**

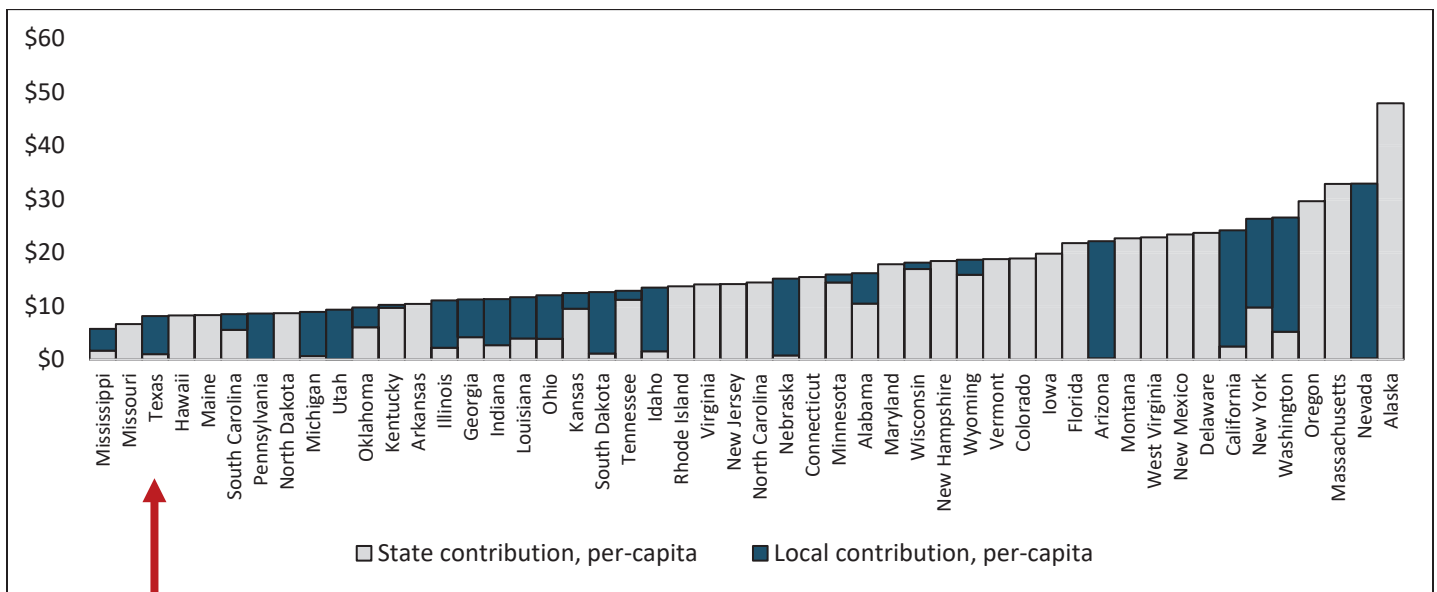
### **Spending Comparisons Among Three Peer States to Texas**



## Indigent Defense Spending Comparisons Among Peer States

Indigent defense spending in Texas can be benchmarked against other states responding to demands similar to Texas. At present, the only fifty-state analysis of such spending data is provided by a 2008 study published by the American Bar Association (ABA).<sup>1</sup> As Figure C-1 illustrates, Texas ranks third from the bottom in per-capita spending.

Figure C-1. Per-Capita Indigent Defense Spending, 2008



Notes: Spending is nominal dollars. Graphic reproduced with data from Stevens et al. (2008).

