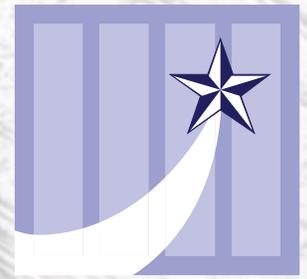


# **Cost-Saving Strategies For Texas' Criminal and Juvenile Justice Systems**

**A Policy Guide, 2011  
Part 3 of 4**



**TEXAS CRIMINAL  
JUSTICE COALITION**

## **Strengthen Indigent Defense Systems And Improve Court and Conviction Practices**



## ACKNOWLEDGEMENTS

We would like to extend our most sincere appreciation to the members of the Policy Research Team at the Texas Criminal Justice Coalition for their invaluable input in the compilation of this policy guide – Chris Cunico, Travis Leete, Leah Pinney, Erica Surprenant, Molly Totman, and Ana Yáñez-Correa.

We would also like to extend our gratitude to those who believe in and guide our work and who remind us that we are not alone. You are an inspiration to us in our pursuit of real solutions to the problems facing Texas' criminal and juvenile justice systems.

Finally, we would like to acknowledge Kim Wilks for her cover design and interior layout and design.

## FEBRUARY 2011

*The Texas Criminal Justice Coalition advances criminal and juvenile justice solutions that promote effective management, accountability, and best practices in efforts to increase public safety and preserve human and civil rights*

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## Letter from the Executive Director

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Dear Reader,

As the Executive Director of the Texas Criminal Justice Coalition (TCJC), I am thrilled to present our third policy guide, *Cost-Saving Strategies for Texas' Criminal and Juvenile Justice Systems*. For your convenience, we have created four independent booklets that address each of TCJC's major areas of policy interest.

In this upcoming 82<sup>nd</sup> legislative session, the state will face an historic budget deficit that our leadership must reconcile with the ongoing need for public safety, social services, education, workforce development, and various infrastructure improvements. The difficulty lies in making cuts now to address the state's immediate needs, while also keeping in mind long-term ramifications so that policy-makers do not simply shift the costs to Texans down the line. Especially in the area of criminal justice, this challenge is clear. Budget reductions in key line items today could lead to increased recidivism and threats to public safety in the future.

**PART 3** of this guide recommends **front-end strategies** that can save the state money in incarceration costs. A strong, well-resourced public defender system protects the constitutional right to counsel, keeping prison and jail populations manageable, providing budget predictability and cost efficiencies, and preventing costly lawsuits against counties or the state. Likewise, strategies that strengthen the Texas Task Force on Indigent Defense, as well as improve attorney appointment and representation procedures, will ensure that victims' needs are met, that innocent individuals are not wrongfully convicted, and that confidence in our court and justice systems is well placed.

Included throughout this guide are comprehensive, cost-saving practices that the state and counties can employ to address the immediate financial deficit, as well as preserve public safety throughout our communities in the future. Already, state leadership has laid the foundation for the continuous success of risk-reduction strategies with their bipartisan support during the past three legislative sessions. These additional smart-on-crime recommendations must serve as a critical consideration-point for policy-makers seeking to implement a rational, responsible, fiscally sound budgetary approach, as they can and will deliver taxpayers a return on their investment. But in consideration of Texas' current economic climate, this policy guide not only provides legislative recommendations that will save the state money now, it also outlines strategies that policy-makers can take back to their respective communities for consideration and implementation during the legislative interim.

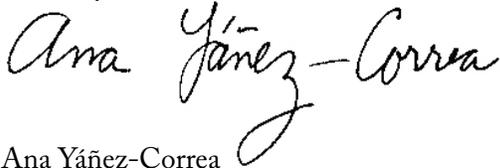
Please note that if you are interested in other areas of criminal and juvenile justice reform, you should have a look at the additional parts in our four-part policy guide.

**PART 1** examines **alternatives to incarceration** and the need for continued funding for probation, parole, treatment, and programming – diversions that have saved the state nearly \$2 billion since 2007 and effectively address the root causes of criminal behavior.

**PART 2** addresses the need to bolster the state's **re-entry infrastructure**, including through in-house and community-based tools for personal responsibility that will enable returning individuals to find and maintain both housing and employment, in turn living as law abiding, contributing members of our communities.

**PART 4** provides guidance to policy-makers in light of a possible restructuring of the state's **juvenile justice system**. Emphasis must remain on ensuring that funding and rights follow the youth.

Sincerely,

A handwritten signature in black ink that reads "Ana Yáñez-Correa". The signature is written in a cursive style with a large, stylized initial 'A' and a long, sweeping underline.

Ana Yáñez-Correa  
Executive Director, Texas Criminal Justice Coalition

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# Introduction

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## Strengthen Indigent Defense Systems And Improve Court and Conviction Practices

This year marks the tenth anniversary of Texas' passage of the historic Fair Defense Act (FDA), legislation that set the framework for improving indigent defense policies in Texas and, among other things, established a Task Force on Indigent Defense (Task Force). The Task Force is responsible for (a) developing statewide policies and minimum standards for the provision of indigent defense (e.g., appointment of qualified counsel, prompt magistration, indigency determinations), (b) distributing funds to supplement county indigent defense services, and (c) independently monitoring the compliance of Texas' 254 counties with set policies and standards.

Despite impressive gains made by the Task Force throughout these past 10 years, ongoing weaknesses in court and conviction practices in Texas continue to lead to unequal sentencing rates and fill jail and prison beds. In large part, this is due to Texas' narrow funding for indigent defense. In fact, according to recent data, Texas ranks 48<sup>th</sup> in per-capita indigent defense spending,<sup>1</sup> placing tenth out of the ten most populated states.<sup>2</sup> Although spending levels have increased dramatically in Texas since the passage of the FDA,<sup>3</sup> they remain far below what other states spend on indigent defense today.

Especially in areas without public defender offices, many defendants are left to negotiate deals on their own, often to their disadvantage. Individuals may eventually end up sitting in jail for days or weeks awaiting trial with high, unaffordable bond payments that preclude their release. Taxpayers foot the bill as these defendants languish in jail without understanding their options. Then, because many do not fully grasp the charges against them, or their possible defenses or sentencing alternatives, these individuals are more likely to waive rights or receive longer prison, jail, or probation terms when they do reach trial.

The state has a significant interest in ensuring that counties have adequate resources to support a quality defense bar, as well as have the necessary funds to provide timely appointment of counsel and a constitutional level of representation to defendants in need.

Specifically, the state must encourage and support counties in their efforts to implement independent indigent defense systems that ensure voracity of the appointment process and provide defendants access to quality representation. Policy-makers must also promote strategies that strengthen the state's Task Force on Indigent Defense and improve attorney appointment and representation procedures. Finally, policy-makers must address bond and bail practices that are flooding corrections facilities at great taxpayer expense with nonviolent, indigent defendants awaiting trial, as well as support strategies that will better prevent the wrongful conviction of innocent individuals. During this 82<sup>nd</sup> legislative session, the state should take the opportunity to renew its commitment to the Fair Defense Act and the protection of individuals' rights.

# Strengthen Indigent Defense Delivery Models to Maximize Resources and Streamline the Criminal Justice Process

## Background

The Task Force on Indigent Defense has been instrumental in assisting counties in the establishment and maintenance of public defender offices. Prior to passage of the Fair Defense Act in 2001, only seven counties had some form of public defender office in operation. Now, there are 18 public defender offices, serving upwards of 90 counties and various specialized populations, that have either been awarded a grant or are in full operation in Texas.<sup>4</sup> Another may soon follow, as Williamson County is considering an office to address the increasing costs posed by its court-appointed system.<sup>5</sup>

Both public defender offices and other defense delivery systems are crucial to counties seeking to provide the greatest quality of service to the greatest number of clients. Defense systems, when incorporating recognized best practices, can also improve cost savings, increase independence from the judiciary, reduce bias, and more effectively address the needs of specialized defendant populations.

## Key Findings

- One of the most important safeguards against unjust convictions is access to a quality defense.
- During 2009, 17 counties did not provide misdemeanants *any* counsel (a 0.0% appointment rate), while 93 counties appointed counsel for misdemeanants in less than 10% of instances.<sup>6</sup> Overall, the state misdemeanor appointment rate was only 35.2%. The state felony appointment rate was not even double that, at 67.7%.<sup>7</sup> Despite these grim rates, it should be noted that from 2002 through 2009, attorney appointment rates for misdemeanors did increase from 26%, while rates for felonies increased from 54%.<sup>8</sup>

- If defendants in felony cases fail to receive effective legal representation and end up in prison, the state pays for the costs of incarceration.
- Although the real savings to counties from public defender offices results from the collateral benefits of a well-functioning system, counties can also get budget predictability and cost savings through lower expenses per case.<sup>9</sup>
- Lubbock's Regional Capital Public Defender Office has saved its member counties nearly \$650,000 in its first two years of operation.<sup>10</sup>
- Costly pre-trial detention of defendants in county jails is caused by a variety of factors, including lack of indigent defense to help eligible individuals obtain release, and the inability of defendants to understand their bond or bail options. Public defender offices can significantly reduce the number of days between defendants' arrest and trial, helping them more promptly return to their obligations in the community. Kaufman County's public defender office reduced the average jail population from 306 to 246 within its first year by clearing a backlog of cases. Val Verde County's Regional Public Defender Office reduced the regional jail population by 20% in 11 months by resolving cases more quickly than the private bar.<sup>11</sup>
- Despite jurisdictions' great incentive to consider a public defender model to meet their representation needs, just 8% of Texas counties use public defender offices in noncapital felony and misdemeanor cases.<sup>12</sup> Furthermore, only eight counties have established public defender offices to provide juvenile indigent defense services.<sup>13</sup>
- With mental health public defender offices, counties can see lowered rates of incarceration for mentally ill populations, as well as cost savings from improvements in recidivism rates.<sup>14</sup> Indeed, according to a recent report by the Task Force and Office of Court Administration, "six months after case disposition, people represented by the mental health public defender experience significantly lower rates of recidivism than otherwise identical people who are not in the program... Recidivism continues to be suppressed up to 18 months after case disposition for people with schizophrenia,"<sup>15</sup> especially important given the prevalence of schizophrenia diagnoses.<sup>16</sup>

- Harris County’s veterans court, the first in Texas,<sup>17</sup> was established in late 2009 to address the needs of the three hundred veterans booked into the county jail each month, many with a mental illness/disorder, a traumatic brain injury, or substance abuse issues.<sup>18</sup> Most participants have been successfully progressing through the program.<sup>19</sup>
- Policy-makers should encourage chief public defenders to implement the American Bar Association’s Ten Principles of a Public Defense Delivery System in their organizational practices, as well as incorporate a community-oriented, client-focused approach in public defense. According to the Brennan Center for Justice, such an approach is “a critical final component in the process of increasing community engagement in the criminal justice system.”<sup>20</sup>

## Cost-Saving Strategies

### (1) Encourage incentives to strengthen and expand public defender systems in Texas.

One of the most important safeguards against unjust convictions is access to a quality defense. To best ensure that defendants knowledgeably navigate the criminal justice system, their ability to obtain court-appointed representation must be clear, and representation must occur quickly in the process – prior to arraignment/first appearance proceedings or plea negotiations. Wider establishment and continued support of county or regional public defender offices will assist individuals in obtaining swiftly appointed, qualified representation.

**Public defender offices are especially important in light of the state budget shortfall, which may cut diversion programs, crowd court dockets, and cause jail populations to explode.**

Other benefits of public defender offices are as follows:

- **Public defender offices increase cost savings.** Performance data produced by Texas’ long-standing public defender programs demonstrate cost benefits for areas that use public defenders. Although the real savings to counties results from the collateral benefits of a well-functioning system, counties can also get budget predictability and cost savings through

lower per-case expenses.<sup>21</sup> Likewise, because public defenders streamline the appointment process and increase consistency in case management, counties see reductions in court administrative costs typically associated with judicial decisions about attorney appointments, training and experience qualifications, caseload management, and fee vouchers.<sup>22</sup>

## Reduce Misdemeanants’ Jail Time Prior to Trial

**“Counties with high misdemeanor arrest rates should especially examine the feasibility of establishing a public defender office. Misdemeanants are typically nonviolent and should not be unnecessarily consuming jail space. In Hidalgo County, the public defender office positively impacted misdemeanor defendants, reducing the average number of days between their arrest and case disposition from 15 to 11 days.”**

*Lise Olsen, Houston Chronicle, August 23, 2009*

- **Public defender offices can significantly reduce the number of days between defendants’ arrest and trial, helping them more promptly return to their obligations in the community.** This, in turn, minimizes the unnecessary and harmful collateral consequences of job and/or housing loss, promotes family stability, and reduces overcrowding and substantial jail costs for counties, both in terms of both lowered pre-trial detention rates and a decline in jail sentences.<sup>23</sup> For example, in Kaufman County, the public defender office reduced the average jail population from 306 to 246 within its first year by clearing a backlog of cases. Likewise, Val Verde County’s Regional Public Defender Office reduced the regional jail population by 20% in 11 months, from 78 to 61 inmates, by resolving cases more quickly than the private bar.<sup>24</sup> Considering the average cost-per-day to house a jail inmate is \$45, counties can experience tremendous savings through the expedited release of eligible defendants.

- **Public defender offices have mechanisms to increase the quality of indigent defense services, improving confidence in the system.** Counties can put in place independent oversight boards, ideally with representation from defense attorneys and organizations concerned with the problems of indigent individuals, which can encourage transparency and ensure that defenders act “without fear of outside intervention or a reduction in resources for performing effective advocacy.”<sup>25</sup> In other words, board leadership can prevent a system riddled with conflicts of interest, wherein attorneys receive appointments from judges based on political contributions or friendship rather than merit, which undermines the justice process to the potential detriment of the client.<sup>26</sup>

Additionally, counties can implement safeguards to more justly and effectively handle large caseloads, promoting accountability<sup>27</sup> and ultimately reducing a defendant’s time in jail awaiting trial. According to the Bureau of Justice Assistance, “When more attention is paid to individual cases, with fewer requests for continuances, more effective bail and sentencing recommendations are developed and less time is spent in jail.”<sup>28</sup> This is especially possible when defender programs are resourced at levels near to or on par with district attorneys. Such resource allocation allows these programs to provide investigators, experts, administrative assistants, interpreters, and case coordinators, in balance with services provided by prosecutors. An even resource allocation also allows defender programs to provide the online research tools and training necessary to improve case management for both felonies and misdemeanors, as well as to facilitate an equitable resolution.<sup>29</sup> Furthermore, well-resourced offices, especially those with access to social workers and

mental health support services, are better equipped to provide specialized, timely assistance to vulnerable classes of defendants, such as the mentally ill<sup>30</sup> or youth. Finally, higher salaries, as opposed to per-case fees, reduce the incentive for attorneys to take more cases, which may lead to a less zealous defense, including by encouraging defendants to take pleas solely to dispose of cases.