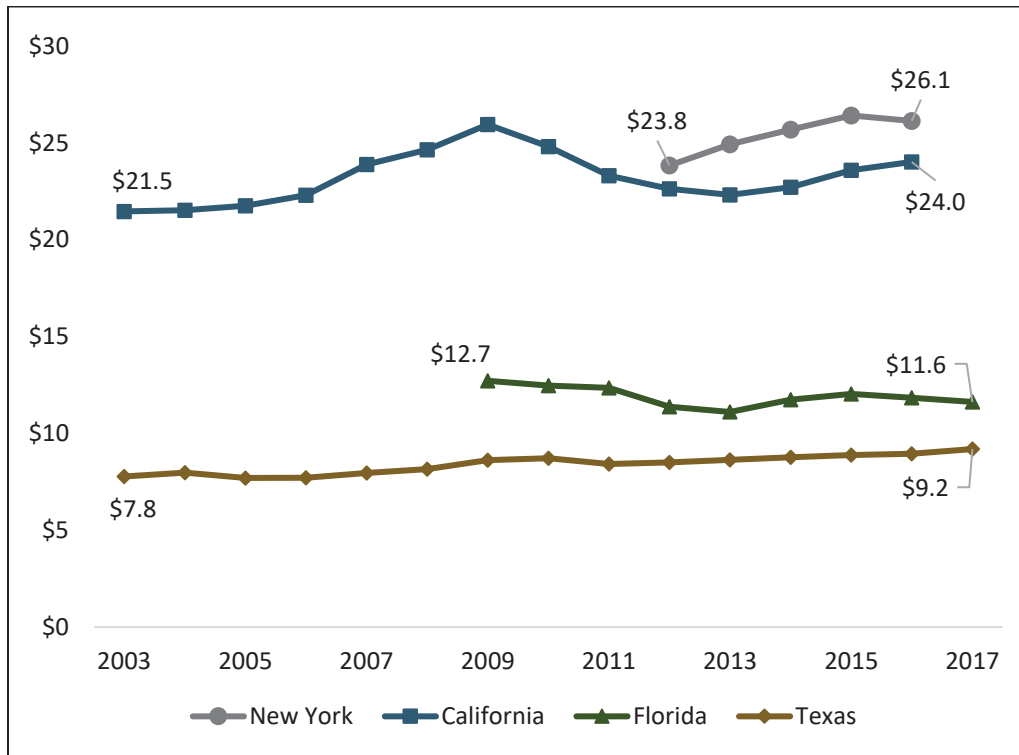
New budget data was collected to compare Texas' indigent defense spending with a smaller cohort of large "peer" states over time. Per-capita spending was calculated in order to standardize estimates across the states.<sup>2</sup>

Like Texas, California, New York, and California are large, demographically diverse states; together these four states contain one-third of the nation's population. Also like Texas, New York and California place primary responsibility for funding indigent defense services on counties; in Florida, with the exception of conflict counsel, court-appointed representation is fully-funded by a statewide Public Defender's Office.

<sup>1</sup> Holly Stevens, Colleen Sheppard, Robert Spangenberg, Aimee Wickman, and Jon Gould, "State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008," A Report for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants Bar Information Program, last modified November 2010, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_exp\\_enditures\\_fy08.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_exp_enditures_fy08.authcheckdam.pdf)

<sup>2</sup> Because these states do not readily report the number and type of court-appointed cases, these estimates are not adjusted for case composition like previous analyses. Instead, reported spending is only adjusted for inflation.

Figure C-2. Per-Capita Indigent Defense Spending Among NY, CA, FL, and TX



Notes: Per-capita indigent defense spending estimates for Texas involve taking the reported spending on the IDER and dividing by Census population estimates. Funding for NY, CA, and FL were either scraped from state budgets or were collected directly from state contacts.

Figure C-2 illustrates a similar pattern to Figure C-1. Florida, New York, and California all spend more money on their systems of indigent defense compared to Texas. Ironically, as Table C-1 depicts, Texas spends the least amount of money per-capita, yet possesses the second-highest violent crime rate among the four states.

Table C-1. 2014 per-Capita Indigent Defense Spending and violent Crime Rates Among Four Large States

State	Indigent Defense spending		State	Violent crime	
	Per-capita	Rank		Per-100k pop.	Rank
New York	\$25.70	1	Florida	540	1
California	\$22.70	2	<b>Texas</b>	<b>406</b>	<b>2</b>
Florida	\$11.70	3	New York	382	3
<b>Texas</b>	<b>\$8.80</b>	<b>4</b>	California	281	4

Notes: FY2014 indigent defense expenditures are inflation adjusted to 2017 dollars. Data for California, New York, and Florida were collected by authors. Violent crime data is taken from Unified Crime Reporting, at: <https://www.ucrdatatool.gov/Search/Crime/State/OneYearofData.cfm>.