In light of all aforementioned benefits, jurisdictions have great incentive to consider a public defender model to meet their representation needs. And yet, just 8% of Texas counties use public defender offices in noncapital felony and misdemeanor cases.<sup>31</sup> **It is incumbent upon the state to guarantee representation for anyone who is at risk of incarceration and unable to hire an attorney.**

To avoid having counties spend valuable system resources jailing individuals who do not pose a threat to public safety, and to avoid costly civil rights litigation against the state,<sup>32</sup> policy-makers must continue to allocate funds to bolster current indigent defense delivery models.

The Legislature must also assist counties in their efforts to develop new systems.

- (a) **Encourage counties to create multi-county regional programs, where necessary and feasible.**

Counties that cannot currently afford to establish a public defender office in their jurisdiction should look into a partnership with surrounding counties. For instance, the Lubbock Capital Public Defender Office serves 71 West Texas counties by providing specialized defense in costly capital cases at a reasonable and predictable expense shared among the counties, much like how an insurance policy provides coverage at a known rate for unexpected and potentially catastrophic events. Already, the office has saved its member counties nearly \$650,000 since it opened in 2008.<sup>33</sup>

*Note:* In June, 2010, the Task Force approved a grant to increase the reach of the Office to 140 counties, mostly in far West and South Texas.<sup>34</sup> Expansion is currently underway.<sup>35</sup>

**“We’re not close to meeting the bar in terms of funding to having a constitutional system.”**

*Jim Allison, General Counsel at the County Judges and Commissioners Association of Texas, cited in The Quorum Report, May 13, 2010*

## **(2) Maintain legal assistance for indigent, mentally ill defendants throughout Texas.**

Individuals suffering from mental illness all too frequently become entangled in the criminal justice system for nonviolent behaviors that are often manifestations of symptoms of their illness, circumstances, and criminogenic factors. As discussed in Part 1 of this four-part guide, Texas is woefully under-funding strategies to address the needs of mentally ill individuals who have been caught up in the system. It is imperative that the state adopts a new approach to meeting the demands posed by mentally ill defendants, especially through early interventions.

### **(a) Implement mental health public defender offices.**

These offices help bridge the gap between the criminal justice and mental health systems, ensuring that eligible individuals suffering from mental illness are given appropriate assistance throughout the criminal justice process, while meeting larger public safety interests. Specialized defenders incorporate the expertise of local social workers and case managers to provide mental health assessment, treatment referral and compliance monitoring, service integration, and follow-up as an alternative to incarceration for indigent defendants charged with low-level crimes. Given defendants' personal progression throughout this continuum, **counties can see lowered rates of incarceration for mentally ill populations, as well as cost savings from improvements in recidivism rates.**<sup>36</sup>

Indeed, according to a recent report by the Task Force and Office of Court Administration (OCA), "six months after case disposition, people represented by the mental health public defender experience significantly lower rates of recidivism than otherwise identical people who are not in the program... Recidivism continues to be suppressed up to 18 months after case disposition for people with schizophrenia,"<sup>37</sup> especially important given the prevalence of schizophrenia diagnoses.<sup>38</sup>

Ultimately, mental health public defender offices operate as a unique early-system resource to courts by serving dual purposes: (1) providing specialized indigent defense representation and case management to address interrelated issues, such as homelessness, disability, and access to medication and/or treatment programs; and (2) advocacy for alternatives that will divert individuals into treatment, assist clients in their efforts to stabilize, and ensure compliance with court requirements.<sup>39</sup> Probation with treatment is one example of an effective alternative to jail for those suffering from mental illness, and mental health public defenders can assist in identifying those who would be better served by probation rather than jail. In fact, according to the Task Force and OCA report, "among clients who are found guilty, the chance of probation instead of jail time for people represented by the [mental health public defender] is approximately twice that of similar people with other forms of counsel. [...] Under community supervision these individuals can be held accountable for their criminal behavior while avoiding the stresses of confinement and reducing the risk of decompensation."<sup>40</sup>

Travis County's Mental Health Public Defender (MHPD), which opened in early 2007, was the first office of its kind in the U.S., and has since made great strides towards reducing the disproportionate lengths and repeated occurrences of jail stays for those suffering from mental illness in Travis County.<sup>41</sup> It now serves 400 indigent misdemeanants annually who have at least one major priority population diagnosis, including schizophrenia, bi-polar disorder, major depression, and/or schizoaffective disorder.<sup>42</sup> In addition to providing legal representation, the office's team approach, including partnerships with social workers,<sup>43</sup> better ensures the provision of mental health treatment and a continuity of services that will assist mentally ill defendants in stabilizing and avoiding re-offending behaviors.

In addition to Travis County, public defender offices in Texas with mental health capacity include Bexar,<sup>44</sup> Dallas,<sup>45</sup> Fort Bend, and Harris counties, while Lubbock's Managed Assigned Counsel Program also has mental health capacity.<sup>46</sup>

**(b) Maintain other models to provide direct client services to indigent defendants with mental health issues.**

For instance, Montgomery County's Managed Assigned Council Program (MACP), recently approved for funding by Texas' Task Force on Indigent Defense,<sup>47</sup> will begin in 2011 to provide specially trained defense attorneys, case management services, and investigators to support eligible defendants. These defendants, identified during the jail intake process, will be assigned to a newly formed specialized mental health docket at their initial appearance before a magistrate. Once the MACP is running at full capacity, county officials estimate that a panel of 12 private attorneys will serve a client base of approximately 600 indigent defendants, with a docket that will meet weekly.

The MACP, the first program of its kind in Texas, will be led by attorneys in the local defense bar who will be under contract with the county. According to the county's proposal, case management services will be provided by "at least one (1) master degree level Clinician to assess persons while in jail, two (2) Caseworkers to provide assistance to clients with appointments/court dates, rehabilitative skills training, etc. and two (2) clinical staff persons to provide field support to clients such as home visits and transportation. Case management services will include, but not be limited to, referrals and other assistance for housing, education, employment, counseling, mental health treatment, substance abuse, and other direct services which will aid the defendant and assist in lowering his/her recidivism."<sup>48</sup>

As a pilot program with great potential to be replicated by other Texas counties, Montgomery County officials have set as major priorities both attorney evaluations (per defender requirements and caseload standards) and the reporting of outcomes. Specifically in regards to the latter, the county intends to conduct research to assess the cost-effectiveness of video conferencing technology for use with detained mentally ill defendants. Equally important, county leadership intends to keep its sights focused on reducing recidivism among the mentally ill population using a research study to better ensure the MACP's desired outcomes.

The program's overarching intent is to address, in a cost-efficient and humane manner, the 30-35% of jail inmates in Montgomery County with documented mental health issues, a large percentage of whom are indigent.<sup>49</sup>

**(3) Address the challenges posed by military service members' and veterans' specialized disorders through support for deferred prosecution programs.**

One specialized population of mentally ill defendants are more frequently coming before local courts: military service members and veterans whose criminal conduct was materially affected by brain injuries or a mental disorder (including post-traumatic stress disorder (PTSD) and Traumatic Brain Injury (TBI)) resulting from military service.

PTSD and TBI caused by blasts are considered the 'signature' injuries of the wars in Iraq and Afghanistan:<sup>50</sup> an estimated 30% of veterans report signs of PTSD, depression, and other mental health issues,<sup>51</sup> which does not include those individuals who may experience other symptoms coupled with PTSD, such as anxiety and alcohol/drug dependence,<sup>52</sup> that can contribute to aggressive behavior.<sup>53</sup> Indeed, veterans with PTSD exhibit high rates of violent outbursts, aggressive behavior, hostility, and poor anger control;<sup>54</sup> one study shows that 40% of veterans who had symptoms of PTSD committed violent crimes after their service.<sup>55</sup> Persons with TBI may also experience mental health problems such as severe depression, anxiety, paranoia, and difficulty controlling anger,<sup>56</sup> and several research studies have shown a link between TBI and both violent and nonviolent criminal behavior.<sup>57</sup>

The need for specialized programming to treat this population and its members' potentially long-term impairments<sup>58</sup> is clear. Absent such programming, veterans may continue to suffer, as well as place undue strain on the criminal justice system through ongoing incidents of criminal behavior. According to one advocate of tailored treatment: "If you look at the Vietnam-era veterans, where nothing was done, they have an inordinately high number of people who are homeless, have chemical dependency issues or are incarcerated. So if we do nothing, we know what the results are going to be."<sup>59</sup>

**(a) Encourage Veterans Court programming.**

Texas should increase incentives for counties to implement veterans courts, through which veterans with cognitive problems and/or substance abuse issues can voluntarily participate in a deferred prosecution program without having to plead guilty if they commit a misdemeanor or felony offense. These programs use a non-adversarial approach involving prosecutors, defense attorneys, and ongoing judicial interaction to allow for early identification of eligible participants, as well as to promote public safety and protect the due process rights of participants.

As part of the process, judges should have a thorough screening conducted, ideally by a forensic psychologist, to ensure a proper diagnosis prior to recommending the tailored treatment options or rehabilitative services that would best address each defendant's brain injury or mental disorder (including gender-specific programming, or group and/or individual counseling). Overall, improper diagnoses and poor treatment have been ongoing problems for returning soldiers of the Iraq and Afghanistan wars. One report noted a 40% vacancy rate in the Army and Navy for psychologist positions, and it also found that only 10-20% of military mental health care providers have training to deal with PTSD.<sup>60</sup>

To best ensure an adequate evaluation<sup>61</sup> and support for veteran clients, veterans courts should form partnerships with local Department of Veterans Affairs (VA) offices, public agencies, community-based organizations, and mental health professionals. Ultimately, housing and employment referrals should also be included in the provision of services, along with the help and advice of outreach specialists.<sup>62</sup>

During a defendant's participation in the program, judges can monitor his or her treatment/therapy, including VA treatment, which was previously privileged information that a judge could not access.<sup>63</sup> Upon a defendant's successful completion of the conditions imposed by the court under the diversion program, a judge should have the authority to dismiss the criminal action against

him or her. This type of program, already underway in Dallas, El Paso, Harris, and Tarrant counties,<sup>64</sup> can greatly benefit the men and women returning to Texas counties. For instance, Harris County's veterans court, the first in Texas,<sup>65</sup> was established in late 2009 to address the needs of the three hundred veterans booked into the county jail each month, many with a mental illness/disorder (like PTSD), TBI, or substance abuse issues;<sup>66</sup> most participants have been successfully progressing through the program.<sup>67</sup> **Similar programming in counties throughout Texas can free up jail beds, save valuable taxpayer dollars in incarceration costs, and minimize potential re-arrest and enforcement costs associated with other, possibly escalating offenses.**

A well-developed model program should be widely replicated to meet the needs of military service members, as well as others suffering from various mental health issues and/or substance abuse. To most effectively meet program goals, the following elements are essential:

- ❑ Early identification and prompt placement of eligible participants in the program.
- ❑ Use of a cooperative approach by prosecutors and defense attorneys to promote public safety and protect program participants' due process rights.
- ❑ Ongoing and regular judicial interaction with program participants.
- ❑ Integration of alcohol and other drug treatment services during case processing.
- ❑ Related treatment and rehabilitation services during program participation.
- ❑ Monitoring of sobriety through weekly alcohol and other drug testing.
- ❑ A coordinated strategy to govern program responses to participants' compliance.
- ❑ Development of partnerships with public agencies and community organizations to enhance effectiveness.
- ❑ Continuing interdisciplinary education to promote effective program planning, implementation, and operations.
- ❑ Monitoring and evaluation of program goals and effectiveness.<sup>68</sup>

With these program elements in place, counties could provide an appropriate path to treatment for those in need who have served our country, while making large strides towards diverting hundreds of otherwise incoming prison or jail inmates.

**(4) Address the needs of youth through an expansion of juvenile public defender offices or divisions.**

Like the adult system, juvenile indigent defense in Texas is largely funded by individual counties, each maintaining its own juvenile public defense delivery system. Essentially, each county Juvenile Board sets its own guidelines and procedures for determining whether a youth's parents are indigent through an examination of income and assets, as well as the method of and qualifications for counsel to be utilized.<sup>69</sup>

Youth ages 10 through 16<sup>70</sup> held in detention, whose parents or guardians are found to be indigent by the court, have a right to appointed counsel during detention hearings and throughout adjudication.<sup>71</sup> Appointment of counsel must be made within five working days of the date the petition for adjudication or discretionary transfer hearing was served on the child.<sup>72</sup> However, problems with this system have arisen. Children have appeared before the court for a detention hearing, a crucial stage in which a child may be held in the state's custody, without ever speaking to an attorney prior to the hearing.<sup>73</sup> Policy-makers must make every effort to improve legal representation in municipal, juvenile, and criminal proceedings for youth by providing for the early appointment of counsel and ensuring continuity in their representation during proceedings against them.

Juvenile public defender offices would be better positioned to handle these specialized caseloads in already overburdened county systems. Early intervention by defense attorneys and trained case managers would also increase youth access to community-based treatment programs, in turn strengthening families and helping nonviolent youth by diverting them from high-security Texas Youth Commission (TYC) facilities. Frequently, treatment programs at these facilities are inadequate or unavailable to the youth that need them. While awaiting treatment, nonviolent youth may be put at risk. Because of these problems, many young people coming out of

TYC may re-offend. Local public defender offices would give nonviolent youth a real chance to get their lives back on track by working with them to meet their needs and keep them out of abusive, violent, and ineffective TYC facilities. Furthermore, effective representation can reduce the long-term, negative impact of criminal justice involvement on a youth's future.

Currently, eight counties have established public defender offices to provide juvenile indigent defense services.<sup>74</sup> These specialized offices increase efficiency through the same mechanisms as the adult system: organizational structure, which ensures proper training, oversight, and accountability, as well as access to shared resources. Furthermore, juvenile public defender offices provide the added benefit of specialized case management to work with the court and families to ensure public safety while increasing opportunities to improve the lives of the youth they serve.<sup>75</sup>

**(5) Emphasize and incorporate recognized guiding principles in the implementation and operation of public defender offices.**

Policy-makers should encourage each county's chief public defender to create written standards regarding the qualification and performance of counsel, attorney trainings, conflicts of interest, caseload caps, attorney compensation, and office practices.<sup>76</sup>

Policy-makers should also encourage chief public defenders to implement the American Bar Association's Ten Principles of a Public Defense Delivery System in their organizational practices (*please see Appendix A for the Ten Principles*), as well as incorporate a community-oriented, client-focused approach in public defense. According to the Brennan Center for Justice, such an approach is "a critical final component in the process of increasing community engagement in the criminal justice system."<sup>77</sup> Nationwide, community-oriented defenders are drawing on resources and expertise from their clients' communities – including advocacy and empowerment groups, churches, social service agencies, criminal justice task forces, and re-entry organizations – to assist defendants as they navigate the criminal justice system and return to our communities.<sup>78</sup> As recommended by the Brennan Center, public defender office practitioners should specifically do the following:<sup>79</sup>

- **Promote a client-centered practice.** Defenders should recognize the importance of creating a climate where employees consider defendants as their clients, respect their clients' wishes and goals, and work together to ensure that the dignity of every client is honored.
  - **Meet clients' various needs outside of criminal legal counsel.** Defenders should recognize not only the legal aspects of the attorney-client relationship, but also to how they would help the client address housing, education, employment, mental health, addiction, immigration, public assistance, family-based issues, and other needs, including through collaborations with outside entities who can link clients with resources, opportunities, and services to meet those needs. A multidisciplinary approach is important and should include social workers, counselors, medical practitioners, investigators, and others who can address the needs of clients, their families, and communities.
  - **Seek necessary support for the sustained operation and continued efficacy of the local public defender office.** Defenders should recognize the importance of advocating for the office in efforts to obtain necessary resources (e.g., funding from the county or state, and from local or national grantors) to enable it to be truly client-centered, and to adhere to national standards for operation and efficiency.
  - **Partner and collaborate with the community.** Defenders should recognize the importance of creating a positive local presence in their county, as well as recognize how imperative it is to form relationships with community members, community-based organizations and other local activists, and community institutions (e.g., courts, schools, county and state decision-makers, treatment and health care providers, and employers) to improve case and life outcomes for clients and to strengthen families and communities. Partnerships with both likely and unlikely allies are important and should include prosecutors, victims, faith-based organizations, and national- and state-based legal aid organizations to share ideas, promote change, and support mutual efforts.
  - **Become and remain involved in addressing systemic problems with the county's criminal justice system.** Defenders should recognize the importance of identifying both local and statewide policies that hamper the success of their clients (and their families) in the county. Defenders should also be willing to work closely with advocates and key stakeholders to collaboratively address such problems (e.g., jail overcrowding, individuals with special needs, re-entry, etc.).
  - **Serve as a resource to the State Bar, other bar associations, and defense attorneys in general.** Defenders should recognize the importance of opening their trainings to all who are interested and working hand-in-hand with them to provide the best indigent defense delivery possible. Ultimately, they must be dedicated to sharing ideas, research, and models to help advance the client-oriented defense approach, which in turn will maximize its benefits for clients, families, and communities.
  - **Educate the public about the importance of having an efficient public defender office that is client-centered.** Defenders should recognize the importance of partnering with the community (e.g., policy-makers, journalists, advocates, and others) and educating them about the human impact of the criminal justice system so that the public can better appreciate the cost to individuals and communities of harmful policies that fail to address clients' needs at every point in the system.
- (6) Allow counties to create assigned counsel programs to establish greater independence among attorneys and the judiciary, and to reduce bias.**
- As per Article 26.04, Code of Criminal Procedure, judges in Texas trying criminal cases are required to screen attorneys for court-appointment eligibility, make appointments in individual cases, make compensation decisions for appointed attorneys, and control access to investigators and experts. However, the judiciary is intended to be an objective arbiter in the courtroom, influencing neither the prosecution nor the defense.

Counties should be explicitly authorized to create and operate independent assigned counsel programs, through which the judicial obligations above would be handled instead by a government office or nonprofit agency independent of the judiciary.

This alternative to the traditional court appointed system would relieve judges of burdensome administrative duties while providing greater oversight of indigent defense delivery.

**(7) Create a “standard of appointment” to limit the fees charged by private attorneys appointed by the court.**

This should not exceed the fee amounts charged by public defenders. Furthermore, the standard of appointment should require a judge to state why private counsel was appointed, rather than a public defender provided by the county.<sup>80</sup>

**(8) Separately, authorize longevity pay for public defenders in Texas.**

In 2001, policy-makers created longevity pay for Assistant District Attorneys, and they did the same for Assistant County Attorneys in 2005. Pay conditions require an attorney to remain in the public service capacity for four years, after which the attorney is paid an additional amount per month, which escalates in ensuing years. Allowing longevity pay for public defenders would incentivize and reward long-term service, while enhancing salary equity between similarly situated district attorneys and public defenders.<sup>81</sup>

**(9) Study the direct and indirect impact that public defender programs in Texas have on jail capacity, especially with respect to the pre-trial phase.**<sup>82</sup>

Data analysis can inform future proposals for public defender programs, as well as identify current gaps in defense delivery among particular offices. Policy-makers should collect and analyze pre- and post-implementation data, including each public defender office’s impact on the following: defendants’ ability to secure bond reductions, case dismissal rates, and the average number of days defendants spend in custody.

# Enable the Task Force on Indigent Defense to Continue to Help Counties Realize the Fair Defense Act

## Background

In a state as large and diverse as Texas, local administration of indigent defense delivery is essential to ensure its adequate provision and address local interests. However, the state must ensure that each model adopted by local counties or regions protects the rights of Texans and guarantees justice in the courts.

With a strong, independent, well-resourced Task Force on Indigent Defense to oversee and provide assistance to counties implementing indigent defense efforts, the state can ensure that discrete offices are collectively providing a system of defense that is effectively meeting the needs of defendants.

## Key Findings

- In addition to being controlled by a judicial agency, the Task Force has a board comprised primarily of judges, which may raise flags given the lack of independence among the judiciary and an organization that promotes fair defense.
- Individual counties shoulder approximately 85% of the costs related to meeting the constitutional requirement to provide indigent defense services. Although the state appropriates over \$28 million to the Task Force,<sup>83</sup> taken from court costs and other fees,<sup>84</sup> for distribution among Texas counties to supplement local indigent defense delivery, that funding comprises only 15% of counties' current total indigent defense expenditures.<sup>85</sup>
- Texas is one of only 18 states that requires counties to provide the majority of funding for such defense services. On the other hand, 32 states' public defense systems are either 100% state funded (26 states) or majority state funded (6 states).<sup>86</sup>
- Following passage of the Fair Defense Act, from Fiscal Year 2002 to 2009, the number of indigent individuals that have been assisted in Texas has increased by 45% from almost 325,000 individuals to more than 470,000 individuals.<sup>87</sup>
- The Task Force's allocation of competitive discretionary grants has created new and innovative programs designed to improve indigent defense, including technology and day-to-day process improvements, as well as larger direct client service projects like public defender offices.<sup>88</sup> These grants have been shown to create a great return on the initial investment, as the specialized programs they fund target the unique needs of counties and facilitate localized defense services to address particular populations.
- Strengthening funding for the Task Force would promote the continued development, maintenance, and expansion of innovative programs that help fulfill a constitutional duty, minimize the burden borne by counties, and increase confidence in Texas' justice system.
- To further improve the delivery of indigent defense services, the Task Force Board would benefit from incorporating more individuals who are knowledgeable about the day-to-day workings of quality indigent defense, including defense lawyer and public defender representatives.
- If defendants in misdemeanor cases fail to receive effective legal representation, they may be forced to pay fines and fees to county coffers. And because, as advocates warn, "there are very real limitations to [counties' current] ability to raise additional dollars,"<sup>89</sup> local county administrators may begin relying on such income to meet basic needs in the absence of adequate state funding to support county indigent defense efforts,<sup>90</sup> to the detriment of defendants and their rights.

## Cost-Saving Strategies

### (1) Provide the Task Force on Indigent Defense with independence and budget authority so that it can best enforce county compliance with the Fair Defense Act.

Under current law, the Task Force is a standing committee of the Texas Judicial Council (TJC<sup>91</sup>), and it lacks independent budget authority. The Office of Court Administration (OCA<sup>92</sup>), which operates in conjunction with TJC, makes budget requests and provides budget administration for the Task Force, while also overseeing the Task Force's Executive Director and staff. In addition to being controlled by a judicial agency, the Task Force has a board comprised primarily of judges, which may raise flags given the lack of independence among the judiciary and an organization that promotes fair defense.

The Task Force should be administratively attached to OCA but no longer a committee of TJC, and it should be re-named the Texas Indigent Defense Commission ("Commission"). Board membership should be expanded to include more bar members, especially representatives of the criminal defense bar [see Recommendation (5) below]. The Commission should also have clear authority to develop its own Legislative Appropriations Request. This will better ensure that Commission leadership can conduct their own budget analyses and present them to the Legislative Budget Board for consideration. **It will also move the Commission beyond its role as a grant administration agency, allowing it to become an agency that can more strongly advocate for improvements throughout the indigent defense system.**

Indeed, with increased authority, the Commission will be able to more effectively track local indigent defense processes and address pervasive problems, including in regard to timely and unbiased attorney appointments, attorney performance standards and compensation (including for various outcomes), caseload standards, misdemeanor representation, accountability, funding for support services, and other capacity issues (e.g., in rural areas).<sup>93</sup>

Ideally, the new Commission would develop Board-approved policies and standards for providing defense services to indigent defendants at trial, on appeal, and in

post-conviction proceedings. In addition to the above-stated problems, these standards could address attorney qualifications regarding mentally ill, non-citizen, or youth defendants; public defender office operations consistent with nationally recognized standards; and indigency determinations, possibly including standardizing the indigency determination process across counties.

The Commission could also establish statewide requirements for counties relating to reporting indigent defense information, which would improve data collection and transparency. Such information could also be used to monitor the effectiveness of each county's indigent defense policies, standards, and procedures (e.g., to determine if the county is meeting grant performance measures), as well as ensure compliance by each county with the requirements of state law relating to indigent defense. Additionally, the Commission could create reports with county-specific information, and examine (a) the quality of legal representation provided by appointed counsel to indigent defendants, (b) current indigent defense practices in Texas as compared to state and national standards, and (c) efforts made by the Commission to improve indigent defense practices in Texas. These reports should include recommendations by the Commission for improving indigent defense practices in the state.

As a final policy change, the Commission should be subject to the Sunset process, which will create accountability, fiscal responsibility, and effective oversight.

### (2) Strengthen investments in the Task Force on Indigent Defense to support evidence-based programs and impact statewide performance standards.

In the first year of the Fair Defense Act (FDA), the state appropriated \$7 million to the Task Force,<sup>94</sup> taken from court costs on convictions,<sup>95</sup> for distribution among Texas counties to supplement local indigent defense delivery that is otherwise paid for with property taxes. In ensuing years, the Legislature has authorized the collection of additional fees<sup>96</sup> to increase the funding that the Task Force distributes to counties, which is now at over \$28 million.<sup>97</sup>

Unfortunately, that funding comprises only 15% of counties' current total indigent defense expenditures. Indigent defense costs to counties have more than doubled since the FDA's passage from approximately \$95 million in 2001 to \$186 million in 2009,<sup>98</sup> and the funding generated by fees is not enough to keep up with the growing demand for services. Especially as the economy continues at this level, individuals are less likely to pay fees. Making matters worse is policy-makers' continual passage of laws that increase penalties for crimes and lengthen the stay of confinement. Without simultaneously allocating additional funds through the state's general revenue to support these mandates, counties will continue to shoulder the majority of the financial burden associated with supporting indigent defense services, and they will continue to forego critical indigent defense programming due to budget difficulties.

In doing so, counties will shirk their responsibility to provide indigent defense services to Texans facing jail time who lack the means to afford an attorney. The ramifications are severe: When defendants fail to receive the early appointment of well-qualified and independent counsel, the state and county incur unnecessary expenses related to delayed case processing and pre-trial jail expenses. Likewise, the criminal justice system is overloaded with defendants awaiting hearings, inmates who have received poorly scrutinized plea deals, and wrongfully convicted individuals.

The Task Force must be allocated additional funding, even if incremental, to (a) assist counties in establishing and maintaining well run public defender offices in the long term, (b) support the success of other cost-effective, evidence-based indigent defense programs,<sup>99</sup> and (c) effectively handle the numerous other responsibilities placed upon the Task Force by law. Policy-makers must ensure that, despite our current budget shortfall, the momentum gained by the tremendous work of the Task Force and our counties is protected and strengthened.

Indeed, since 2001, the Task Force has helped develop award-winning and innovative programs, which have provided thousands more people with appointed counsel. Strengthening funding would promote the continued development, maintenance, and expansion of good programs that help fulfill a constitutional duty, minimize the burden borne by the counties, and increase confidence in Texas' justice system.

*Note:* Where possible, the state should also make every effort to support public defender systems beyond allotments provided under current state funding mechanisms. Presently, Texas funds public defender programs over a four-year span, with the percentage of state funding decreasing incrementally each year (80% of the program's funds coming from the state in year 1, 60% in year 2, 40% in year 3, and 20% in year 4); the remaining funds are contributed by counties themselves. By the conclusion of the fourth year, the program should be sufficiently operational. However, this is not the case in counties struggling with budget deficits and other local conflicts. For instance, the Val Verde Regional Public Defender Office, which served four counties, has recently shut down.<sup>100</sup> The state should increase its investment in indigent defense delivery systems to ensure long-term operational success.

### **(3) Establish guidelines for the allocation of grant funds to counties by the Task Force.**

#### **(a) Policy-makers should instruct the Task Force to prioritize discretionary grant funding to incentivize the implementation of public defender offices and other best practices.**

Discretionary grants are highly sought-after funds. Over \$18 million has been awarded to 38 counties since 2003, and in FY 2011 alone, the Task Force has received over \$12 million in grant requests. The competitive grant program is open to any new and innovative programs designed to improve indigent defense. Single-year grants fund programs dedicated to technology and process improvements that will significantly impact the day-to-day indigent defense operations in a county (e.g., video-conferencing, indigent defense coordinators, etc.). Multi-year grants fund direct client service projects;<sup>101</sup> for instance, funding can help offset the initial start-up cost of a public defender office, which can be significant and may present an overwhelming barrier to counties otherwise inclined to transition to this system.

The Task Force's enabling statute, Government Code, Sec. 71.062, allows the organization to be flexible when allocating funds among its grant programs. Policy-makers should require the Task Force to prioritize discretionary grant funding for public

defender offices, independent assigned counsel programs, and counties that use best practices or implement programs that meet or exceed the requirements of the Fair Defense Act. Funding for regional programs and underserved areas is especially scarce and should also be a primary concern.

This funding emphasis would promote more effective practices, more cost-efficient solutions, and accountability in establishing and improving indigent defense systems.

**(b) Policy-makers should also instruct the Task Force to revamp its current grant allocation structure to better ensure the sustainability of successful programs.**

Approximately 90% of current grant funds issued by the Task Force are state formula grants, while approximately 10% are targeted (i.e., discretionary) grants for specialized programs.<sup>102</sup> For a more effective distribution of funding, one-third of the Task Force's available grant funds should be allocated to counties in compliance with standards set by the Task Force to offset their costs of indigent defense. One-third should be designated for discretionary grants, which in part provide funding for the expansion and implementation of new indigent defense programs. The final one-third should be used to help counties sustain successful, cost-effective defense-delivery programs.

*Note:* Discretionary grants have been shown to create a great return on the initial investment. The specialized programs they fund target the unique needs of counties and facilitate localized defense services to address particular populations. However, recipients of discretionary grants are the most vulnerable to loss due to funding expiration. Because discretionary grants are the most productive method to ensure efficiencies and innovation that support best practices and effective representation, their allocation must be strengthened.