## **Appendix D**

### **FY 2018 and 2019 Cost Containment Grant Awards**



**Table D-1. Cost Containment Grants for FY 2018**

County	Program	Amount	Cost Containment Strategies
Atascosa	TechShare Indigent Defense	\$7,250	Uniform and objective eligibility screening; streamlined processes for appointments, payments and required reporting.
Bee (regional)	Mental Health Social Worker for Public Defender	\$35,880	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release, and reduce recidivism.
Bexar	Representation for Mentally Ill Defendants at Magistration	\$116,254	Divert qualified mentally ill defendants from jail to treatment, address unmet mental health needs that contribute to CJS involvement. Reduce unnecessary pre-trial jail days.
Culberson (Regional)	Far West Texas Regional Public Defender Office (videoconferencing portion)	\$8,525	Facilitate attorney-client remote jail visits in very large, remote rural coverage area.
Dallas	TechShare Indigent Defense	\$146,975	Uniform and objective eligibility screening; streamlined processes for appointments, payments and required reporting.
El Paso	Public Defender Mental Health Advocacy and Litigation Unit	\$840,273	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
Harris (statewide)	Statewide Texas DNA Mixture Case Review Project	\$329,400	Centralized resource for efficient case screening avoided hundreds of attorney appointments and unnecessary reanalysis.
Henderson	TechShare Indigent Defense	\$10,750	Uniform and objective eligibility screening; streamlined processes for appointments, payments and required reporting.
Kaufman	TechShare Indigent Defense	\$11,275	Uniform and objective eligibility screening; streamlined processes for appointments, payments and required reporting.
Lubbock (statewide)	Regional Public Defender Office for Capital Cases (180 counties)	\$3,000,000	Partnership with many counties to operate common resource that provides budget predictability and mitigates dramatic budget spikes for indigent defense in death penalty cases. Focus on early mitigation and plea agreements avoids many costly trials.
Nueces	Pre-Trial Assessment Initiative	\$160,000	Implement pre-trial risk assessment to reduce unnecessary pre-trial incarceration and associated costs, conduct program impact analysis.
Smith	Mental Health Defender Program	\$68,800	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
Taylor	Videoconferencing System	\$50,000	Streamlines prompt magistration, eligibility screening and attorney-client communication.
Travis	Holistic Defense Program (mental health portion)	\$87,034	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
	<b>Total</b>	<b>\$4,872,416</b>	

**Table D-2. FY2019 Cost Containment Grant Awards**

County	Program	Amount	Cost Containment Strategies
Bee (regional)	Mental Health Case Worker for Public Defender	\$33,280	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release, and reduce recidivism.
Bexar	Representation for Mentally Ill Defendants at Magistration	\$58,127	Divert qualified mentally ill defendants from jail to treatment, address unmet mental health needs that contribute to CJS involvement. Reduce unnecessary pre-trial jail days.
Dallas	Young Adult Felony Diversion Program with Interdisciplinary Support	\$324,170	Program supports alternatives to incarceration combined with multidimensional supports to improve defendant outcomes, cut jail costs, and reduce recidivism.
Ellis	TechShare Indigent Defense	\$14,665	Uniform and objective eligibility screening; streamlined processes for appointments, payments and required reporting.
El Paso	Public Defender Mental Health Advocacy and Litigation Unit	\$623,432	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
Grimes	Videoconferencing System	\$50,000	Streamlines prompt magistration, eligibility screening and attorney-client communication.
Leon	TechShare Indigent Defense System	\$9,488	Uniform and objective eligibility screening; streamlined processes for appointments, payments and required reporting.
Lubbock (statewide)	Regional Public Defender Office for Capital Cases (180 counties)	\$2,000,000	Partnership with many counties to operate common resource that provides budget predictability and mitigates dramatic budget spikes for indigent defense in death penalty cases. Focus on early mitigation and plea agreements avoids many costly trials.
Smith	Mental Health Defender Program	\$51,600	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
Travis	Mental Health Public Defender Limited Felony Expansion	\$214,819	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
Travis	Holistic Defense Program (mental health portion)	\$58,022	Improve defendant outcomes by connecting them with resources needed to stabilize, successfully comply with terms of release and reduce recidivism.
Webb	Public Defender Mental Health Case Worker	\$70,037	Program supports alternatives to incarceration combined with multidimensional supports to improve defendant outcomes, cut jail costs, and reduce recidivism.
Williamson	Young Adult Felony Diversion Program with Interdisciplinary Support	\$308,728	Program supports alternatives to incarceration combined with multidimensional supports to improve defendant outcomes, cut jail costs, and reduce recidivism.
	<b>Total</b>	<b>\$4,155,203</b>	