*Note Additionally:* As discussed in Recommendation (1), the Task Force should collect data from counties that can demonstrate the effectiveness of their indigent defense delivery practices and prove their compliance with state requirements for indigent

defense. Based on this data, the Task Force would be better positioned to provide meaningful technical assistance through grants to counties with a shown commitment to compliance with state requirements, as well as those seeking to improve their indigent defense systems.

**(4) Allow the Task Force to create a special team of defense attorneys that would be funded through extraordinary disbursements.**

This special team would put defense attorneys on par with prosecutors, for whom the state has a special fund devoted to instances where a team is needed to fly to a location to bolster local prosecution efforts.

**(5) Diversify the Task Force's Board composition.**

Since the inception of the Task Force, its Board has commendably set policies that have established a framework for identifying and targeting weakness in indigent defense delivery in Texas. Each board member brings with him or her the strengths and expertise instrumental to the performance of the Task Force. However, in its future efforts to improve the delivery of indigent defense services, the Board would benefit from incorporating more individuals who are knowledgeable about the day-to-day workings of quality indigent defense. For instance, the Board should add two defense lawyer representatives, as well as two public defender representatives. Additionally, board members should reflect the geographic and demographic diversity of the state.

**(6) Clarify statutory language to improve public defender programs and the Task Force's application process.**

**(a) Require oversight boards to have authority over public defender offices, a responsibility currently afforded to commissioners courts.**

Having a singular oversight board will facilitate communication and decision-making for public defender offices, especially regional offices that serve many counties and thus are overseen by several counties' commissioners courts.

*Note:* Clarifications to statutory language should include guidance for the structure of the board, its duties, and its membership.

**(b) Allow a county, as a government entity, to provide indigent defense services through a county-run public defender office without having to use the application process for non-profit entities.**

Current statutory language requires counties, like any other entities, to submit proposals and complete other application requirements in efforts to win county approval for funding to provide indigent defense services. In other words, counties must post and respond to their own request for proposal solicitations. They should be exempt from such administrative mandates.

**(c) Make more apparent the concept of a public defender office with the authority to appoint each defender.**

Policy-makers should clarify statutory language by changing references from “public defender” to “public defender office,” and from “appointing” to “creating or designating.”

**(7) Examine whether and how counties are adhering to the Fair Defense Act and H.B. 1178 [80(R)], for use by the Task Force in grant allocations.**

H.B. 1178 (effective 2007) requires that a defendant facing jail time understands s/he has a right to an attorney, has an opportunity to request the assistance of counsel prior to talking to a prosecutor about the facts of the case and/or agreeing to a plea bargain, and has the option of seeking out an attorney without losing the opportunity to request appointed counsel if, ultimately, the individual cannot afford to hire an attorney.

Despite these mandates, some courts may continue to operate as “plea mills,” in which prosecutors obtain uncounseled waivers of the right to counsel from defendants and judges are there to rubber stamp any subsequent plea agreement made. These practices invite constitutional challenges to the finality of convictions by raising serious questions about whether such waivers were knowing and voluntary, and thus valid. Policy-makers should study this key issue during the next legislative interim to assist the Task Force in allocating resources through its grant-making process.

# Clarify and Improve Attorney Performance and Appointment Standards to Reduce County Costs in Unnecessary Incarceration

## Background

Improving performance and appointment standards among both the prosecution and defense will reduce costs to local counties by lowering pre-trial jail populations and lengths of stay, while also reducing costs to the state in unnecessary pleas and felony sentences.

Likewise, requiring attorneys and the judiciary to undergo additional trainings on appropriate methods of handling and diverting specialized defendants will reduce incarcerated populations and its associated costs through improved quality of counsel and program placement.

## Key Findings

- When attorneys fail to assist defendants in the bond/bail process, it may contribute to jail overcrowding by the increasing the number of days that individuals spend in custody unnecessarily.
- Criminal justice experts argue that a 50% non-prosecute rate (i.e., refusing to prosecute a nominal case at the beginning of the process rather than dismissing it after charges have been filed) could indicate “an exceedingly well-run office” and make significant reductions in swelling jail populations.<sup>103</sup>
- Judges, prosecutors, and defense attorneys in both criminal and juvenile cases who undergo specialized training in court practices and sentencing alternatives, as well as on the effective management of individuals with substance abuse and/or mental illness, can significantly improve the way that thousands of individuals are handled in the system.
- The standardized collection and analysis of data on indigent defense systems can improve the future delivery of client services by informing appointments based on attorney caseload size, identifying gaps in service delivery, and determining long-term program efficacy and outcomes.

## Cost-Saving Strategies

- (1) **Establish minimum performance guidelines for criminal defense attorneys.**

National performance guidelines for defense counsel speak to the role of counsel, qualifications and training of counsel, pre-trial release obligations, sentencing options, appellate assistance, and other post-trial duties.<sup>104</sup> Pre-trial obligations are especially important in the prevention of jail overcrowding by pre-trial detainees. Specifically, attorneys who make infrequent client visits and/or neglect to seek bond or bail reductions, personal recognizance bonds, or other bonds for their clients may contribute to jail overcrowding by increasing the number of days that individuals spend in custody unnecessarily. *(Please see a later section for more information on bond and bail reforms.)*

In addition to encouraging defense counsel to adopt nationally recognized guidelines, policy-makers should ensure that criminal defense attorneys inform their clients of any right that may exist to be released on bond or bail, and any bond options available to them.

- (2) **Encourage district attorneys to maintain a lower prosecution rate, where the interests of public safety allow.**

Criminal justice experts argue that a 50% non-prosecute rate could indicate “an exceedingly well-run office” and make significant reductions in swelling jail populations.<sup>105</sup> In fact, refusing to prosecute a nominal case at the beginning of the process rather than dismissing it after charges have been filed allows for additional low-level violators to be released from overcrowded jails, instead of waiting for a trial that may never happen. Furthermore, responsible use of the screening process eases overburdened court dockets and attorney caseloads.

- (3) **Clarify that the Fair Defense Act (FDA) applies to attorney appointments in cases of probation revocations and appeals proceedings.**

According to the Code of Criminal Procedure, Art. 42.12, Sec. 21(d), a person accused of violating probation has the right to counsel for a probation revocation hearing. However, some judges fail to appoint representation in such cases.

In regard to appeals, although the FDA does not directly address attorney appointments, it implies that initial attorney appointments continue through a case's conclusion, including during the appeals process.

Policy-makers must make it clear that defendants have the right to counsel at various stages throughout the criminal process, to protect their rights and the integrity of the system, and to keep individuals from unnecessarily or unjustly being sentenced to prison or jail time.

**(4) Require attorneys to be trained on the right to counsel and appointment rates, as well as attorney qualifications.**

This training is especially imperative to address instances in rural areas where few attorneys are handling a wide range of cases.

*Note:* Because attorneys are already required to take continuous legal education (CLE) courses on various topics, expanding the educational requirement to include trainings on attorney obligations, appointment rates, and qualifications would not be a burden to the state. Additionally, there are enough existing entities that provide CLE trainings that could easily accommodate the demand for specialized trainings.

**(5) Require judges and attorneys (both prosecutors and defense counsel) to receive additional training on trial and sentencing practices intended to minimize prison and jail overcrowding, if they take or hear criminal cases.**

Specifically, attorneys and judges should complete additional courses of instruction in the following areas:

- the sources and prevention of wrongful convictions.
- the range of sentencing alternatives in Texas, including substance abuse and mental health diversion programming.
- evidence-based sentencing, utilizing a nationally recommended curriculum.

These trainings should be mandatory for (a) each attorney representing the state in the prosecution of criminal matters, (b) criminal defense lawyers, and (c) each district court and county court-at-law judge hearing criminal cases.

*Note:* Because judges and attorneys are already required to take CLE courses on various topics, expanding the educational requirement to include training on trial and sentencing practices would not be a burden to the state. Additionally, there are enough existing entities that provide CLE trainings that could easily accommodate the demand for specialized trainings for these criminal justice practitioners.

**(6) Require judges and attorneys (both prosecutors and defense counsel) to receive additional training on mental health and substance abuse issues, if they take or hear criminal cases involving juvenile or adult defendants.**

As discussed throughout Parts 1 and 2 of this four-part guide, Texas prisons and jails have become warehouses for people with substance abuse and mental health issues who have failed to receive proper treatment – at an increasing and unsustainable cost to the state. In large part, this is due to the lack of recognition or understanding of the strategies that may provide appropriate and tailored interventions.

Policy-makers should mandate that judges, prosecutors, and defense attorneys in both criminal and juvenile cases undergo trainings that teach practitioners to recognize, communicate with, and handle mentally ill defendants. This will raise the likelihood that individuals with mental health issues receive access to needed treatment outside prison or jail walls. Likewise, criminal justice practitioners should undergo supplemental training in substance abuse, as mentally ill individuals often use drugs to self-medicate, and co-occurring disorders require tailored treatment programs.

This policy change can significantly improve the way that thousands of individuals are handled in the system, especially in regards to sentencing. It will greatly assist stakeholders who are currently struggling to handle specialized populations through an emphasis on appropriate, risk-reducing care. **It will also save the state millions in unnecessary incarceration costs as practitioners learn how to effectively target the root causes of a defendant's involvement with the criminal justice system through better, more informed treatment and referral decisions.**

*Note:* Because judges and attorneys are already required to take CLE courses on various topics, expanding the educational requirement to include training on appropriate, evidence-based interventions and treatment would not be a burden to the state. Additionally, there are enough existing entities that provide CLE trainings that could easily accommodate the demand for specialized trainings for these criminal justice practitioners, and a free curriculum on these topics also exists.

### **Logistics:**

- The training requirement should apply to the judiciary, to each attorney representing the state in the prosecution of felonies, and to each attorney who represents criminal defendants in fifty percent or more of the person's practice.
- Substance abuse information should include: (a) the medical model of addiction, including the diagnosis and treatment of substance abuse problems; (b) medical findings regarding the psychological and physical effects of substance abuse; (c) the effects that certain particular controlled substances, marijuana, and alcohol have on the individual; (d) the effects of substance abuse on the family, household members, and personal relationships of the substance abusing individuals; (e) the concept of relapse and relapse prevention; and (f) available community and state resources for substance abuse counseling and treatment of substance abusing individuals.
- Mental health information should include: (a) the difference between mental retardation and mental illness; (b) the types of mental illnesses that are prevalent in the criminal justice system; (c) treatment or counseling options for dealing with mental illnesses; (d) the need for conducting a psychological evaluation to determine a defendant's mental health status; (e) post traumatic stress disorder and traumatic brain injuries; and (f) available community and state resources for mental health counseling and treatment of mentally ill individuals.
- The training organization should have experience in training professionals on issues related to substance abuse and mental illness, or have personnel or planning committee members who have at least two years' experience in working directly in the field of substance abuse and mental health treatment.

- A judge or judicial officer who does not comply with the training requirements should be reported to the State Commission on Judicial Conduct, and a prosecutor or defense attorney who does not comply with the requirements should be reported to the State Bar of Texas.

### **(7) Require the reporting of data on appointments, caseloads, expenditures, and outcomes by local attorneys who receive appointments.**

The collection and analysis of data on indigent defense systems for both the private bar and public defenders can improve the future delivery of services to clients with appointed counsel. Some counties are already implementing similar practices, but a standardized data collection schedule would ensure uniformity. *(Please see Appendix B for the specific indigent defense data that could be submitted by attorneys to administrators.)*

Specifically, each attorney should submit brief information to his or her local appointment administrator (or the Office of Court Administration (OCA)) in real time or on a set basis, as current technology allows. Again, data analysis can inform future appointments, keeping attorney caseloads manageable to maintain more effective quality of representation. Analysis can also identify gaps in service delivery and determine long-term program efficacy and outcomes.

*Note:* In order to collect this additional information, the OCA could change its reporting requirements. Then, new information could be requested and submitted at no additional cost to the counties or the state.<sup>106</sup> Where possible, the state and Task Force must make efforts not to burden attorneys or counties more than necessary.

# Improve Bond and Bail Practices to Safely Reduce Incarcerated Populations Among Nonviolent Individuals

## Background

A large contributor to pre-trial delays in jail derives from the inconsistent setting of bond. In some courts, judges are inclined to seem more “tough on crime.” As a result, they favor cash bonds over personal bonds. (*Note:* Cash bonds must be paid in full to the court but are refunded to defendants after appearing in court, while personal bonds are either a small monetary amount or a small percentage of the full bond, marking a promise to appear before the judge.) Without necessary funds to pay bond and an unwillingness to simply plead guilty, indigent defendants must sit in jail until their trial. Over time, cash bond amounts have also grown very high, leading to “punitive” bonds that even non-indigent defendants have difficulty paying.

Bond and bail amounts pose particular difficulties for defendants lacking counsel, who must attempt to negotiate deals or reduce the amount owed on their own, often to poor results. Many end up in jail awaiting trial: without knowledge about pre-trial services or their bond options, they consequently fail to secure their own release.

Even in instances when individuals do make bond, extra conditions can be imposed on their release – including urinalysis tests, mandatory ignition interlock and electronic monitoring, and evening curfews – which increases the likelihood of revocations.<sup>107</sup> Often these conditions are in place for extended periods.

Individuals arrested for nonviolent offenses who are likely to remain law-abiding and appear before the judge for a scheduled hearing should be eligible for low bail or inexpensive personal bonds, not sitting in jail wasting taxpayer dollars and valuable space.<sup>108</sup>

## Key Findings

- Whenever possible, jail beds should be reserved for housing the dangerous, not the indigent.
- Pre-trial services divisions assess whether individuals meet various criteria for pre-trial bond release, which helps inform release and detention decisions. In the case of individuals’ pre-trial release, staff are also responsible for supervising them in the community prior to trial. Effective supervision can minimize criminal behavior and reduce failure-to-appear rates, in turn reducing law enforcement time spent making warrant arrests.<sup>109</sup>
- Pre-trial services division staff can also match individuals suffering from mental illness, substance abuse, and/or homelessness to needed services, which also lowers the risk of re-offending.<sup>110</sup>
- Given the state’s 37,000 pre-trial defendants in detention in Texas’ county jails,<sup>111</sup> the participation by nonviolent individuals in volunteer labor programs and the resulting credit for time served could drastically ameliorate several counties’ overcrowding dilemmas.
- In Travis County, 61% of eligible pre-trial defendants interviewed for personal bonds in 2009 were released on personal bond,<sup>112</sup> 75% of whom were misdemeanants.<sup>113</sup> This high bonding rate ensured that thousands of individuals, many charged with low-level offenses, did not unnecessarily consume jail beds. On the other hand, Harris County judges released 5,416 defendants on personal bond during Fiscal Year 2008-9,<sup>114</sup> yet almost 15,000 defendants who underwent pre-trial interviews were deemed low-risk in 2008.<sup>115</sup>
- Leadership throughout the nation has significant concerns with commercial bail bondsmen. Some take issue with the bond industry’s profiting from crime. Some feel the bail bonding system discriminates against lower-income individuals who cannot afford a bondsman’s fee. Others feel that because defendants’ money and assets are exhausted on bondsmen, they often cannot later afford counsel, and so taxpayers foot the bill for indigent defense.<sup>116</sup> As a result of these various concerns, some states, not including Texas, have banned commercial bail bonding outright.<sup>117</sup>

- Use of partial cash bonds would go far towards reducing jail overcrowding in counties where personal bonds are not used as frequently. Furthermore, defendants who are allowed to submit such bonds would have a greater ability to pay for their own private representation, saving the county additional indigent defense expenses.
- Coryell County’s three-month Supervised Pretrial Services pilot program, which allowed sworn-indigent defendants to remain out of jail prior to trial (provided they met specific requirements), saved the county \$25,622 per month. Extending that figure out, yearlong cost-savings would total \$307,464.<sup>118</sup>
- Judges must make great effort to ensure they impose the least restrictive conditions upon defendants while still ensuring that public safety is protected.<sup>119</sup> Separately, judges should be required to evaluate noncompliance with bond conditions on a case-by-case basis. They should impose graduated sanctions so that small technical violations are not penalized by time in already crowded jails.

- Those on writ charges.<sup>121</sup>
- Those with capital offenses.
- Those with civil commitments.<sup>122</sup>

In other cases, pre-trial services divisions assess whether individuals meet various criteria for pre-trial bond release. The criteria can include employment, current housing, retention of counsel, family support, and ties to the community, which point to a relatively low flight risk or likelihood of recidivism.<sup>123</sup>

Pre-trial services division staff provide courts and attorneys with this information prior to magistration, which helps inform release and detention decisions. In the case of an individual’s pre-trial release, staff are also responsible for supervising him or her in the community prior to trial. Effective supervision can minimize criminal behavior and reduce failure-to-appear rates, in turn reducing law enforcement time spent making warrant arrests.<sup>124</sup> Pre-trial services division staff can also match individuals suffering from mental illness, substance abuse, and/or homelessness to needed services, especially through utilization of a validated risk/needs assessment tool that can lower the risk of re-offending. The critical role of pre-trial services divisions is noted by the American Probation and Parole Association (APPA): “The bail bond industry is simply unable to provide such service to the community.”<sup>125</sup>

In some counties, pre-trial services divisions do not exist, leaving judges to make bond decisions with often limited available information. In other counties that do have such divisions, staff recommendations for bond, bail, or conditions upon release are frequently ignored.<sup>126</sup>

Policy-makers must support county efforts to implement pre-trial service programs. Counties that have the ability to pre-screen defendants for flight risk and recidivism, and whose judges rely on those screenings, can **reduce costly pre-trial jail overcrowding** (especially through increased personal bond usage), while keeping public safety intact. Equally important, they allow released individuals to maintain crucial support networks in the community.

For counties that cannot afford to fund such offices, policy-makers should encourage alternatives, including multi-county programs, partnerships with community-

## Cost-Saving Strategies

### (1) Counties should create and rely on pre-trial services divisions to identify defendants who are eligible for release on low bail or personal bonds.

Pre-trial services divisions are imperative in reviewing the eligibility of defendants for bond release. However, not all defendants are eligible for personal bond review, including the following:

- Those with bond forfeitures.
- Those with probation warrants.
- Those for whom the Court has set the bond at cash or surety only.<sup>120</sup>
- Those with out-of-county and out-of-state felonies.
- Those held in jail by an external agency, including Immigration and Customs Enforcement (ICE).
- Those held by the U.S. Marshall’s Service.
- Federal detainees.
- Those with TDCJ bench warrants.
- Parole violators.
- Felony probation violators.
- Those on contempt charges.

and faith-based organizations, or an incorporation of pre-trial services within jail administration or probation departments.<sup>127</sup>

*Note:* Measuring a pre-trial services division's success in reducing the local jail population should include the following: (a) the percentage of the county's arrestees interviewed, (b) the rate of and time to release based on those recommended for release, (c) the rates of compliance with pre-trial release conditions, (d) the appearance rates for all court events, and (e) crime-free rates for those on release.<sup>128</sup>

**(a) Encourage additional staff at pre-trial services divisions.**

Policy-makers should encourage increased staffing levels for pre-trial services divisions, which will expedite screenings and go further towards reducing jail overcrowding. Indeed, additional staff will enable pre-trial services divisions to review jail rosters on a daily basis to identify defendants in need of reduced bond, as well as follow up on delays in charges being filed, in district attorneys obtaining police reports, etc.

Additional staff will also enable a quicker identification of those eligible to participate in volunteer manual labor programs in lieu of awaiting trial in jail, as authorized by Article 43.101, Code of Criminal Procedure:

(a) **A defendant who is confined in county jail before trial**, after conviction of a misdemeanor, or after conviction of a felony or revocation of community supervision, parole, or mandatory supervision and awaiting transfer to the Texas Department of Criminal Justice may volunteer to participate in any work program operated by the sheriff that uses the labor of convicted defendants.

(b) The sheriff may accept a defendant as a volunteer under Subsection (a) **if the defendant is not awaiting trial for an offense involving violence** or is not awaiting transfer to the Texas Department of Criminal Justice after conviction of

a felony involving violence, and if the sheriff determines that the inmate has not engaged previously in violent conduct and does not pose a security risk to the general public if allowed to participate in the work program.

This policy allows each day of volunteer labor to be deducted from the person's sentence. Especially given the state's 37,000 pre-trial defendants in detention in Texas' county jails,<sup>129</sup> participation in labor programs and the resulting credit for time served could drastically ameliorate several counties' overcrowding dilemmas.

**(b) Encourage judges to adhere to pre-trial services divisions' recommendations.**

Judges who override a pre-trial services division's recommendation for release should be required to track each override and report that data to the county, along with an explanation of why jail time was warranted.

**(2) Increase the use of personal bonds.**

Personal bonds allow eligible, low-risk individuals to pay the court a small monetary amount or a small percentage of the full bond as a promise to appear before the judge. This ensures that individuals can continue their lives in the community, maintaining employment and supporting their families, prior to their trial. It also increases the likelihood that the money saved through the low bond amount can be put towards counsel or court costs, as necessary.

In Travis County, 61% of eligible pre-trial defendants interviewed for personal bonds in 2009 (18,568 out of 30,643 individuals) were released on personal bond,<sup>130</sup> 75% of whom were misdemeanants.<sup>131</sup> This high bonding rate ensured that thousands of individuals, many charged with low-level offenses, did not unnecessarily consume jail beds.

On the other hand, Harris County judges released 5.3% of felony and misdemeanor defendants on personal bond during Fiscal Year 2008-9. Out of 102,949 total defendants, only 5,416 were released on personal bond,

and of the subcategory of felony defendants, only 520 of 41,838 were released.<sup>132</sup> Yet almost 15,000 defendants who underwent pre-trial interviews were deemed low-risk in 2008.<sup>133</sup>

Policy-makers should require judges to routinely consider personal bonds for low-risk misdemeanants. **Whenever possible, jail beds should be reserved for housing the dangerous, not the indigent.** As stated by the American Bar Association, which advocates for the least restrictive means of release, “Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.”<sup>134</sup>

### (3) Reduce bond and bail amounts.

For low-risk, nonviolent individuals who are likely to appear before the judge, the refundable bond and bail amounts that promise those appearances should be low. Keeping the amounts reasonable can prevent untrue guilty pleas with harsh sentences or probation terms (agreed to solely to secure eventual release by defendants who may not understand the collateral consequences of convictions), as well as unnecessary pre-trial waits in jail by those unwilling to plead guilty.<sup>135</sup>

Policy-makers should encourage judges to set low bond and bail amounts, in keeping with the nature of the offense and reflective of each individual’s likelihood of appearing later. Pre-trial services divisions are key in assisting judges in determining this likelihood.

#### □ Lowered bond and bail amounts will reduce reliance on predatory bail bondsmen.

Some defendants rely on bail bondsmen for assistance in paying bail amounts. They pay the bondsman a percentage of the bail owed (typically 10%), which serves as a nonrefundable fee for the loan. The bondsman secures the defendant’s release by promising to pay the court in full if the defendant does not appear for a scheduled hearing. In the case of a no-show, the bondsman can legally track down the defendant and force him or her to repay what the bondsman fronted to the court.

Over time, use of bondsmen has become increasingly controversial. The APPA notes that “the bond industry serves as the de facto decision maker of who is released from jail and these decisions are based on monetary considerations.” On the other hand, “pretrial supervision agencies’ decisions are based on likelihood of court appearance and community safety considerations.”<sup>136</sup> Leadership throughout the nation agrees, taking issue with the bond industry’s profiting from crime; discriminating against lower-income individuals who cannot afford a bondsman’s fee; and exhausting defendants’ resources to spend on counsel, leaving taxpayers to foot the bill for indigent defense.<sup>137</sup> Others point to national data indicating that “it takes about eight days for defendants with a secured bond to obtain financing for release as opposed to those who are released immediately on an unsecured bond.”<sup>138</sup>

As a result of these various concerns, some states have banned commercial bail bonding outright.<sup>139</sup> However, in Texas, bondsmen are permitted to contribute to elected officials’ campaigns, which may incentivize their continued business. Ultimately, this also keeps indigent defendants with high bond amounts waiting in overcrowded jails, suffering the collateral consequences and costing significant taxpayer dollars, while those who can afford bondsman financing are released. A state-mandated reduction in bond and bail amounts would reduce the use of profit-making bondsmen and allay stakeholder concerns.

### (4) Allow defendants to pay partial cash bonds.

Under Article 17.02, Code of Criminal Procedure, counties are not authorized to accept partial cash bonds from defendants who are unable to pay the full amount (though some counties have been allowing the practice<sup>140</sup>). Permitting defendants to pay a partial bond would go far towards reducing jail overcrowding in counties where personal bonds are not used as frequently. Furthermore, counties could deposit these bond payments into an interest-bearing account that could serve as a funding source to either offset the administrative costs of operating a pre-trial screening program, or assist in implementing the partial bond policy. Another advantage of such a policy is that

defendants who are allowed to submit partial bonds will have a greater ability to pay for their own private representation, saving the county additional indigent defense expenses.

**(5) Allow eligible, indigent defendants to return to the community during the pre-trial phase.**

Counties with a large number of jail beds consumed by indigent defendants should consider the pilot program recently implemented in Coryell County. There, the Commissioners Court and Justices of the Peace (JPs) collaborated to create the Supervised Pretrial Services Program, which allowed sworn-indigent defendants to remain out of jail prior to trial, provided they met the following requirements:

- ❑ A permanent residence.
- ❑ Positive identification.
- ❑ Willingness to appear in court.
- ❑ In jail for a Coryell County offense.
- ❑ Not on parole and no prior felony conviction.<sup>141</sup>
- ❑ No more than two prior convictions of a Class A misdemeanor within the preceding three years.
- ❑ No history of bond forfeiture or failure to appear.
- ❑ Not at that time incarcerated on a charge related to a sex crime, a crime against children, a crime involving family violence, murder, a first degree felony, or a 3(g) offense.<sup>142</sup>

In addition to these requirements, an investigator would screen each defendant to make a determination on bond,<sup>143</sup> including “flight risk, risk of re-offending, and ability to succeed,”<sup>144</sup> based on factors like employment, substance abuse, family and dependent status, and references.<sup>145</sup> Any program participants who subsequently failed to report to Pretrial Services, provide requested information, provide required documentation, or comply with other conditions of release could face a bond revocation and possible arrest warrant.<sup>146</sup>

As created, the program, which ran from May 31 – July 31, 2010,<sup>147</sup> and cost the county approximately \$150 per week to implement,<sup>148</sup> was intended to address overcrowded jails through decreased pre-trial

populations.<sup>149</sup> As of June 30, 2010, County Attorney Brandon Belt stated, “Our program is working. We still have plenty of people in jail, but they are mostly the ones that need to be there.”<sup>150</sup> By the program’s conclusion, Pretrial Services had released 17 eligible defendants on personal bond. **Their diversion from jail saved the county \$25,622 per month**, using a \$50.24 inmate cost-per-day for the county. Extending that figure out, **yearlong cost-savings would total \$307,464.**<sup>151</sup>

Policy-makers should encourage other counties to tailor such a program to fit their particularized needs, keeping indigent defendants and other nonviolent violators from consuming jail beds unnecessarily.

*Note:* The monthly data collected to monitor the program’s efficacy included the number of individuals reviewed for initial eligibility, the number who qualified for program participation, the number released from jail into the program, the number denied release, and the number who bonded out of jail of their own means.<sup>152</sup> Other monthly data focused on outcomes, including the number of individuals who were sentenced to community supervision, had their case dismissed, were revoked from Pretrial Services, were sentenced to incarceration, had a bond forfeiture or failure to appear violation, continued to have a case pending, or fell into the “Other” category.<sup>153</sup>

**(6) Eliminate harsh conditions imposed for release on bond.**

As mentioned above, some individuals have numerous conditions imposed upon them when released on bond, which can increase the likelihood of revocations. *Note:* These are over and above the standard supervision requirements.

In addition to drug testing, electronic monitoring, use of an ignition interlock device, and curfews, these enhanced conditions could include mandatory participation in drug and alcohol counseling, or participation in family violence or stress management counseling.<sup>154</sup> For individuals with a multitude of employment and family obligations, these conditions can be difficult to meet. **Judges must make great effort to ensure they impose the least restrictive conditions upon defendants while still ensuring that public safety is protected.**<sup>155</sup>

Separately, judges should be required to evaluate noncompliance with bond conditions on a case-by-case basis. Minor infractions as opposed to willful noncompliance may not necessitate immediate revocation and jail time. As with probation conditions, judges should impose graduated sanctions so that small technical violations are not penalized by time in already crowded jails.

*Note:* In regard to drug testing, the Justice Management Institute advises the following: “The courts should seek to develop cost-effective common policies concerning when drug testing should be ordered, for what types of drugs, how and by whom the tests should be conducted, what responses should be made to test results, and when (under what circumstances) the drastic step of revoking bond should be taken.”<sup>156</sup>

# Improve Court and Conviction Practices to Protect Victims and Ensure that Innocent Individuals Are Not Wrongfully Convicted

## Background

Texas leads the nation in wrongful convictions.<sup>157</sup> The conviction of the innocent destroys public trust and confidence in the justice system: guilty culprits are free, threatening communities and preventing justice for victims. Indeed, for every innocent person sent to prison, the state re-victimizes the victim by allowing the perpetrator who harmed him or her to target others. Policy-makers must work towards solutions that eliminate unfair and unjust assumptions of wrongdoing and, in turn, improper guilty convictions.

Specifically, policy-makers must provide all defendants, as well as inmates who claim they are wrongfully convicted, with the means to ensure their innocence is proven, including improved front-end practices relating to the collection and presentation of evidence, and post-conviction practices that allow for the testing of new evidence. Addressing the failures of the justice system is particularly imperative in light of recent issues raised by Timothy Cole's posthumous exoneration,<sup>158</sup> and the ongoing Cameron Todd Willingham arson case.<sup>159</sup> The state must continue to improve defense practices to ensure fairer treatment in our legal system.

**NOTE:** In 2009, the Legislature created the 9-member **Timothy Cole Advisory Panel on Wrongful Convictions (TCAP)** via H.B. 498.<sup>160</sup> The independent body was tasked with creating a report of the causes of wrongful convictions and identifying recommendations to address those issues. TCAP included representative stakeholders from across the system, including the Office of the Governor, the Court of Criminal Appeals, the Texas District and County Attorneys Association, the Texas Criminal Defense Lawyers Association, the Texas Association of Chiefs of Police, and legislators from both parties.

Over the course of a year, TCAP members researched various topics and made specific recommendations for best practices in eyewitness identification procedures, the recording of custodial interrogations, and evidence discovery procedures, as well as expanded opportunities for DNA testing for post-conviction proceedings and the creation of a full innocence

commission. In August 2010, TCAP issued its final recommendations, which were forwarded to the Governor, Lt. Governor, and Speaker of the House.

We commend the work of TCAP and the Task Force for their dedication to ensuring that known best practices become a reality in the Texas justice system. Yet we do recognize that the recommendations can be strengthened even further to allow for greater fairness in our court and criminal justice systems.

Below are recommendations that, if implemented, will realize TCAP's work and, where necessary, strengthen it. Especially because statutory authorization for TCAP expired on January 1, 2011, the following recommendations are imperative to ensure justice for those passing through or touched by Texas' criminal justice system.

## Key Findings

- The state has a responsibility to the victims of crime, as well as to individuals convicted of those crimes, to do everything within its means to ensure that innocent individuals are not sent to prison.
- According to The Justice Project's March 2009 report, "To date, 38 people have had their convictions overturned in Texas as a result of DNA testing on evidence from the case. These 38 men have spent 507 years in prison for crimes that they did not commit."<sup>161</sup> Since that time at least three more Texans have been exonerated by DNA.<sup>162</sup>
- More than 84% of wrongful convictions in Texas are due to eyewitness misidentification.<sup>163</sup> However, many Texas law enforcement agencies in 2010 had yet to implement policies or practices to reduce misidentification.<sup>164</sup>
- A 2008 investigation by *The Dallas Morning News* showed that all but one of Dallas County's 18 exonerations involved faulty eyewitness identification; taxpayers spent more than \$3 million in incarceration and compensation costs for those cases alone.<sup>165</sup>
- Another contributor to wrongful convictions in Texas is the use of false confessions during trial.<sup>166</sup> One study of 238 law enforcement agencies in 38 states, including Austin, Houston, and Corpus Christi Police Departments, found officers are "enthusiastically in favor of" the electronic recording of suspect interviews.<sup>167</sup>

## Cost-Saving Strategies

### (1) Require law enforcement agencies to use known best practices in photo or live lineup procedures to strengthen the quality of eyewitness identifications.

Erroneous eyewitness testimony, whether offered in good faith or perjured, is the single greatest cause of wrongful convictions in Texas.<sup>168</sup> Indeed, according to The Justice Project, more than 84% of wrongful convictions in Texas are due to eyewitness misidentification.<sup>169</sup> Dallas County has led the nation in DNA exonerations since 2001 when state law began allowing post-DNA testing.<sup>170</sup> A 2008 investigation by *The Dallas Morning News* showed that all but one of Dallas County's exonerations involved faulty eyewitness identification; taxpayers spent more than \$3 million in incarceration and compensation costs for those cases alone.<sup>171</sup>

Despite problems with misleading lineup procedures, many Texas law enforcement agencies in 2010 had yet to implement policies or practices to reduce misidentification.<sup>172</sup> It is essential that law enforcement officers use the most objective and reliable procedures to obtain accurate eyewitness identifications. Researchers have identified proper and inexpensive methods for officers to use when conducting a lineup or using a photo array, which should be put in place before jury members are presented with eyewitness testimony:<sup>173</sup>

- Ensure that a 'blind' administrator (i.e., someone not involved in the investigation and who does not know who the suspect is) conducts the procedure, which will better prevent his or her body language and verbal cues from unintentionally influencing the results.
- Ensure that photos do not provide clues as to which person the officers expect the witness to pick.
- Ensure that the witness is informed that the suspect may not be there, that the witness is not required to make identification, and that the investigation of the case will continue regardless of whether the witness makes identification. *Note:* This is important to ensure that the witness does not feel pressured to make an identification, and thus better protects the rights of the accused.

- Ensure that the witness' exact response and level of certainty are recorded at the time of the identification. *Note:* It is important to record this level of certainty at this point because, in the time it takes for a case to go to trial, any reinforcing feedback provided after an identification is made can artificially inflate a witness' certainty that the person they identified must be the guilty culprit.

Some experts also suggest using *sequential* blind photo lineups, where the administrator reveals the photos one at a time.<sup>174</sup> This should better prevent the witness from choosing the wrong person because it precludes that witness from directly comparing one person to another and choosing someone who more closely resembles the perpetrator relative to the others.

Policy-makers should require Bill Blackwood Law Enforcement Management Institute of Texas (LEMITE), with the advice and assistance of law enforcement agencies and scientific experts on eyewitness memory, to develop, adopt, and disseminate to every law enforcement agency a written policy and associated training materials regarding the administration of photograph and live lineup identification procedures. This should include the selection of filler photographs or participants, witness instructions, and the documentation and preservation of results.

Where practicable, this policy should also require the video-recording of photograph and live lineup identifications, which would reinforce the integrity of law enforcement procedures. In instances where the procedure could not be videotaped, the individual administering the procedure should be required to document in writing the reason it was not recorded.

It is also imperative that the policy addresses the manner in which a photograph array or live lineup is administered to an illiterate person or a person with limited English proficiency.

Finally, evidence of compliance or noncompliance by a law enforcement agency with this model policy should be admissible in court.

*Note:* This policy, which should be annually reviewed, should take into consideration relevant policies and guidelines developed by the federal government, other states, and other law enforcement agencies.

*Note Additionally:* Training in eyewitness identification procedures should be integrated into the required curricula of LEMIT and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).

**(2) Require the electronic recording of custodial interrogations prior to being admissible in felony cases.**

Another contributor to wrongful convictions in Texas is the use of false confessions during trial.<sup>175</sup> People falsely confess to crimes for a myriad of reasons – fear, confusion, intoxication, mental illness, or biased police interrogation techniques.<sup>176</sup>

Because of the prevalence of false confessions, the American Bar Association,<sup>177</sup> the National Association of Criminal Defense Lawyers,<sup>178</sup> and the National District Attorneys Association<sup>179</sup> support the videotaping of custodial interrogations, and policy-makers should require this practice for felony cases.<sup>180</sup> Law enforcement agencies too are “enthusiastically in favor of the practice,”<sup>181</sup> according to one study of 238 law enforcement agencies in 38 states.<sup>181</sup> The study found that electronic recording of suspect interviews, through the use of inexpensive recording technology already used by some departments,<sup>182</sup> is an efficient, powerful law enforcement tool. Both audio and video recording methods create a permanent record of what occurred, thereby preventing disputes about officers’ conduct, the treatment of suspects, and/or any statements they made. Interrogation recording also prevents law enforcement officers from having to be called upon later to paraphrase statements or to try to describe a suspect’s words, actions, or attitudes.<sup>183</sup>

Ultimately, requiring interrogations to be completely and contemporaneously recorded in all feasible cases, ideally from the point of the Miranda warning, will allow members of the jury to understand how a confession was obtained, and it will ensure that they have the ability to assess the validity of a confession if it is later recanted. Recordings can also assist the prosecution: if police are falsely accused of unfair interrogation practices, the recording may clear them of any wrongdoing and allow the evidence to stand on its own merits.<sup>184</sup>

**“I like to capture the person’s own words, so we can’t be accused of changing what was said. Video is an especially great tool, I love it. ... Why not let what happened during an interrogation play out before the eyes of the jury?”**

*Law Enforcement Officer with the Houston, Texas Police Department*

In making this change, policy-makers should also require each electronic recording of a custodial interrogation that resulted in a written statement to be preserved until (a) the defendant’s conviction is final, (b) all appeals have been exhausted, and (c) the time to file a petition for a writ of habeas corpus has expired. This would protect the rights of the accused by ensuring that each defendant has access to evidence in his or her case, and that the integrity of that evidence is maintained.

In addition, policy-makers should require law enforcement agencies to provide training to officers in the electronic recording of interrogations, which will ensure proper use of the recording equipment.

Finally, the policy should allow the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.

**(3) Establish a writ of habeas corpus process to challenge scientific evidence, post-conviction.**

Judges should be authorized to grant a convicted individual relief on an application for writ of habeas corpus if the individual can indicate that (a) relevant scientific evidence is currently available but was not available at the time of his or her trial, or (b) the scientific evidence would have been admissible under the Texas Rules of Evidence at a trial held on the date of the application.

*Note:* For relief on the writ application to apply, judges should find that, had the scientific evidence been presented at trial, it is reasonably probable that the individual would not have been convicted.

#### **(4) Ease restrictions on post-conviction DNA testing.**

Under current law, to obtain an order for DNA testing, it must be shown that the evidence was not previously subject to DNA testing (a) either because DNA testing was not available, or was available but not technologically capable of providing probative results, or (b) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing.<sup>185</sup>

Policy-makers should ease the restrictions on DNA testing, permitting convicted defendants to present a motion requesting a forensic DNA test provided simply that the evidence was not previously subjected to DNA testing, or although previously subjected to DNA testing, it could be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

## Appendix A: American Bar Association's Ten Principles of a Public Defense Delivery System

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The following principles were approved by American Bar Association (ABA) House of Delegates, in February 2002. The ABA recommends that jurisdictions use these Principles to promptly assess the needs of public defense delivery systems and clearly communicate those needs to policy-makers.

- The public defense function, including the selection, funding, and payment of defense counsel, is independent.
- Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
- Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
- Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
- Defense counsel's workload is controlled to permit the rendering of quality representation.
- Defense counsel's ability, training, and experience match the complexity of the case.
- The same attorney continuously represents the client until completion of the case.
- There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
- Defense counsel is provided with and required to attend continuing legal education.
- Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



## Appendix B: Attorney Indigent Defense Data For Submission to Administrator

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



## Endnotes

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- <sup>1</sup> Texas Task Force on Indigent Defense, “State Spending: 2008, 2005” spreadsheet, compiled in 2010.
- <sup>2</sup> John Reynolds, “Though Underfunded, Indigent Legal Defense Much Improved: State May End Up Cost-Shifting More of the Burden Back to the Counties,” *Quorum Report*, May 13, 2010.
- <sup>3</sup> The Spangenberg Group, “State and County Expenditures for Indigent Defense Services in Fiscal Year 2005,” prepared for the American Bar Association, December 2006, pg. 29.
- <sup>4</sup> Task Force on Indigent Defense (TFID), “18 Public Defender Offices in Texas (revised January 6, 2011),” pgs. 2, 3; <http://www.courts.state.tx.us/tfid/pdf/webpagepdomac.pdf>.
- <sup>5</sup> “Williamson County Considering Public Defender System,” *Texas Government Insider*, Volume 8, Issue 33, August 20, 2010; <http://www.partnerships.com/newsletter/tgi%208-20-10/tgi.html>.
- <sup>6</sup> Data compiled from county data sheets, available at the Texas Task Force on Indigent Defense Public Access website, [http://tfid.tamu.edu/Public/Default.asp?County\\_ID=1](http://tfid.tamu.edu/Public/Default.asp?County_ID=1).
- <sup>7</sup> *Ibid.*
- <sup>8</sup> Senate Committee on Criminal Justice, “Senate Committee on Criminal Justice Interim Report to the 82<sup>nd</sup> Legislature,” December 15, 2010, pg. 28.
- <sup>9</sup> Texas Task Force on Indigent Defense (TFID) and The Spangenberg Group, “Blueprint for Creating a Public Defender Office in Texas, Second Edition,” June 2008, pgs. 5, 7. Note additionally, pg. 16: The Blueprint finds significant cost savings to counties as a result of decreased pretrial incarceration.
- <sup>10</sup> Logan G. Carver, “Defenders’ office could see expansion,” *Lubbock Avalanche-Journal*, April 27, 2010.
- <sup>11</sup> Texas Fair Defense Project (TFDP), “Benefits of a Public Defender Office: Increasing Accountability and Cost Effectiveness in Harris County’s Indigent Defense System,” September 2009, pg. 12.
- <sup>12</sup> Texas Fair Defense Project (TFDP), written testimony for an Interim Hearing of the Texas House of Representatives Criminal Jurisprudence Committee on Charge 2, May 13, 2010, pg. 16.
- <sup>13</sup> TFID, *18 Public Defender Offices in Texas*, pgs. 1, 2.
- <sup>14</sup> TFDP, *Written testimony for an Interim Hearing*, pgs. 7, 9, 15.
- <sup>15</sup> Public Policy Research Institute (PPRI) at Texas A&M University, Court Consulting Services (CCS) at the National Center for State Courts, and the Justice Center at the Council of State Governments, “Representing the Mentally Ill Offender: An Evaluation of Advocacy Alternatives,” Texas Task Force on Indigent Defense and Office of Court Administration, April 2010, pgs. xi, 37-38.
- <sup>16</sup> *Ibid.*, pg. 55.
- <sup>17</sup> “Uniform Justice,” Need to Know, *PBS*, July 9, 2010. To view the video, please visit <http://www.pbs.org/wnet/need-to-know/culture/uniform-justice/2135/> (14:56).
- <sup>18</sup> Mimi Swartz, “Home Front Lines: Will Iraq and Afghanistan be the wars that teach us how to take better care of our returning warriors?,” *Texas Monthly*, January 2010, <http://www.texasmonthly.com/2010-01-01/btl.php>. Information also from Bobby Cervantes, “Courts for Accused Veterans Prioritize Treatment,” *The Texas Tribune*, May 17, 2010.
- <sup>19</sup> “Uniform Justice,” *Need to Know*.
- <sup>20</sup> Brennan Center for Justice, *Community-Oriented Defense Fact Sheet*, February 2002; [http://www.brennancenter.org/content/resource/community\\_oriented\\_defense\\_fact\\_sheet/](http://www.brennancenter.org/content/resource/community_oriented_defense_fact_sheet/).

<sup>21</sup> TFID and The Spangenberg Group, *Blueprint for Creating a Public Defender Office in Texas*, pgs. 5, 7. Note additionally, pg. 16: The Blueprint finds significant cost savings to counties as a result of decreased pretrial incarceration.

<sup>22</sup> *Ibid.*, pg. 7.

<sup>23</sup> TFDP, *Written testimony for an Interim Hearing*, pg. 3.

<sup>24</sup> TFDP, *Benefits of a Public Defender Office*, pg. 12.

<sup>25</sup> “Justice lite: Harris County should beef up its pilot public defender program,” *Houston Chronicle – Editorial*, June 19, 2010, citing an evaluation by The Spangenberg Project of Harris County’s proposal for a public defender program.

<sup>26</sup> *Ibid.*

<sup>27</sup> TFDP, *Written testimony for an Interim Hearing*, pg. 7.

<sup>28</sup> Bureau of Justice Assistance (BJA), “A Second Look At Alleviating Jail Crowding: A Systems Perspective,” U.S. Department of Justice – Office of Justice Programs, October 2000, pg. 63.

<sup>29</sup> Robert C. Boruchowitz, Malia N. Brink, and Maureen Dimino, “Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts,” National Association of Criminal Defense Attorneys, April 2009, pg. 7; information also taken from TFDP, *Benefits of a Public Defender Office*, pg. 6.

<sup>30</sup> Texas Task Force on Indigent Defense (TFID), “Evidence for the Feasibility of Public Defender Offices in Texas,” November 2006, pg. 12; information also taken from TFDP, *Benefits of a Public Defender Office*, pg. 10.

<sup>31</sup> TFDP, *Written testimony for an Interim Hearing*, pg. 16.

<sup>32</sup> “Montana was forced to overhaul its criminal defense system in 2005 after the American Civil Liberties Unions sued the state over a slew of representation shortcomings similar to the ones advocates identify in Texas. Montana allowed poor defendants to spend months in jail before trial, according to the *Chicago Tribune*, and none of the accused in misdemeanor cases were appointed attorneys. Lawyers for the indigent were unable to fully investigate cases because they didn’t have the funds.” From Brandi Grissom, “Advocates: Texas Indigent Defense Nearing Crisis,” *The Texas Tribune*, May 19, 2010.

<sup>33</sup> Logan G. Carver, *Defenders’ office could see expansion*.

<sup>34</sup> Logan G. Carver, “Area defense office covers wider region,” *Lubbock Avalanche-Journal*, June 9, 2010.

<sup>35</sup> TFID, *18 Public Defender Offices in Texas*, pg. 2.

<sup>36</sup> TFDP, *Written testimony for an Interim Hearing*, pgs. 7, 9, 15.

<sup>37</sup> PPRI, CCS, and the Justice Center, *Representing the Mentally Ill Offender*, pgs. xi, 37-38.

<sup>38</sup> *Ibid.*, pg. 55.

<sup>39</sup> Dee Wilson, then-Director of Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI), in testimony at the Joint Hearing of the Substance Abuse and Mental Illness Subcommittee and Appropriations Subcommittee on Criminal Justice, Texas House of Representatives, May 29, 2008. Note additionally: Ms. Wilson stated TCOOMMI-funded treatment programs have a “phenomenal” 3-year recidivism rate of 12% statewide, but noted some shortcomings in front-end processing of mentally ill defendants to divert the mentally ill into treatment.

<sup>40</sup> PPRI, CCS, and the Justice Center, *Representing the Mentally Ill Offender*, pgs. xi, 53, 54.

<sup>41</sup> Travis County Mental Health Public Defender (MHPD) Office, “A Different Kind of Law: Holistic Justice for the Mentally Ill,” video available at <http://www.courts.state.tx.us/tfid/videos3/TravisCountyMHPDO2010.wmv>.

<sup>42</sup> *Ibid.* Information also taken from Travis County Mental Health Public Defender, Brochure, 2009: Travis County MHPD’s staff includes lawyers, social workers, caseworkers and support staff. Referrals are made for a variety of social services, and follow-up case management services are also provided. While cases are primarily referred to the MHPD through Travis County Court Administration, referrals are also made by judges, attorneys, pre-trial services or mental health advocacy groups; [www.courts.state.tx.us/tfid/pdf/MHPDO%200209%20brochure.pdf](http://www.courts.state.tx.us/tfid/pdf/MHPDO%200209%20brochure.pdf).

<sup>43</sup> Travis County MHPD Office, *A Different Kind of Law*.

<sup>44</sup> Dominic Gonzales, Task Force on Indigent Defense, in email correspondence to Molly Totman, Texas Criminal Justice Coalition, January 21, 2011.

- <sup>45</sup> PPRI, CCS, and the Justice Center, *Representing the Mentally Ill Offender*, pgs. 9-10. Also from Dominic Gonzales, *email correspondence on January 21, 2011*.
- <sup>46</sup> TFID, *18 Public Defender Offices in Texas*, pgs. 2, 3.
- <sup>47</sup> On August 25, 2010, the Task Force awarded Montgomery County \$547,400 for the program's first year. The county will provide more funding as the program continues, resulting in an estimated 50/50 funding split over four years. From the Task Force on Indigent Defense, "Staff Grant Recommendation: Montgomery County Managed Assigned Counsel Program," *Meeting Book: August 25, 2010*, pg. 35.
- <sup>48</sup> *Ibid.*, pg. 37.
- <sup>49</sup> *Ibid.*, pgs. 35-50.
- <sup>50</sup> Hillary S. Burke, Charles E. Degeneffe, and Marjorie F. Olney, "A New Disability for Rehabilitation Counselors: Iraq War Veterans with Traumatic Brain Injury and Post-Traumatic Stress Disorder," *Journal of Rehabilitation*, Vol. 75, No. 3, July 2009, pg. 5.
- <sup>51</sup> Drug Policy Alliance (DPA), "Issue Brief: Healing a Broken System – Veterans Battling Addiction and Incarceration," November 4, 2009, pg. 2.
- <sup>52</sup> Research suggests that veterans diagnosed with PTSD have worse substance abuse issues than veterans who do not suffer from PTSD. Specifically, "veterans who screened positive for PTSD had greater lifetime use of alcohol to the point of intoxication, of heroin, and of cocaine." From Andrew J. Saxon, et al., "Trauma, Symptoms of Posttraumatic Stress Disorder, and Associated Problems Among Incarcerated Veterans," *Psychiatric Services*, Vol. 52, No. 7, July 2001, pg. 961.
- <sup>53</sup> Matthew Jakupcak et al., "Anger, Hostility, and Aggression Among Iraq and Afghanistan War Veterans Reporting PTSD and Subthreshold PTSD," *Journal of Traumatic Stress*, Vol. 20, Issue. 6, December 2007, pg. 950. Note additionally: According to a June 2010, survey of over 18,000 recent army and National Guard veterans conducted by psychiatrists from the Walter Reed Army Institute of Research, "About half the soldiers with either PTSD or depression also misused alcohol or had problems with aggressive behavior." From Scott Hensley, "PTSD And Depression Common In Returning Combat Soldiers," *NPR*, June 7, 2010.
- <sup>54</sup> Casey T. Taft et al., "Aggression Among Combat Veterans: Relationships with Combat Exposure and Symptoms of Posttraumatic Stress Disorder, Dysphoria, and Anxiety," *Journal of Traumatic Stress*, Vol. 20, No. 2, April 2007, pg. 135.
- <sup>55</sup> Major David L. Daniel, "Post-traumatic Stress Disorder and the Casual Link to Crime: A Looming National Tragedy," School of Advanced Military Studies, United States Army Command and General Staff College, AY 2007-2008, pg. 30.
- <sup>56</sup> National Institute of Neurological Disorders and Stroke, *Traumatic Brain Injury: Hope Through Research - What Disabilities Can Result From a TBI?*, [http://www.ninds.nih.gov/disorders/tbi/detail\\_tbi.htm](http://www.ninds.nih.gov/disorders/tbi/detail_tbi.htm).
- <sup>57</sup> L. Turkstra, D. Jones, and Hon. L. Toler, "Brain injury and violent crime," *Brain Injury*, Vol. 17, No. 1, 2003, pg. 39: One study "reported a 50% prevalence of TBI in individuals convicted of non-violent felony or misdemeanor crimes, compared to 5-15% in comparison samples"; another found that "veterans with TBI had higher ratings of violence, aggression, anger and hostility than those without brain injury."
- <sup>58</sup> "Civilian studies indicate that 5 percent to 15 percent of those who suffer [mild traumatic brain] injuries have lingering cognitive problems." From T. Christian Miller, ProPublica, and Daniel Zwerdling, *NPR*, "Congress Demands Answers on Brain Injury Care at Texas Base," June 16, 2010.
- <sup>59</sup> Jessica Mador, "New Minn. Court Handles Vets Accused Of Crimes," *NPR*, May 20, 2010; citing Col. Eric Ahlness of the Minnesota National Guard, in reference to that state's new veteran's court.
- <sup>60</sup> Natalie Bogle, "Post-Traumatic Stress Disorder Among Veterans," *Chrestomathy: Annual Review of Undergraduate Research*, Vol. 7, 2008, pg. 7.
- <sup>61</sup> Constantina Aprilakis, "The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD," *The Georgetown Journal of Law and Public Policy*, Vol. 3, Issue 2, Summer 2005, pg. 566.
- <sup>62</sup> Jessica Mador, *New Minn. Court Handles Vets Accused of Crimes*.
- <sup>63</sup> "Uniform Justice," *Need to Know*.

<sup>64</sup> John Council, “Even Heroes Make Mistakes: Veterans Courts Give Those Who Served in Combat a Second Chance,” *Texas Lawyer*, June 21, 2010. Bexar, Denton, Fanning, Hidalgo, Orange, and Travis counties are in the process of establishing courts as well.

<sup>65</sup> “Uniform Justice,” *Need to Know*.

<sup>66</sup> Mimi Swartz, *Home Front Lines*. Information also from Bobby Cervantes, *Courts for Accused Veterans Prioritize Treatment*.

<sup>67</sup> “Uniform Justice,” *Need to Know*.

<sup>68</sup> The National Association of Drug Court Professionals, Drug Court Standards Committee, “Defining Drug Courts: The Key Components,” U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, October 2004, pg. iii.; also: Texas Health and Safety Code Ann., Chapter 469.001.

<sup>69</sup> Texas Family Code, Sec. 51.102.

<sup>70</sup> “Texas defines a criminally responsible child as crimes committed by children age 10–16. A child younger than 10 is typically not held criminally responsible. A person age 17 or older is considered an adult.” From Clancy and Clancy, <http://www.dfwcriminallawyer.com/juvenile.php>.

<sup>71</sup> The right to an attorney for juveniles was established by the U.S. Supreme Court in *In re Gault* (1967) and is codified in the Texas Family Code, Chapter 51, which sets the standards for the appointment process for youth whose families meet criteria for indigence.

<sup>72</sup> Texas Family Code, Sec. 51.101(d).

<sup>73</sup> Task Force on Indigent Defense and Texas Juvenile Probation Commission, “Indigent Defense in the Texas Juvenile Justice System, June 2007, pg. 1: “If the child does not have counsel at the detention hearing and a determination was made to detain the child, the child is entitled to immediate representation of an attorney.”

<sup>74</sup> TFID, *18 Public Defender Offices in Texas*, pgs. 1, 2.

<sup>75</sup> National Juvenile Defender Center and National Legal Aid & Defender Association (NJDC), “Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems,” Second Edition, July 2008, pg. 1: “Advances in brain research [...] confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults.” Note additionally, pg. 2: The Ten Principles urge a special system that ensures supervision of ongoing training, manageable caseload, resource parity, and defense advocacy for treatment alternatives. These goals are achievable through an established juvenile public defender office.

<sup>76</sup> Dr. Tony Fabelo, “Indigent Defense Reform in Texas and Public Defender Offices: The Big Picture,” Report to Texas House Criminal Jurisprudence Committee, Council of State Governments–Justice Center, May 13, 2010, slide 12.

<sup>77</sup> Brennan Center for Justice, *Community-Oriented Defense Fact Sheet*.

<sup>78</sup> *Ibid.*

<sup>79</sup> Melanca Clark and Emily Savner, *Community Oriented Defense: Stronger Public Defenders*, Brennan Center for Justice, July 21, 2010; [www.brennancenter.org/content/resource/CODreport/](http://www.brennancenter.org/content/resource/CODreport/).

<sup>80</sup> Senate Committee on Criminal Justice, *Interim Report to the 82<sup>nd</sup> Legislature*, pgs. 29–30.

<sup>81</sup> Task Force on Indigent Defense (TFID), “Proposals for 82<sup>nd</sup> Legislature Related to Indigent Defense,” #6, 2010, pg. 3.

<sup>82</sup> Texas Task Force on Indigent Defense, “Programs, Processes, and Technology: An Overview of Discretionary Grants Funded by the Texas Task Force on Indigent Defense,” May 4, 2010, pg. 7.

<sup>83</sup> “Overview,” 2010, pg. 2; <http://www.courts.state.tx.us/tfid/ebookhousecrim051310/Overview.pdf>.

<sup>84</sup> These include court costs and fees upon conviction, surety bond fees, and State Bar fees. From TFID, “Task Force on Indigent Defense 2009 Annual and Expenditure Report,” pgs. 21–22.

<sup>85</sup> *Overview*, pg. 2: “In FY 2009 county indigent defense expenses totaled \$186,382,932.”

<sup>86</sup> *Ibid.*, pg. 5.

<sup>87</sup> *Ibid.*, pg. 4.

- <sup>88</sup> Task Force on Indigent Defense (TFID), “Discretionary Grant Program” informational brochure, August 2010.
- <sup>89</sup> Brandi Grissom, *Advocates: Texas Indigent Defense Nearing Crisis*; citing Andrea Marsh, Executive Director, Texas Fair Defense Project.
- <sup>90</sup> *Ibid.*, citing a concern by Jeff Blackburn, General Counsel, Texas Innocence Project.
- <sup>91</sup> Texas Courts Online, “Texas Judicial Council,” <http://www.courts.state.tx.us/tjc/>. TJC, the policy-making body for the state judiciary, is tasked with examining the organization and practices of Texas’ judicial system – specifically, “methods to simplify judicial procedures, expedite court business, and better administer justice” – and submitting recommendations for improvement to the Legislature, the Governor and the Supreme Court.
- <sup>92</sup> Texas Courts Online, “Office of Court Administration (OCA),” <http://www.courts.state.tx.us/oca/>. The OCA is a state agency in the judicial branch that operates under the direction and supervision of the Supreme Court of Texas. OCA provides support to a various judicial organizations, including TJC and the Task Force. Specifically, OCA provides resources (including technical assistance, training, research, fiscal consultation, and other support) and information (statistics, analysis, and reports) for the efficient administration of the judicial branch of Texas.
- <sup>93</sup> Dr. Tony Fabelo, “Indigent Defense Reform in Texas: The Record of the Last Ten Years and Emerging Challenges,” Report to Texas Senate Criminal Justice Committee, Council of State Governments – Justice Center, May 13, 2010, slides 17-19.
- <sup>94</sup> Texas Judicial Council, Office of Court Administration, Committee on Information Technology, and Task Force on Indigent Defense, “Annual Report of the Judicial Support Agencies: 2002 Fiscal Year,” 2002, pg. 24.
- <sup>95</sup> *Overview*, pg. 1.
- <sup>96</sup> These include court costs and fees upon conviction, surety bond fees, and State Bar fees. From Task Force on Indigent Defense, “Task Force on Indigent Defense 2009 Annual and Expenditure Report,” pgs. 21-22.
- <sup>97</sup> *Overview*, pg. 2.
- <sup>98</sup> Brandi Grissom, *Advocates: Texas Indigent Defense Nearing Crisis*.
- <sup>99</sup> Dr. Tony Fabelo, “Texas Indigent Defense Summit: Summary of Issues and Strategic Challenges,” The Justice Center, February 24, 2010, slide 10.
- <sup>100</sup> David Carroll, “Gideon Alert: Policies of prosecutor and judges close doors of Val Verde County (Del Rio, Texas) public defender,” National Legal Aid & Defender Association, October 24, 2010: “Texas policymakers should note that it was the former Val Verde Sheriff who said [Texas Rio Grande Legal Aide, of which the public defender office was a division] was a ‘positive program’ that saved the county money (over \$1 million) by keeping people out of jails”; <http://www.nlada.net/jscri/blog/gideon-alert-policies-prosecutor-and-judges-close-doors-val-verde-county-del-rio-texas-pu>.
- <sup>101</sup> TFID, *Discretionary Grant Program informational brochure*.
- <sup>102</sup> Senate Committee on Criminal Justice, *Interim Report to the 82<sup>nd</sup> Legislature*, pg. 31.
- <sup>103</sup> Cindy V. Culp, “Data offer clues on McLennan County district attorney’s performance,” *Waco Tribune*, December 13, 2009.
- <sup>104</sup> National Legal Aid & Defender Association, *Performance Guidelines for Criminal Defense Representation*, Adopted 1994, Fourth Printing, 2006, Guideline 2.3; [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines).
- <sup>105</sup> Cindy V. Culp, *Data offer clues on McLennan County district attorney’s performance*.
- <sup>106</sup> Senate Committee on Criminal Justice, *Interim Report to the 82<sup>nd</sup> Legislature*, pg. 31.
- <sup>107</sup> Barry Mahoney and Walt Smith, “Pretrial Release And Detention In Harris County: Assessment And Recommendations,” The Justice Management Institute, June 2005, pg. 12.
- <sup>108</sup> *Ibid.*, pg. 5.
- <sup>109</sup> Urban Institute – Justice Policy Center, “Jail Population Management Initiative Preliminary Findings and Recommendations,” January 2010, pg. 12.
- <sup>110</sup> Judge Marion F. Edwards, “Reduce Recidivism in DUI Offenders: Add a Cognitive-Behavioral Program Component,” 2006, pg. 3.
- <sup>111</sup> Texas Commission on Jail Standards (TCJS), “Texas County Jail Population,” December 1, 2010.

- <sup>112</sup> Irma Guerrero, “Overview of Travis County Pretrial Services,” November 6, 2009, slide 9.
- <sup>113</sup> Irma G. Guerrero, Director of Travis County’s Pretrial Division, in email correspondence to Ana Yáñez-Correa, Texas Criminal Justice Coalition, May 28, 2010.
- <sup>114</sup> “Harris County Personal Bond Release Statistics: State Fiscal Year (September to August),” compiled for the Office of Court Administration (OCA) using data from Harris County Pretrial Services Monthly Reports, September 2004 – August 2009. Note additionally: The number of defendants released on personal bond includes those whose cases are not in the pretrial stage, including motions to revoke probation, motions to adjudicate, and cases on appeal.
- <sup>115</sup> Lise Olsen, “Thousands languish in crowded jail: Inmates can stay locked up more than a year waiting for trial in low-level crimes,” *Houston Chronicle*, August 23, 2009.
- <sup>116</sup> Dan McGraw, “Cell-Blocked,” *Fort Worth Weekly*, June 21, 2006.
- <sup>117</sup> Illinois, Kentucky, Oregon, and Wisconsin have banned commercial bail bondsmen. From Laura Sullivan, “Bail Burden Keeps U.S. Jails Stuffed With Inmates,” *NPR*, January 21, 2010.
- <sup>118</sup> “Pretrial Services Program,” presentation by Jim Hall, Coryell County, on August 2, 2010, pg. 1, provided by Jean Morrison, Office of the County Judge, in email correspondence to Molly Totman, Texas Criminal Justice Coalition, August 6, 2010.
- <sup>119</sup> Nastassia Walsh, “Baltimore Behind Bars: How to Reduce the Jail Population, Save Money, and Improve Public Safety,” Justice Policy Institute, June 2010, pg. 24.
- <sup>120</sup> The above three bullets are from Irma G. Guerrero, *email correspondence on May 28, 2010*.
- <sup>121</sup> The above nine bullets are from Urban Institute – Justice Policy Center, *Jail Population Management Initiative*, pg. 5.
- <sup>122</sup> The above two bullets are from Irma Guerrero, *Overview of Travis County Pretrial Services*, slide 8.
- <sup>123</sup> *Ibid.*, slide 11.
- <sup>124</sup> Urban Institute – Justice Policy Center, *Jail Population Management Initiative*, pg. 12.
- <sup>125</sup> American Probation and Parole Association (APPA), Press Release: “APPA Supports Pretrial Supervision Services,” June 15, 2010, pg. 1.
- <sup>126</sup> Scott Henson, “Counties that rejected new jails must now get serious about diversion,” *Grits for Breakfast*, November 7, 2007; <http://gritsforbreakfast.blogspot.com/2007/11/counties-that-rejected-new-jails-must.html>.
- <sup>127</sup> Cherise Fanno Burdeen, “Jail Population Management: Elected County Officials’ Guide to Pretrial Services,” Pretrial Justice Institute and National Association of Counties, September 2009, pg. 8.
- <sup>128</sup> *Ibid.*, pg. 18.
- <sup>129</sup> TCJS, *Texas County Jail Population*.
- <sup>130</sup> Irma Guerrero, *Overview of Travis County Pretrial Services*, slide 9.
- <sup>131</sup> Irma G. Guerrero, *email correspondence on May 28, 2010*.
- <sup>132</sup> *Harris County Personal Bond Release Statistics*, compiled for OCA. Note additionally: The number of defendants released on personal bond includes those whose cases are not in the pretrial stage, including motions to revoke probation, motions to adjudicate, and cases on appeal.
- <sup>133</sup> Lise Olsen, *Thousands languish in crowded jail*.
- <sup>134</sup> American Bar Association, “ABA Criminal Justice Standards On Pretrial Release, Third Edition,” Approved February 2002, Standard 10-1.1, pg. 1.
- <sup>135</sup> Robert C. Boruchowitz, Malia N. Brink, and Maureen Dimino, *Minor Crimes, Massive Waste*, pgs. 36-37.
- <sup>136</sup> APPA, *Press Release Re: APPA Supports Pretrial Supervision*, pg. 2.
- <sup>137</sup> Dan McGraw, “Cell-Blocked,” *Fort Worth Weekly*, June 21, 2006.
- <sup>138</sup> State of Colorado, “Proposition 102: Criteria for Release to Pretrial Services Programs,” 2010 State Ballot Information Booklet, pg. 31.
- <sup>139</sup> Illinois, Kentucky, Oregon, and Wisconsin have banned commercial bail bondsmen. From Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*.

<sup>140</sup> Raymond Angelini, State District Judge, and Keith Hampton, Texas Criminal Defense Lawyers Association, in testimony at the Texas Senate Committee on Criminal Justice hearing on S.B. 498, April 21, 2009, on practices in Bexar County and Travis County respectively.

<sup>141</sup> All above bulleted requirements are from Taylor Short, “Members OK plans to ease jail overcrowding,” *Killeen Daily Herald*, May 24, 2010.

<sup>142</sup> The above three bulleted requirements are listed in Coryell County’s “Order” regarding the Supervised Pretrial Services Program, May 19, 2010, provided by Brandon Belt, Coryell County Attorney, in email correspondence to Ana Yáñez-Correa, Texas Criminal Justice Coalition, June 30, 2010.

<sup>143</sup> Taylor Short, *Members OK plans*.

<sup>144</sup> Coryell County, *Order*.

<sup>145</sup> Coryell County Pretrial Services, “Pre-Trial Intervention Program Personal Data Sheet,” provided by Brandon Belt, *email correspondence on June 30, 2010*.

<sup>146</sup> Coryell County Pretrial Services, “Special Conditions Of Bond” order, 2010, provided by Brandon Belt, *email correspondence on June 30, 2010*.

<sup>147</sup> *Pretrial Services Program*, pg. 1.

<sup>148</sup> Implementation costs were restricted to the part-time investigator who reviewed the applicants. Another county employee conducted follow-up with program participants, so no additional costs were accrued there, and the Compliance Officer who monitored participants after bond only had an increase in duties. From Brandon Belt, Coryell County Attorney, in email correspondence to Molly Totman, Texas Criminal Justice Coalition, July 30, 2010.

<sup>149</sup> Taylor Short, *Members OK plans*.

<sup>150</sup> Brandon Belt, *email correspondence on June 30, 2010*.

<sup>151</sup> *Pretrial Services Program*, pg. 1.

<sup>152</sup> Coryell County Pretrial Release Program, “Statistics Compilation,” 2010, provided by Brandon Belt, *email correspondence on June 30, 2010*.

<sup>153</sup> *Ibid*.

<sup>154</sup> Irma Guerrero, *Overview of Travis County Pretrial Services*, slide 6.

<sup>155</sup> Nastassia Walsh, *Baltimore Behind Bars*, pg. 24. Note additionally: “To the extent that special conditions are imposed with the expectation that Pretrial Services will monitor compliance with them, the conditions should be ones that are in fact readily monitorable by agency staff given the level of resources available.” From Barry Mahoney and Walt Smith, *Pretrial Release And Detention*, pg. 41.

<sup>156</sup> Barry Mahoney and Walt Smith, *Pretrial Release and Detention*, pg. 42.

<sup>157</sup> The Justice Project, *Texas Wrongful Convictions*; <http://www.thejusticeproject.org/texas/texas-wrongful-convictions/>.

<sup>158</sup> Mr. Cole was falsely convicted of rape in 1985, based on victim eyewitness testimony; he died in prison in 1999 before DNA cleared his name in 2009, and he was posthumously exonerated the following year.

<sup>159</sup> Mr. Willingham was executed in 2004 for allegedly setting fire to his house and killing his three young children – this despite mistakes in the arson investigation, which were presented before his execution.

<sup>160</sup> Commission membership included the Executive Director of the Task Force on Indigent Defense (who is the presiding officer of TCAP), members of various legislative committees, attorneys from various associations, a member of the Governor’s office, a Court of Criminal Appeals judge, a University of Houston school professor, and a law enforcement officer.

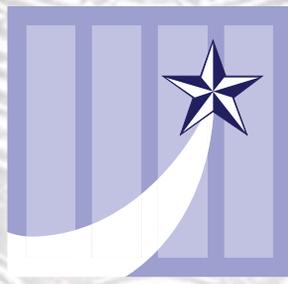
<sup>161</sup> The Justice Project, *Texas Wrongful Convictions*.

<sup>162</sup> Edwin Colfax, Texas Task Force on Indigent Defense, in email communication to Ana Yáñez-Correa, Texas Criminal Justice Coalition, January 25, 2011.

<sup>163</sup> The Justice Project, *Texas Wrongful Convictions*.

- <sup>164</sup> Renée C. Lee, “Efforts to draw up policies for eyewitnesses lagging,” *Houston Chronicle*, March 29, 2010.
- <sup>165</sup> Steve McGonigle and Jennifer Emily, “18 Dallas County cases overturned by DNA relied on heavily eyewitness testimony,” *The Dallas Morning News*, October 12, 2008; <http://truthinjustice.org/dallas-eyewitness.htm>.
- <sup>166</sup> The Justice Project, *Texas Wrongful Convictions*.
- <sup>167</sup> Thomas P. Sullivan, “Police Experiences with Recording Custodial Interrogations,” Number 1, Northwestern University School of Law – Center on Wrongful Convictions, Summer 2004, pg. 6; <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf>.
- <sup>168</sup> The Justice Project, *Texas Wrongful Convictions*.
- <sup>169</sup> *Ibid.*
- <sup>170</sup> Jennifer Emily, “Dallas County conviction integrity unit turns focus to non-DNA cases,” *The Dallas Morning News*, May 24, 2010.
- <sup>171</sup> Steve McGonigle and Jennifer Emily, *18 Dallas County cases overturned by DNA relied on heavily eyewitness testimony*.
- <sup>172</sup> Renée C. Lee, *Efforts to draw up policies for eyewitnesses lagging*.
- <sup>173</sup> Scott Henson, “Juries need more, better information to prevent false convictions,” *Grits for Breakfast*, November 13, 2008; citing written testimony submitted by Mr. Henson on behalf of the Innocence Project of Texas to the House Committee on the Judiciary, November 13, 2008; <http://gritsforbreakfast.blogspot.com/2008/11/juries-need-more-better-information-to.html>.
- <sup>174</sup> Innocence Project, “Line-up Protocol,” pg. 3: “Exhaustive studies have found that witnesses are much more likely to identify the guilty suspect if the lineup is sequential. Under traditional simultaneous lineups, some witnesses will inadvertently begin to compare the photos to one another instead of comparing the photo to their memory. Consequently, the identifications are not as reliable as those conducted sequentially”; [www.innocenceproject.org/docs/Santa\\_Clara\\_Lineup\\_Protocols.pdf](http://www.innocenceproject.org/docs/Santa_Clara_Lineup_Protocols.pdf).
- <sup>175</sup> The Justice Project, *Texas Wrongful Convictions*.
- <sup>176</sup> Innocence Project, *False Confessions*.
- <sup>177</sup> American Bar Association, *Resolution 8A:Videotaping Custodial Interrogations*, approved February 2004; [http://www.nacdl.org/sl\\_docs.nsf/freeform/MERI\\_attachments/\\$FILE/ABA-MERI\\_Resolution\(2-9-04\).doc](http://www.nacdl.org/sl_docs.nsf/freeform/MERI_attachments/$FILE/ABA-MERI_Resolution(2-9-04).doc).
- <sup>178</sup> National Association of Criminal Defense Lawyers, *Resolution of the Board of Directors Supporting Mandatory Videotaping of Law Enforcement Interrogations*, May 4, 2002; <http://www.nacdl.org/public.nsf/26cf10555dafce2b85256d97005c8fd0/7cac8b149d7416a385256d97005c81bb?OpenDocument>.
- <sup>179</sup> National District Attorneys Association, *Policy on Electronic Recording of Statements*, adopted October 23, 2004; [http://www.ndaa.org/pdf/ndaa\\_policy\\_electronic\\_recording\\_of\\_statements.pdf](http://www.ndaa.org/pdf/ndaa_policy_electronic_recording_of_statements.pdf).
- <sup>180</sup> Recorded interrogations must especially be made in cases of murder, capital murder, kidnapping, aggravated kidnapping, continuous sexual abuse of a young child or children, indecency with a child, improper relationship between an educator and student, sexual assault, aggravated sexual assault, or sexual performance by a child.
- <sup>181</sup> Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, pg. 6.
- <sup>182</sup> Scott Henson, *Juries need more, better information to prevent false convictions*.
- <sup>183</sup> Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, pg. 6.
- <sup>184</sup> *Ibid.*, pg. 8: “If the officers conduct themselves properly during the questioning, there is no basis to challenge their conduct or exclude the defendants’ responses from evidence. Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations.”
- <sup>185</sup> Texas Code of Criminal Procedure, Art. 64.01.





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